

SOUTH AFRICA / JUDGMENT

Jansen v Naylor and Another [2005] ZAGPHC 378; 21292/02 (24 August 2005)

[2005] ZAGPHC 378**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

21292/02

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

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 21292/02

DATE:2005-08-24

In the matter between

PIETER JOHAN JANSEN.....Plaintiff

and

MICHAEL NAYLOR.....First Defendant

ATOMAER (RSA) |PTY) LTD.....Second Defendant

JUDGMENT

WILLIS, J: A former Deputy Judge President in this division described litigation as a "game of chess". That metaphor did not meet with universal approval. I have also heard the High Court of South Africa being described as a "casino". This case troubles me gravely because it could lead various people to conclude not only that litigation is a "game of chess" but that the Courts of this land are indeed like casinos.

I have before me now an application in terms of Rule 34(1 2) to vary the costs order which I made in a defamation action on 31 October

2003. Briefly the relevant facts are the following. The plaintiff instituted an action for defamation against the defendant. In the particulars of claim the following allegation appears:

"As a result of the publication of the aforesaid defamatory statement, the plaintiff has been damaged in his reputation generally and within the industry within which he operates and has suffered damages in the sum of R250 000". The plaintiff claimed payment of the sum of R250 000, interest and costs.

After a trial which ran before me for several days, I concluded that the plaintiff had indeed been defamed and awarded him R30 000 together with interests and costs. I also afforded the defendant the option to make a public apology for the defamation in lieu of paying R30 000 but indicated that in that instance the defendant should pay costs on an attorney and client scale.

Prior to the institution of that defamation action, the plaintiff who was an incola of Gauteng, applied for and was granted an ex parte order for the arrest of the first defendant in order to confirm the jurisdiction of the High Court in Johannesburg. It was common cause that the first defendant was an Australian citizen and a peregrine of South Africa. An order was granted by Coetzee J for the arrest of the first defendant which would fall away upon the first defendant furnishing security or showing cause why the arrest should be set aside. The first defendant put up security for the action and the

question of costs was held over for determination later.

After (had given judgment, in the defamation action on 31 October 2003, my attention was drawn to the question of the order, more particularly the deferred costs order relating to the arrest of the first defendant and was asked to make an order. I made an order that the plaintiff was to pay the costs of the application for the arrest of the first defendant.

Both judgments went on appeal to the Supreme Court of Appeal. In other words, the judgment relating to the defamation on the merits went to the Supreme Court of Appeal as did the judgment relating to the costs order in so far as the arrest of the first defendant was concerned. As was noted by the Supreme Court of Appeal:-

"A somewhat unusual feature of the proceedings in this Court (i.e. the SCA) was that while Jansen was represented by counsel in the costs appeal (in which he was the appellant), he was not represented in the defamation appeal in which he was the respondent) and instead elected to abide the judgment of the Court."

The Supreme Court of Appeal, in Case No. 243/04, dealt with both appeals in the same judgment. The Supreme Court of Appeal held that I had misdirected myself with regard to the question of the costs relating to the arrest of the first defendant and awarded the costs to the plaintiff. The Supreme Court of Appeal said as follows.-

"Having found for Jansen (i.e. the plaintiff) in the main action there was no justification for not ordering Naylor to pay the costs of the arrest application."

The Supreme Court of Appeal reduced the quantum in the defamation action from the R30 000, which I had awarded, to R15 000. The Court held that;-

"The limited success achieved on appeal, namely by the reduction of the amount of R30 000 to R15 000, does not in my view justify an order of costs in favour of the defendants.

Jansen, it will be recalled, abided the judgment of this Court."

It has now transpired that on 3 October 2003, namely a few weeks before the commencement of the actual trial, the defendants made an offer of settlement in terms of Rule 34(1) and (5) of the Rules of this court. The offer reads as follows:-

"Take notice that the defendants hereby make the following offer of settlement to the plaintiff;-

1. Payment by the defendants to the plaintiff of a sum of R15 500.
2. Such payment to be settlement of the plaintiff's claim in the above action.
3. The said offer is made without prejudice as an offer of settlement.
4. The said offer is made without any admission of liability on the part of the defendant.
5. The said offer is accompanied by an offer to pay all of the taxed costs of the plaintiff on a High Court scale, incurred up to the date of this offer."

In other words, with breathtaking accuracy, the tender of the defendants was R500,00 more than that which the Supreme Court of Appeal decided ultimately to award.

