

SOUTH AFRICA / JUDGMENT

du Toit obo Nkuna v Road Accident Fund (454/2010) [2021] ZANCHC 66 (17 December 2021) [2021] ZANCHC 66

COURT

Northern Cape High Court, Kimberley

BEFORE

A Eillert

CASE / FILE NUMBER

454/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

number: 454/2010

Date

Delivered: 17 December 2021

In

the matter between:

Adv

AJ du Toit N.O. on behalf of

MAWETHU

MAXWELL NKUNA

Plaintiff/Applicant

and

THE

ROAD ACCIDENT

FUND

Defendant/Respondent

JUDGMENT

Eillert AJ.

1. This matter concerns an application by the plaintiff for a special costs order against the defendant. The plaintiff instituted a claim for damages against the defendant arising out of a motor vehicle accident that occurred on 18 May 2007. After the defendant had conceded the merits of the plaintiff's claim, the trial in respect of the quantum of the plaintiff's claim came before Mofokeng AJ on 24 November 2020.
2. Mofokeng AJ delivered judgment on 11 December 2020. The judgment contained somewhat extensive provisions for the payment of the plaintiff's costs by the defendant. Broadly speaking, Mofokeng AJ awarded the plaintiff costs on the High Court scale as between party and party.
3. On 18 December 2020 the plaintiff's counsel, Mr Eia, addressed an e-mail to Mofokeng AJ's clerk, requesting that the Acting Justice's attention be drawn to the fact that on 14 October 2020 the plaintiff had made a so-called Calderbank offer to the defendant. Mofokeng AJ was requested to exercise her discretion in favour of the plaintiff and to award the plaintiff costs on the attorney and client scale in view of the aforesaid Calderbank offer.
4. On 25 January 2021 Mofokeng AJ advised the plaintiff's legal representatives through the acting court manager that, having considered the plaintiff's request, she was of the view that the order that had been granted should stand.
5. The plaintiff persisted with his request and on 25 February 2021 launched the application that is the subject of this judgment. The plaintiff now seeks relief in the following terms:

"That the respondent/defendant is liable for the applicant/plaintiff's costs on an attorney and client scale, from the date of service of the applicant/plaintiff's Calderbank offer...."
6. The application was properly served upon the defendant and brought to the attention of the claims handlers of the defendant beforehand. The defendant elected not to oppose the application. A judgment-monitoring officer in the employ of the defendant, Mr. A. Rakgwale, did attend the hearing of the application, but informed the Court that he did not have any instructions in the matter. The factual averments and legal submissions made by plaintiff's legal representatives in the application are therefore undisputed.
7. The events that led up to the plaintiff making the so-called Calderbank offer were these. The plaintiff's attorneys served the notice of set down in respect of the quantum trial on the defendant's attorneys on 20 February 2020. On 4 March 2020, the defendant's attorneys withdrew as attorneys of record. The plaintiff's attorneys therefore sent a copy of the notice of set down and the defendant's former attorneys' notice of withdrawal to the defendant by e-mail on 29 July 2020.

On 18 September 2020, a bit more than two months prior to the quantum trial, the plaintiff's attorneys sent a "without

prejudice" settlement proposal to the defendant's claims handlers. One of the claims handlers, Mr. Frank, read the e-mail from the plaintiff's attorneys on 25 September 2020. No response was however forthcoming from the defendant. On 2 October 2020, the plaintiff's attorneys sent a follow-up email to the defendant's claims handlers. This e-mail was again read by Mr. Frank, and on the same day elicited a response from a Mr. Mowzer stating that Mr. Frank would attend to the matter as soon as humanly possible. By 14 October 2020, the plaintiff's attorneys had still not received a response from the defendant, and then proceeded to deliver the so-called Calderbank offer. The covering e-mail of the plaintiff's attorneys was read by Mr. Frank on the same day. It is apparent that the defendant never substantially responded to the plaintiff's settlement proposals.

8. The plaintiff proceeded with the quantum trial on 24 November 2020. Paragraph 4 of Mofokeng AJ's judgment records that Mr. Rakgwale was present in court and that he confirmed that the defendant was aware that the matter was set down for trial. The Court was informed that the claims handler of the defendant based in Cape Town had submitted an executive summary to the defendant's Pretoria office for a mandate, but that the claims handlers were unable to make an offer until they received a mandate. Such mandate however never materialised.
9. At trial, the plaintiff called two expert witnesses, Dr Z. Domingo, a neurosurgeon and Ms Kotze, an industrial psychologist to testify on the plaintiff's behalf, as well as the plaintiff's sister. The plaintiff further relied on the expert reports and joint minutes that had been filed of record.
10. As a result of the quantum trial, Mofokeng AJ awarded the plaintiff a total amount of R7 208 988.16 in damages, consisting of general damages, loss of earnings and past medical expenses.
11. In seeking the special costs order against the defendant, the plaintiff relied both on Rule 34 and on the so-called Calderbank offer. Mr Eia, who also appeared on behalf of the plaintiff and argued the application, submitted that the plaintiff's offer of 14 October 2020 fell four-square within the provisions of Rule 34. I find myself unable to agree with this proposition, for the simple reason that the purpose of Rule 34 is to enable a defendant to safeguard himself against liability for costs by utilising the procedures prescribed by the Rule.[1] The procedures prescribed in Rule 34 may be utilised by a defendant, a party who may be ordered to contribute towards an amount for which any other party to an action may be held liable, a third party, or by a plaintiff as a defendant in reconvention.[2] The provisions of Rule 34 do not provide for the situation before me, where a plaintiff, who is not a defendant in reconvention,

makes an offer to a defendant. Rogers J in *AD and Another v MEC for Health and Social Development, Western Cape*[3] also drew this distinction when the learned Judge stated that Rule 34 permits a defendant to make a secret tender, but that a plaintiff may also make a secret tender outside of the rules.

