

SOUTH AFRICA / JUDGMENT

Singh and Another v Ebrahim (8027/2004) [2008] ZAKZHC 113 (15 December 2008) [2008] ZAKZHC 113

COURT

High Courts - Kwazulu Natal

BEFORE

Koen

CASE / FILE NUMBER

8027/04

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IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

Case No. 8027/04

In the matter between:

GAIL SINGH First Plaintiff

NASHEE SINGH Second Plaintiff

And

DR ASHRAAF EBRAHIM Defendant

J U D G M E N T

KOEN, J.

[1] In the prayer to their Particulars of Claim, plaintiffs claim:

- (a) R186 304,09 for past hospital, medical and related expenses and R52 031 and R46 693 for future medical and related expenses;
- (b) R13 608 for therapy required by their son Gian Singh;
- (c) R50 949 443 for future, hospital, medical and related expenses, future loss of earnings (earning capacity) and general damages for their son Nico Singh.

[2] In my judgment, I awarded to plaintiffs inter alia:

- (a) R126 694,77 in respect of their claim in paragraph [1](a) above;
- (b) R13 579,20 in respect of Gian Singh;
- (c) R9 008 503,40 in respect of Nico Singh.

In paragraph 3 of the order I directed:

“3. the defendant is ordered to pay the plaintiffs’ taxed or agreed costs (excluding the costs of four trial days referred to in paragraph 16 above) on the party and party scale, such costs to include:

3.1 the costs consequent upon the employment of two counsel, where applicable, including the preparation of written heads of argument;

3.2 the reasonable costs of obtaining medico legal and actuarial reports from those experts who testified and whose qualifying fees are allowed;

3.3 the reasonable costs of those experts who attended joint meetings of expert witnesses;

3.4 the reasonable qualifying and reservation fees relating to attendance at court of the following witnesses :

Dr R Koch

Dr P Lofstedt

Mr D Rademeyer

Dr G Versfeld

Mr H Schüssler

Mr H Grimsehl

Dr R Wiersma

Miss B Donaldson

Dr M Lilienfeld

Miss I Hattingh

Miss G Steyn

Miss A Crosbie

Mr J Lapp

Dr A Botha

Miss P Jackson

Miss E Bubb

Professor P A Cooper

Dr D Strauss

Mr G Whittaker

the costs of obtaining a transcript of the proceedings”

- [3] Unbeknown to me at that time, the defendant on 20 October 2006 had made the following written offer of settlement in terms of Rules 34(1) and 34(5):

“Without prejudice or admission of liability and by way of an offer in full and final settlement of plaintiffs’ claim, the defendant hereby offers to settle the plaintiffs’ claim by :

1. payment direct to the plaintiffs of the sum of R12 000 000 (Twelve million) Rand inclusive of the costs of a curator bonis;
 2. the defendant also tenders in the event of this offer of settlement being accepted by the plaintiffs, to pay the plaintiffs’ taxed costs as between party and party to date of service of this Notice, including any costs attendant upon obtaining of the amount of R12 000 000 (Twelve million) Rand and such costs to include the qualifying expenses (the amount of such expenses to be determined by the taxing master) of such witnesses in respect of whom the plaintiffs have given proper notice in terms of Rule 36 and the cost of two counsel.”
- [4] The defendant had previously agreed to pay an amount calculated at 7,5% of the capital amount awarded to Nico towards the costs of a curator bonis/trustee. That amount would be R675 637,76. Accordingly, the total amount payable to the plaintiffs in terms of the judgment and the aforesaid agreement is R9 824 415,13.
- [5] The defendant has now served a Notice in terms of Rule 34(12) in terms whereof he requests a reconsideration of the costs awarded to the plaintiffs as set out in paragraph 3 of the Order dated 30 July 2008 as the offer to settle exceeds the amounts awarded. He submits that his offer of settlement exceeds the total sum eventually awarded to the plaintiffs by R2 175 584,87.
- [6] The issue thus is whether the award of costs to the plaintiffs contained in paragraph 3 of the Order of 30 July 2008 should remain undisturbed.
- [7] The purpose of a tender or offer to settle in terms of Rule 34 is to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation – see *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co. (Pty) Ltd* 1978 (3) SA 465 (A) at 477 A – B. It enables a defendant to exert pressure upon a plaintiff to accept a settlement on pain of being penalised for costs. The intention of Rule 34(9)(b) is to enable the Court to take into account the fact that an offer of settlement had been refused by the plaintiff, when exercising its discretion as to what order as to costs would be fair in all the circumstances of the case – see *Bloom v General Accident and Life Assurance Corporation Ltd* and *Another* 1967 (2) SA 116 (D). More recently in *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) the

following statement by Denning LJ in *Findlay v Railway Executive* [1950] 2 All ER 969 (CA) at 972 E – F was quoted namely :