The defendants have now brought an application in terms of Rule 34(12) which reads as follows:-

"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 the subrule contained shall affect the court's discretion as to an award of costs."

It is common cause that my judgment was given in ignorance of the offer or tender. It is also common cause that nothing hinges on the time period provided for in the rule. (i.e. Rule 34(12)).

The defendants have submitted that I should make the following order:-

- "1. Defendants are to pay the plaintiff's costs up to 3 October 2003 (i.e. the date of the tender),
2. Plaintiff to pay the defendant's costs from 4 October 2003."

Ms Robinson, who appears for the defendants (as she did in both the trial action and in the appeal before the Supreme Court of Appeal),

has relied on the case of *Omega Africa Plastics (Pty) Ltd v Swiss Tool Manufacturing Co (Pty) Ltd* 1 978 (3) SA 465 (A) and 1 978 (4) SA 675 (A). This series of judgments affirms that ordinarily where a tender has been made which is above that determined by a Court, the

defendant should pay the plaintiff's costs up to the date of payment and the plaintiff should be ordered to pay the costs incurred

thereafter.

Nevertheless, it was said in that case that in appropriate circumstances a Court may make a different apportionment of the costs in the exercise of the discretion that it retains under the rule. This case was decided when Rule 34 was slightly differently cast but nothing really turns on that. The fact of the matter is that Rule 34(1 2) makes it clear that nothing in the subrule affects the court's discretion on an award of costs and the same principle was affirmed in both judgments in the *Omega Africa Plastics v Swiss Tool Manufacturing* case. Obviously I accept the general proposition contained in the *Omega Africa Plastics v Swiss Tool Manufacturing* cases. I also accept the general proposition contended for by Ms Robinson that ordinarily where a tender has been made above the quantum determined by the Court, that the appropriate order is that the defendant should pay the costs up to the date of tender and thereafter the plaintiff should pay the costs.

The essential difficulty that I have with applying that general rule to this particular case is that this is a defamation action and in defamation actions the quantum is largely irrelevant. It is well settled law that in a defamation action the quantum most often essentially takes the form of a solatium. As I indicated in the judgment which I gave in the trial action, costs on a High Court scale are ordinarily allowed in defamation actions despite the fact that the plaintiff's level of success falls within the jurisdiction of the Magistrates' Court. (See e.g. *Greeff v Raubenheimer and Another* 1976 (3) SA 37 (A) at 44E-G; *Van der Merwe v Schraader* 1 953

(2) SA 339 (E) at 342A-344B; *Hassen v Post Newspapers* 1965 (3) SA 562 (WJ at 577G-57SB)).

This principle seems to be to underline how important it is for a person who has been defamed to come to the High Court in order to clear his or her name and reputation and how relatively unimportant, in the greater scheme of things, is the actual quantum that is ultimately awarded.

In the plaintiff's particulars of claim he pertinently makes the allegation that he has "been damaged in his reputation generally

and within the industry within which he operates" and then goes on to make the additional allegation that he has "suffered

damages in the sum of R250 000". It seems clear from the particulars of claim, never mind the ordinary principle that is applicable in matters such as this, that the plaintiff came to the High Court *inter alia*, but perhaps most importantly for him, to vindicate his reputation. The tender upon which the defendants rely contains no admission of liability, no acknowledgement whatsoever

that a defamatory statement had been made or, more particularly, that the statement which had been made, was made wrongfully and

unlawfully. The tender, moreover, contains no apology whatsoever.

Regardless of whether or not I am right in the case of *Mineworkers investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 {W} on the question of an apology in defamation matters, I am certain that the question of whether or not an apology accompanies the tender is relevant to the question of a judicial discretion with regard to the question of costs. It seems to me that although the plaintiff ultimately succeeded in proving damages in an amount of R15 000 whereas the defendant had tendered R15 500, the plaintiff nevertheless needed to persist with the action in order to vindicate his reputation, more especially his reputation "generally and within the industry within which he operates".

Accordingly, I am satisfied that in this particular case a judicial exercise of a discretion requires me not to vary the costs order which I made on 31 October 2003 in this matter.

The following order is made:

There is no order varying the costs order which I made in this matter on 31 October 2003.

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/ZAGPHC/2005/378.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/jansen-v-naylor-and-others-unknown-topic-agphc-2005>

Prepared on 12 October 2026 · Esheria