

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Forbes (CA 197/05) [2006] ZAECHC 47 (28 September 2006)

[2006] ZAECHC 47**COURT**

High Courts - Eastern Cape

BEFORE

Jones, Schoeman

CASE / FILE NUMBER

CA 197/05

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Source record**FORM A****FILING****SHEET FOR EASTERN CAPE JUDGMENT****ECJ no:**

PARTIES: ROAD ACCIDENT FUND v
CORNEL FORBES
REFERENCE NUMBERS –
Registrar: CA
197/05

Magistrate:

Supreme Court of
appeal/Constitutional Court: EASTERN
CAPE DIVISION
DATE HEARD: 25 AUGUST 2006
DATE DELIVERED: 28 SEPTEMBER
2006
JUDGE(S): JONES J & SCHOEMAN
LEGAL REPRESENTATIVES –

Appearances:

for
the State/Applicant(s)Appellant(s): ADV
NM PATERSON
for
the accused/respondent(s): ADV
J NEPGEN
Instructing

attorneys:**Applicant(s)/Appellant(s):**

NN
DULLABH & CO

Respondent(s):	WHITESIDE ATTORNEY'S CASE INFORMATION – Nature of proceedings: CIVIL APPEAL
Topic:	Appeal – costs in the magistrates' courts – an award of party and party costs including counsel's fees at three times the amount of the tariff is no incompetent – such an award was not made arbitrarily and was not an unwarranted interference with the taxing-master's discretion.
Keywords:	Not reportable In the High Court of South Africa (Eastern Cape Division) Case No: CA 197/05
Delivered:	28/09/06 In the matter between THE ROAD ACCIDENT FUND Appellant and C. FORBES Respondent Summary: Appeal – costs in the magistrates' courts – an award of party and party costs including counsel's fees at three times the amount of the tariff is not incompetent – such an award was not made arbitrarily and was not an unwarranted interference with the taxing-master's discretion.

JUDGMENT

JONES J:

- [1] At the conclusion of an action in the magistrate's court, Uitenhage for damages under the Road Accident Fund Act No 56 of 1996 the magistrate awarded the plaintiff damages in the sum of R35 326-03 with interest and costs, and he ordered the Fund to furnish an undertaking in respect of future medical expenses. The costs order was for the plaintiff's taxed party and party costs, with interest. It included a special order for a refresher fee for counsel and his travelling expenses for specified court attendances. An expert witness was declared a necessary witness and his qualifying costs and travelling expenses were included.

- [2] As part of his costs order, the magistrate added a rider that the fees of counsel for the plaintiff were awarded at three times the tariff laid down by the magistrate's courts rules. This order was made as an alternative to an argument, which he had rejected, that counsel's fees should be allowed in accordance with the tariff prescribed by the Eastern Cape Society of Advocates, which sets out high fees than a fee three times the amount in the official tariff. His view was that although the matter justified an increased fee for counsel, it did not justify the fees recommended by the Bar Council. He had also rejected an argument on the plaintiff's behalf that attorney and client costs should be awarded.
- [3] The Fund now appeals against the order for counsel's fees at three times the amount laid down by the rules. It has three grounds. First, the Fund argues that this part of the costs order is incompetent; second, that it is an arbitrary award and not a proper exercise of the magistrate's discretion; and, third, that it amounts to an unwarranted interference with the taxing master's discretion. I am of the view that none of these grounds has merits.
- [4] It is not competent for the magistrate to order costs which are not authorised by the Act. Is that the case here? Section 48 and rule 33 provide that the magistrate may make such order as to costs as may be just. This is a wide discretion which must be exercised judicially in accordance with the principles and rules of practice which regulate orders for costs by the courts. These are the guidelines to what is just and fair to both parties. Mr Paterson argued that what the magistrate did, in effect, in fixing counsel's fees in this way was to award attorney and client costs. This he could not do because he had already decided that the jurisdictional facts for an attorney and client costs award were not established. The fallacy in counsel's argument is that an increase in counsel's fees beyond the amount in the tariff does not alter the character of the costs order. It does not change the costs from party and party costs to attorney and client costs. The tariff of fees prescribed by the rules, with its three scales, applies to party and party costs. It included a tariff of counsel's fees. Note
- (b) under items 21 to 26 of Annexure 2, which set out the amount of counsel's fees in defended actions, gives the magistrate the power to allow a high fee for counsel for drawing pleadings, for consultations, and for trial fees and refreshers. That is what the magistrate has done in this case. In the judgment in *Eerste Nasionale Bank van Suid Afrika (handelend as Wesbank) v Mokotso* 2003 JDR 0655 (O) Wright J in the Orange Free State Provincial Division puts it thus:

‘Van belang is dit ook om daarop te let dat die toelating van verhoogte advokaatskoste nie beteken dat koste nie op party en party skaal betaal moet word nie. Die toestaan van so ‘n bevel beteken eenvoudig dat ‘n verhoogde fooi aan ‘n advokaat

toegestaan behoort te word in die lig van die besondere omstandighede en veral ingewikkeldheid van die betrokke saak en wel op ‘n party en party basis.’

Far from being incompetent as an unauthorised departure from the Magistrates' Court Act and rules, the magistrate's costs order in this case is specifically authorised by note (b) to items 21 to 26.

[5] A decision is arbitrary if it is capricious, variable, uncertain, an unrestrained exercise of personal whim without reference to any sensible or relevant criteria. Mr Nepgen for the respondent argues convincingly that that is not what happened here. He points out that the magistrate took into account that both sides briefed counsel, that a substantial amount was claimed and awarded, that the issue involved the examination and

cross-examination of an expert witness, and that the fees for advocates prescribed by the tariff have with the erosion in the value

of money become extremely low, especially when compared with the amount allowed for attorneys. He had before him on the one hand the amount in the tariff and, on the other, the amount recommended by the Eastern Cape Society of Advocates. His choice of a fee falling between the two, viewed in the light of the considerations listed above, is not an unrestrained exercise of whim, divorced from any rational criteria. It is a considered and balanced exercise of his discretion. Mr Paterson suggested that he misdirected himself by referring to the low fees set out in the tariff for counsel because this sets at nought the object of laying down a tariff in the rules. That is not so. The courts have frequently pointed to the inadequacy of a tariff as a relevant consideration in making special costs award. See for example *Trevor v Nordien T/A Builders and Plasterers* 1987 (3) SA 199 CPD 200 G. In all the circumstances there is no basis for interfering with the magistrate's discretion on costs. There

can be no talk here of a costs award which unfairly burdens the defendant by requiring it to pay for extravagantly or luxuriously

conducted litigation. This costs order does no more than indemnify the successful plaintiff for the reasonable expenses he was obliged to incur in being forced into court to exercise his rights.

[6] The courts frown upon unwarranted interference with the taxing master's discretion with regard to the fees which should be allowed when he taxes a bill. The emphasis is on interference which is unwarranted. The tariff itself places fetters on this discretion by fixing a maximum fee. The court has no alternative but to place a similar

fetter when it exercises its discretion to allow a higher fee in terms of note (b). As it is, the taxing master still retains a proper measure of discretion when he comes to tax the bill in this case. The tariff provides, for example, for a trial fee not exceeding the amount set out in the tariff (item 22). That must be read in this case as a fee not exceeding three times the amount set out in the tariff. It seems to me that the taxing master has the same degree of discretion that he always has in deciding upon the reasonableness of fees charged. The only difference is that the ceiling has been raised. The third ground of appeal is also without substance.

[7] In the result the appeal is dismissed with costs.

RJW JONES

Judge of the High Court

5 September 2006

SCHOEMAN J: I agree.

I SCHOEMAN

Judge of the High Court

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