

SOUTH AFRICA / JUDGMENT

Dumbe Transport CC v Alex Carriers
(221/08) [2010] ZAKZPHC 71; 2011
(3) SA 664 (KZP) (29 October 2010)
[2010] ZAKZPHC 71

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Wallis

CASE / FILE NUMBER

221/08

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IN THE KWAZULU-NATAL HIGH COURT

PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO.221/08

In the matter between

DUMBE TRANSPORT CCPlaintiff

and

ALEX CARRIERSDefendant

J U D G M E N T

Del. 29 October 2010

WALLIS J.

- [1] When this trial commenced the parties asked me to make an order in terms of Rule 33(4) separating the issues of liability and quantum. That order was made on the basis that the quantification of the claim and counter-claim raised no issue of causation. The trial then proceeded solely on the issue of liability. At the conclusion of argument I delivered judgment and held that responsibility for the collision between the plaintiff's and the defendant's vehicles was to be apportioned as to 25% to the plaintiff and 75% to the defendant. That left only the issue of costs.

- [2] Mr van Rooyen, who appeared for the plaintiff, submitted that his client had enjoyed substantial success and should accordingly be awarded the costs of the action. Mr Bielderman, who represented the defendant, handed up a notice in terms of Rule 34(1), delivered two days before the start of the trial, embodying a tender to resolve the issue of liability on the basis of an apportionment of

75/25 in favour of the plaintiff. On that basis he submitted that the costs of the trial after the first day should have been avoided and sought an order in favour of the defendant in respect of those costs. Mr van Rooyen contended that as the period of 15 days provided in Rule 34(6) had not yet expired the defendant could not take advantage of the tender. As it was already late in the day I reserved my decision on the question of costs.

- [3] The terms of the defendant's tender are important. The notice embodying the tender reads as follows:

'BE PLEASED TO TAKE NOTICE THAT the Defendant hereby tenders, without prejudice and without admitting liability, to resolve the issue of liability on an apportionment of 75/25 in favour of the Plaintiff in terms of the Apportionment of Damages Act. The Defendant thus tenders to accept 75% responsibility for the collision with the Plaintiff's driver being 25% responsible for the collision.

BE PLEASED TO TAKE NOTICE THAT the Defendant further tenders that the issue of costs also be resolved on the basis of a 75/25 apportionment. The Defendant thus tenders that the Defendant will pay 75% of the Plaintiff's party and party costs as taxed or agreed and the Plaintiff shall pay 25% of the Defendant's party and party costs as taxed or agreed.'

- [4] A court has a discretion to be exercised in accordance with well-recognised principles in regard to the award of costs in an action. The primary principle is that costs follow the result and a party that is substantially successful will ordinarily obtain an order for costs in their favour.¹ The purpose of a tender under Rule 34 is to enable a defendant to avoid further litigation and failing that to avoid liability for the costs of such litigation. This benefits not only the particular defendant making the tender but also the public interest in avoiding unnecessary litigation.² Where a plaintiff continues an action in the face of a tender and fails to obtain an award in amount greater than the amount tendered it will often be the case that the defendant is awarded the costs after the date upon which the tender is made, although there is no rule to this effect.³ Although Rule 34(6) gives a plaintiff 15 days in which to accept a tender the fact that the 15 days have not elapsed before the trial does not mean that the tender can be safely ignored when it comes to determining the proper order in regard to costs. The general approach of courts is that a plaintiff should decide promptly upon receipt of the notice embodying the tender whether or not to accept it and should not keep the defendant waiting for an answer. If it prevaricates and this leads to additional unnecessary costs being incurred the court may in the light of the tender award those costs against the plaintiff.⁴

[5] Had the defendant in this case made a tender embodying the apportionment of liability set out in its notice together with an offer to pay the plaintiff's costs up to the date of tender there can be little doubt that the proper order would have been that the plaintiff should have its costs up to and including the first day of trial and the defendant should have its costs thereafter. What complicates the matter is that the tender in regard to liability is joined with a tender in regard to costs. That tender follows the tender in respect of the apportionment of damages. The proposal advanced by the defendant was that it would pay 75% of the plaintiff's party and party costs and that the plaintiff should pay 25% of the defendant's party and party costs.

[6] There is no suggestion in the notice embodying the tender that the tender in regard to the apportionment of liability was in any way severable from the tender in regard to costs, so that the former could be accepted and the latter left over for argument,

without the need for evidence. The plaintiff was faced with a tender in regard to both the question of apportionment and the issue of costs that had to be accepted or rejected as a whole. Accordingly the question whether the tender should influence the order for costs to be made in this case depends upon whether the tender in regard to costs was one that the plaintiff should have accepted.

[7] The general rule that costs should follow the results is difficult to apply in a case involving the apportionment of damages arising from negligent conduct on the part of both the plaintiff and the defendant or their representatives. The difficulties can be illustrated by referring to the divergence of judicial views on the topic. In some cases costs have been apportioned in accordance with the relative blameworthiness of the parties as determined on the merits of the action.⁵ In other cases the court, having determined both liability and quantum, dealt with the costs on the basis that the party in whose favour a balance arises from the determination of the claim and counter-claim was the substantially successful party and should receive their costs.⁶ A third approach is to award the costs of the claim to the plaintiff and the costs of the counter-claim to the defendant. The tender is based on the first of these three possibilities.