“The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally

who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better

secured by allowing plaintiffs to go on to trial at their own risk generally as to costs.”

[8] In *Naylor and Another v Jansen* (supra) at paragraph 14 it was held that:

*“Ordinarily the purpose behind Rule 34 would cause the Judge to order the defendant to pay the plaintiff’s costs incurred up to the date of the offer, and the plaintiff to pay the defendant’s costs thereafter. That does not mean, however, that there is a ‘rule’ to this effect, from which departure is only justified in the case of ‘special circumstances’, as suggested in *Van Rensburg v AA Mutual Insurance Co Ltd* and *Mdlalose v Road Accident Fund*. All it means is that the exercise of the Court’s discretion as to costs in this way would usually be proper and unimpeachable, and failure to do so would, if unjustifiable, amount to a misdirection. But it needs to be emphasised, as the proviso to Rule 34(12) makes clear, that the Rule does not dictate this result, even provisionally.”*

[9] A court in considering the issue of costs in the context of an offer to settle in terms of Rule 34 has an unfettered discretion, to be exercised judicially, not capriciously or upon a wrong principle, not in a biased manner or for not substantial reasons.

[10] In terms of Rule 34(6) a party to whom an offer is made may accept such offer within fifteen (15) days after receipt of the Notice contained in the offer or tender. It has been recognised that the offeree might, in appropriate instances, be entitled to a so-called *spatium deliberandi* to consider the offer without the risk of incurring further costs. Whether a *spatium deliberandi* should be provided for at all, and if so, the reasonableness of the duration thereof, will depend on a number of factors including for example, the complexity of the matter, the stage when the offer is made and the like.

[11] Plaintiffs have referred to *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* (supra); *Scott v Norwich Union Fire Insurance Society Ltd* 1966 (1) SA 72 (SR); *Sayed v President Insurance Co Ltd* 1967 (2) SA 220 (N); *Kakana v Commercial Union Assurance Co of SA Ltd* 1975 (3) SA 230 (C); *Erasmus v Santam Insurance Ltd and Another* 1992 (1) SA 893 (W); *Poo v President Insurance Co Ltd* The Quantum of Damages in Bodily and Fatal Injury Cases – Corbett and Honey Vol IV page A3 – 96; *Griffiths v Mutual & Federal Insurance Co Ltd*

[1993] ZASCA 121; 1994 (1) SA 535 (A); *Hassett v Santam Insurance Co Ltd* 2000 (1) SA 403 (C); *Mdlalose v Road Accident Fund* 2000 (4) SA 876 (N) and *NM and Others v Smith & Others* (Freedom of Expression Institute as Amicus curiae)

[2007] ZACC 6; 2007 (7) BCLR 751 (CC).

[12] The defendant concedes that under Rule 34(12) a trial court retains an overriding discretion on costs – *Griffiths v Mutual & Federal Insurance Company Limited* (supra), but maintains that the general practice is that where the offer exceeds the amount of the judgment, the defendant will be ordered to pay the plaintiff's costs incurred up to the date of the offer or tender and the plaintiff pay the defendant's costs thereafter.

[13] At the time the offer was made the defendant was faced with a trial which would clearly be protracted, involve numerous issues and be extremely costly. The very nature of the claim was one where the quantum ultimately could not be calculated with arithmetical

precision. The court would have difficulty to arrive at a remotely accurate estimation, as I remarked at one stage during the trial,

within a million, probably more. That was a difficulty that might also have faced the plaintiffs, and certainly also confronted the defendant.

[14] The offer made by the defendant was, as it turned out, not only adequate, but generous, exceeding the total amount eventually awarded by more than R2 000 000.