12. Because I am of the view that the plaintiff's offer of 14 October 2020 is not governed by the provisions of Rule 34, it necessarily follows that the mechanism provided by Rule 34(12) is not available to the plaintiff herein and would not allow me to consider the question of costs afresh at this stage.
13. However, as foreshadowed in paragraph 11 above, a plaintiff is not precluded from making a secret offer to a defendant outside of the rules of court. It has since the judgment in *AD and Another supra* in 2017 been recognised that a so-called Calderbank offer, after the judgment of the English Court of Appeal in *Calderbank v Calderbank*[4], forms part of our common law. A Calderbank offer is a settlement offer made by a litigant under the qualification "without

prejudice save as to costs", or words to similar effect, which at the time it is made may naturally not be disclosed to the court, but which the litigant may, once judgment had been granted, rely on in support of a request for a particular costs order. The law relating to Calderbank offers formed the basis upon which the Court in *Van Reenen v Lewis and Another*[5] inter alia made a punitive costs order against the second defendant in favour of the plaintiff.

14. In relation to the plaintiff's so-called Calderbank offer, it must first be determined whether the plaintiff's offer is admissible at all in relation to costs. In order to be admissible for the purposes of costs, the offer must explicitly state that it is made without prejudice "except in relation to costs" or must employ words to similar effect.[6] In the matter of *Van Reenen supra*, the plaintiff did not employ the explicit working of "without prejudice save in relation to costs". The Court nevertheless

held that the Calderbank offers were admissible, as it could be inferred from the terms of the offers that it was without prejudice

except for the costs, in that the second defendant was placed on notice not to disclose the offer to the Court at any stage before

judgment. The Court held that it was also clear that the offer in respect of costs was to be disclosed to the Court after judgment for the purpose of considering an appropriate costs order.

15. In the matter at hand, the plaintiff's offer of 14 October 2020 took the form of a notice with the title "Plaintiff's Calderbank Offer in terms of Rule 34". It proceeded to set out the plaintiff's offer, namely that the plaintiff would inter alia accept payment of a capital sum of R7 188 988.16. It concluded with the words:

“BE PLEASED TO TAKE FURTHER NOTICE that should the above offer not be accepted by the defendant within a reasonable time and the eventual outcome is similar or less favourable to the defendant, the plaintiff will request that a punitive costs order be made against the defendant.”

The notice was sent to the claims handlers of the defendant under cover of an e-mail of the plaintiff’s attorney, which advised the defendant that the plaintiff was thereby serving the plaintiff’s Calderbank offer in terms of Rule 34, and that the defendant would note from the offer that the defendant was placed at risk of a punitive (attorney and client) costs order from the date of the offer in the event of the trial court in due course awarding a similar or greater capital sum.

16. I am in the circumstances not persuaded that the plaintiff’s attorneys went far enough in the formulation of the plaintiff’s offer of 14 October 2020 to qualify it as a proper Calderbank offer. The words “without prejudice save as to costs” were not employed, nor were words to similar effect. I also do not think that Calderbank offers are so notorious in our civil procedure and practice that the mere use of the title of “Calderbank offer” would qualify a document as a Calderbank offer or properly alert the defendant without more of the document’s import. I am therefore of the view that the plaintiff’s offer of 14 October 2020 is not admissible at this stage after judgment for the purposes of considering the question of costs afresh, or alternatively, cannot form the basis for a punitive costs order against the defendant herein.
17. Even if I am wrong in this respect and perhaps being too strict, overly technical, or formulaic, if the plaintiff’s offer of 14 October 2020 were to be construed as a proper Calderbank offer which is in fact admissible, there are two factors that in such case would have militated against a special costs order. A plaintiff who has made a Calderbank offer is not entitled to attorney and client costs merely because he made a secret offer which was less than what the Court awarded. The Court must still consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer.[7] It is so that the defendant in the matter at hand did not engage reasonably in attempting to settle the matter; in fact, the defendant failed to engage at all. As there is no version of the defendant before the Court, I am left to wonder why that is. A plethora of cases have expressed scathing criticism against the Road Accident Fund for the manner in which it conducted litigation[8] and this case could be added to the long list. The plaintiff also allowed the defendant a reasonable time to consider his offer.

However, there is a mere difference of R20 000.00 between the amount of the plaintiff’s offer and the amount of Mofokeng AJ’s reward. Given the extent of the quantum, the plaintiff was not offering a fair discount to the defendant, but was basically asking the defendant to pay what he was in any event claiming. Based upon a realistic assessment of the case, I would not have been able to find that the defendant was unreasonable in not reacting to the plaintiff’s offer or not making a counter-offer.

18. In the result I make the following order:

The plaintiff's application dated 22 February 2021 for a special costs order against the defendant is hereby dismissed.

A EILLERT

ACTING JUDGE

Northern Cape Division, Kimberley

Appearances

Adv P Eia for the plaintiff/applicant Instructed by Elliot Maris, Kimberley

No appearance for the defendant

- [1] Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, Fifth Edition, Juta & Co Ltd, page 615.
- [2] Herbstein *supra*, page 617.
- [3] 2017
- (5) SA 134 (WCC) at [46].
- [4] [1975] 3 All ER 333 (CA)
- [5] (2302/2014)
- [2019] ZAFSHC 55 (14 May 2019)
- [6] See AD and Another *supra*, paragraphs [42] – [43]
- [7] AD and Another *supra*, paragraph [61].
- [8] A number of these cases are enumerated in *Daniels and Others v Road Accident Fund and Others* [2011] ZAWCHC 104 (28 April 2011).

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Prepared on 12 October 2026 · Esheria