[8] Each of these approaches has weaknesses and each can, in a particular situation, result in unfairness. It is for that reason that no hard and fast rule can be laid down. If the court apportions the costs or makes an order that the plaintiff will have the costs of the claim and the defendant the costs of the counter-claim that will result in the need to prepare two bills of costs and to engage in the taxation of both. The complexity and potential injustice of such an approach has been highlighted in several cases.⁷ As regards the approach of determining where the financial balance lies at the end of the proceedings, Baron JA said:

'It is self-evident that in contributory negligence cases the final outcome in terms of monetary balance may well turn on which party suffered the greater loss, a purely coincidental factor...'⁸

Without prejudging matters in any way, that is potentially the situation in the present case where the damage to the defendant's vehicle (a rig consisting of a horse towing two trailers) was manifestly far greater than the damage to the plaintiff's similar vehicle and this is reflected in the respective amounts of the claim and counter-claim.

[9] The parties elected by agreement to separate the issues of liability and quantum. It may be that they anticipate that the latter issue can be resolved relatively easily. Be that as it may there is little in the papers to indicate that the litigation thus far has focused on anything other than the question of liability and the possibility of the apportionment of damages. That was the issue

that lay at the heart of the trial. Agreement that the trial would proceed only on liability was reached on 13 September 2010 over a month before the hearing.

[10] The trial itself revolved around the issue of how the collision occurred. Here the parties advanced diametrically different versions not reconcilable on the basis of difficulties of observation and the frailty of human memory. The plaintiff's version was that its vehicle was travelling in the southbound carriageway; that the defendant's rig encroached into that carriageway and, notwithstanding evasive action, a glancing collision occurred. At the point of the collision the southbound and northbound

carriageways were separated over a considerable distance by a three metre wide turning lane and before that a painted traffic island on the road separating the two carriageways. The defendant's version was that its vehicle was travelling in the northbound

carriageway; that the plaintiff's vehicle encroached into that carriageway, crossing a similar painted traffic island separating the two and situated to the north of the point of collision and, notwithstanding efforts by its driver to avoid the collision, firstly by crossing towards the incorrect carriageway and then by returning, the collision occurred in the turning lane fairly close to the northbound carriageway.

[11] It will be apparent from this summary, as read with the judgment on the merits, that the case was fought out on the basis of which of these two versions was the more probable. My conclusion was that the collision occurred in the southbound carriageway and

that the defendant's rig had not only left its own northbound carriageway but had crossed the turning lane and entered the

southbound carriageway prior to the collision. In substance therefore the plaintiff's version of the collision was vindicated.

[12] The substantial issue in this litigation was which of the plaintiff's or the defendant's version of how the accident occurred was to be accepted. That is the terrain on which they chose to fight. Their purpose was clear. In the plaintiff's

case it was to obtain an order that the defendant's driver was responsible for the collision or at least primarily so. Conversely

the defendant's aim was to obtain an order that the plaintiff's driver was responsible for the collision or at least primarily so. Had its version of the collision been accepted by the court then the result would have been either that the plaintiff's driver was held entirely to blame for the collision or, at the very least, there would have been a substantial apportionment of liability in favour of the defendant.

[13] As that is the issue over which the parties were litigating it is proper to say that in consequence of the judgment on the merits the plaintiff succeeded and the defendant failed. This was not a case where the defendant from the outset accepted some responsibility for the collision but sought to attribute some blame to the plaintiff's driver. Its case was that the plaintiff's

driver was the person responsible for causing the collision. It has not succeeded with that case. Fairness suggests that the plaintiff

should accordingly have its costs of advancing and proving its case.

[14] Is there any reason in those circumstances why the plaintiff should have accepted a tender that deprived it of a substantial part of its costs? In my view there is none. Acceptance of the tender would have deprived it of 25% of its costs and in addition required it to pay 25% of the defendant's costs. Even assuming that the defendant's costs would be more limited than

the plaintiff's costs it seems probable that the overall effect would have been that the plaintiff would obtain no more than 60% of its taxed or agreed party and party costs, which is disproportionate even to the apportionment of responsibility that has been made.

[15] It follows that although the tender was accurate and appropriate in regard to the apportionment of responsibility for the collision between the parties the tender for costs was not appropriate in all the circumstances. Accordingly the plaintiff was under no obligation to accept the tender in those terms and was entitled to proceed with the action. As it was successful it should have its costs of doing so.

[16] The order I made in my judgment on the merits is accordingly supplemented by an order that the defendant pay the plaintiff's costs of suit up to and including the 22 October

2010. Mr Proctor-Parker, the plaintiff's expert witness, is declared a necessary witness.

DATES OF HEARING 20 - 22 OCTOBER 2010

DATE OF JUDGMENT 29 OCTOBER 2010

PLAINTIFF'S COUNSEL MR R.M. VAN ROOYEN

PLAINTIFF'S ATTORNEYS VENN NEMETH & HART INC

DEFENDANT'S ATTORNEY MR P BIELDERMAN

DEFENDANT'S ATTORNEYS BIELDERMANS INC

1John Sisk & Son SA (Pty) Limited v Urban Foundation and Another 1985 (4) SA 349 (N) at 352 G-H

2Naylor and Another v Jansen 2007 (1) SA 16 SCA, para [13].

3Naylor and Another v Jansen , supra para [14].

4Henry v AA Mutual Insurance Association Limited 1979

(1) SA 105 (C) at 113 C-116A.

5Stolp v du Plessis 1960 (2) SA 661 (T); Venter v Dickson 1965

(4) SA 22 (E).

6Bhyat's Stores v van Rooyen 1961 (4) SA 59 (T).

7Bhyat's case, supra, 68 C-D and 69 D-E; Smith v W H Smith & Sons Limited [1952] 1 All ER 528 (CA) at 530 A; Viriri v Wellesley Estates (Pvt) Limited 1982 (4) SA 308 (ZSC) at 316 H.

8Viviri v Wellesley Estates (Pvt) Limited, supra, 315 H.

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