[15] Although some submissions have been made on the issue by the plaintiffs, it is in my view clear and the defendant has not contended otherwise, that the offer made by the defendant to the plaintiffs was an indivisible one.

[16] The acceptance of an offer or tender amounts to the conclusion of a contract which puts a contractual end to the litigation between the plaintiffs and the defendant – see *Modise v Standard General Insurance Co Ltd* 1989 (2) SA 276 (W), *Erasmus v Santam Insurance Co Ltd and Another* 1992 (1) SA 893 (W) at 898C, *Hassett v Santam Insurance Co Ltd* 2000 (1) SA 403 (C) at 406 A. The ordinary principles of contract apply. A court has no discretion to award costs other than that provided for in accordance with the offer (unless the offer is one where no costs are offered as envisaged in Rule 34(9), which is not position in casu). An offer may only be accepted in the terms upon which it is made. Accordingly, the validity and effect of an offer in settlement must be sought by an application of the general principles of contract to the wording used in the context in which they were used. The question becomes one whether it was reasonable for the plaintiffs to have declined the offer, which if accepted, would have resulted in them having the contractual rights, benefits and obligations flowing from such acceptance, particularly the amount exceeding that provided for in the judgment.

[17] I do not understand the authorities to mean that any and all subjective concerns and reservations which a plaintiff may have regarding an offer would entitle a plaintiff to reject (or at least not accept) an offer and provide it with an opportunity to proceed with litigation at the cost of the defendant. If an offer was made, which if accepted and construed in accordance with applicable legal principles relating to the conclusion of contracts, with terms necessarily or tacitly implied, would have resulted in compensation in excess of that eventually awarded in a judgment, then, in the absence of particularly strong reasons and

considerations having made the acceptance of the offer unreasonable, the plaintiffs should be liable for further costs incurred subsequent to the making of the offer.

- [18] In casu, the plaintiffs attack the validity/enforceability of the offer and the reasonableness thereof on essentially four grounds:
- (a) firstly, that the offer to settle does not indicate which of the claims of the plaintiff is being settled;
 - (b) secondly, that the offer is one offering payment of the amount of R12 000 000 “direct to the plaintiffs”;
 - (c) thirdly, that the plaintiffs were entitled to a *spatium deliberandi* of a minimum period of 5 to 10 days to consider the offer;
 - (d) fourthly, that having regard to considerations such as that Nico’s claim was being pursued on behalf of a disabled minor, thus casting, it was submitted, “an added responsibility” on the parents and legal representatives to be able to justify any decision on an offer, considerations such as the possible application of section 28(2) of the Constitution entailing a different approach and measure to the assessment of damages, and the difficulties in assessing variables such as life expectancy, the rate of medical inflation and the like, that it was reasonable to proceed with the litigation and not to accept the offer.
- [19] As regards the first issue, plaintiffs contend that they were entitled to reject any offer which is not unambiguous. An ambiguous proposal cannot be classified as an offer in law – see *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633 E – G. An offer must however not be seen in isolation but must obviously be construed against the background facts preceding such offer – see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A). A common sense and objective approach is called for. Ultimately the question whether a particular proposal constitutes an offer in law, must be decided objectively on a preponderance of probability having regard to the reliance the parties could place on the wording used in the context they were used. If on that approach an agreement would be concluded with terms which would justify disturbing a previous costs order, then a plaintiff cannot complain of subjective concerns he may have harboured regarding the offer. If he had any such concerns he should clarify them, not to cure a defective proposal which otherwise upon acceptance would not have given rise to a binding an enforceable agreement, but to remove any reservations he subjectively may have to what a court ultimately may construe objectively as having been an offer.
- [20] It is obviously important in the process of interpretation to determine who addressed the offer and to whom it was addressed to – see *Christie - Law of Contract in South Africa* 5th ed. page 32 to 62.

[21] The offer was made to the plaintiffs. That does not present any difficulty. The plaintiffs' difficulty and the reason for contending that the offer is ambiguous appears to arise purely from the use of the word "claim" in the singular. Plaintiffs claim that they had two claims – one in their personal capacity on behalf of themselves and Gian and one on behalf of Nico. In fact however, the plaintiffs had a number of claims. As pointed correctly by the defendant these included:

- (a) the first plaintiff's claim for future medical expenses in the sum of R93 818;
- (b) the second plaintiff's claim for future medical expenses in the sum of R62 059;
- (c) the plaintiffs' claim for an amount of R12 782 for Gian's future medical expenses;
- (d) the plaintiffs' claims in respect of past hospital and medical expenses in the amount of R186 304,09, in respect of Nico;

Each individual claim under the different headings, in respect of Nico's damages, could potentially also be construed as individual claims. Further, the plaintiffs' claim for example for alterations to their home to accommodate Nico, was, at least partially, claims in their personal capacity. The claim was pursued as part of their representative claim on behalf of Nico, although the amount claimed would relate to the enhancement of their asset.

[22] Clearly, having regard to the amount of the offer and the terms thereof, the offer did not relate to the claims of Mr and Mrs Singh firstly and in respect of Gian as the offer by far exceeded the amounts claimed and also was expressed to include a contribution towards the costs of the curator bonis/trustee.

[23] Plaintiffs' submission is that the offer was ambiguous as to whether it related only to the various claims in respect of Nico, or whether it also included the claims in respect of Mr and Mrs Singh personally and that in respect of Gian.

[24] Being filed when it was, namely on the Friday before an expensive and protracted trial was due to have commenced, being stated to be "in full and final settlement" of "plaintiffs" claim, and including a tender of the costs of all experts up to that date, which would include the costs of experts relevant to claims other than that of Nico only, it can not be said that an offeree in the position of the Plaintiffs would have construed the word "claim" in any manner other than to include their every claim in their particulars of claim. The response of any bystander as to whether the offer was in settlement of every claim to bring finality to the litigation, or whether it was only in settlement of Nico's claim, with the defendant foregoing the advantages of offering a larger amount also in settlement of the claim of the plaintiffs and their claim on behalf of Gian, with the trial proceeding in respect of only those relatively insignificant claims, would have only elicited one response, mainly that the offer was in final settlement of every claim of the plaintiffs. The tender of costs was also not

qualified to be confined to for example the claim of Nico only. It seems to me that the plaintiffs' first point of objection fits more appropriately in the category of what Christie : Law of Contract 5th ed. page 32 has termed as dredging up "fanciful doubts" in retrospect about the meaning of an offer in order to deny that it was truly an offer of sufficient certainty to give rise to a binding and enforceable agreement upon acceptance.

[25] As regards the second point, the objection is that the offer was to pay the amount of R12 000 000 "direct to the plaintiffs". It is contended by the plaintiffs that at the time it had been made abundantly clear that the amount claimed on behalf of Nico would require protection and management by an independent curator bonis or trustee, that is a person other than his parents. It is also contended that this was agreed at the pre-trial conference on 19 October 2006 where agreement was reached that a contribution towards the remuneration of the curator would be paid at 7,5% of the capital amount awarded. It is further contended that the plaintiffs were represented by attorneys who by law would be obliged to safeguard any payment to be made in respect of Nico and to ensure timeous appointment of a curator bonis or the creation of a Trust. Consequently it is submitted that the offer to make payment "direct to the plaintiffs" is a conditional offer which condition the plaintiffs were entitled to reject and that it would have been "downright irresponsible" for them not to have done so.

[26] The offer made by the defendant was one in terms of Rule 34. It is reasonable to accept that terminology used in the formulation of the offer in terms of that Rule would employ terms as defined in terms of the Rules. Rule 1 defines the word "party" as follows:

"Party' or any reference to a plaintiff or other litigant in terms, shall include his attorney with or without an advocate, as the context may require."

[27] Properly construed, the words "plaintiffs" in the offer in terms of Rule 34 will include plaintiffs' attorney.

[28] The word "direct" does not affect the validity or reasonableness of the offer. It qualifies the word "payment"

and probably means no more than that payment would be made direct to the plaintiffs (or their attorney), as opposed to for example payment of any portion thereof direct to suppliers of any services (whether in the past or in the future). It is desirable that Nico's position be safeguarded, but there is no legal impediment to a claim pursued in a representative capacity on behalf of a minor being paid out to that representative "direct".

[29] That would be so even if the parties had agreed that a curator bonis/trustee should be appointed in due course as such an obligation

at that stage, in the absence of a specific court order to that effect, would have been one for the parents/guardians to give effect

to. Such an obligation is no different to the parents having to administer and divide the collective amount of the offer appropriately in accordance with the claims that had been made. It is merely one of the incidences of responsibility flowing from the manner in which the plaintiffs in this action were cited and their claim pursued.

[30] As regards the third point, the objection is that the offer contains a tender to pay plaintiffs taxed costs as between party and party to date of service of the offer and certain specific costs relating to expert witnesses “to date of service of this notice”, and does not allow for a *spatium deliberandi*” and further costs incurred beyond the date of the offer. Plaintiffs submit that the matter was complex. Two pre-trial conferences had been held prior to the offer and certain responses were awaited. A further third pre-trial conference followed later. Further informal meetings were held and letters exchanged. The plaintiffs submit that proof of the complexity, imponderables and uncertainties became even more pronounced during the course of the trial, reliance being placed on my remark at one stage that it would not be possible to be accurate in the assessment of the final damages within a million or probably more. Plaintiffs submit that on their calculations at the time, the quantum exceeded by far the amount of R12 000 000 tendered. In summary, it is submitted that it would be eminently unreasonable not to have afforded the plaintiffs any time whatsoever within which the offer could be considered. Given that the offer was made one week prior to the trial actually commencing on 30 October 2006, the plaintiffs’ argue that it was imperative that preparations for the trial would continue, resulting in further significant costs being incurred during the period the offer was considered.

[31] The defendant’s primary retort is that the plaintiffs did not accept the offer because they clearly considered it inadequate, that the issue of the *spatium deliberandi* is therefore not of significance. The defendant submits that if the offer was remotely acceptable save on the issue of the *spatium*, plaintiffs’ attorney could have raised that with defendant’s attorney. This latter submission is in my view not relevant to considering whether the offer was reasonable per se.

[32] There is nothing magical about a *spatium deliberandi*. Obviously whether a *spatium* should be allowed and the duration thereof, are questions the answers to which are dependent on the facts of each particular case – see *Hassett v Santam Insurance Co Ltd* (supra) at 407 C. In exercising its overriding discretion, a court may or may not allow a *spatium deliberandi*. It is undesirable to attempt to describe an exhaustive list of considerations and circumstances which would determine the need for and the duration of any *spatium deliberandi*. Obviously, the complexity of the action, will be a relevant issue. But it is not decisive on its own. Another important issue would be the stage during litigation when an offer is made. If made at an early stage where preparations are in their infancy and still under way with investigations still being made in relation to quantum, then it would be reasonable to allow a longer period to enable some investigations to be conducted, professional advice to be obtained and for final assessments and calculations to be done to determine the reasonableness of an amount offered.

- [33] In casu, that was not the case. The trial was initially set down for 23 October 2006, that is the Monday following Friday 20 October 2006 when the offer was made. Plaintiffs should have been fully prepared to proceed with their case on that day. All the expert summaries should have been filed and served. At least initial but detailed consultations with experts should have been conducted by that stage. The plaintiffs would have calculated and recalculated the quantum of their claim, assessed whether they were possessed of the necessary relevant evidence to support their claim, and assessed the strength and weakness of their arguments. At the commencement of a major trial where the issue remaining in dispute is the quantum of damages, any legal team will continuously exercise its collective mind repeatedly on the amount likely to be recovered in a judgment, even if subconsciously. In fact during the trial I was left with the clear and certain impression that plaintiffs were keeping a very firm eye on the quantum of the claim. As the trial progressed, and plaintiffs' legal team considered amendments, invariably net increases to plaintiffs' quantum necessary, the particulars of claim were amended accordingly.
- [34] Plaintiffs would have been acutely aware at that stage when the commencement of the trial was imminent, how the quantum was calculated, what it was comprised of, what assumptions were made arriving at that quantum or might come into play, what contingencies, if any provision had been made for, and the like. The defendant was in no better position. The offer was one tendering a globular amount. No details as to how it was calculated nor of any assumptions made by the defendant, were contained in the offer, nor would the defendant be legally obliged to furnish such detail in the offer. The plaintiffs would have been in no better position five days after receipt of the offer to consider the reasonableness thereof any more than they would have been on the afternoon of receiving the offer. Furthermore, costs that would have been incurred in respect of experts or legal work by 20 October 2006, even if it related to events thereafter, would have been covered by the offer.
- [35] It is the duty of a plaintiff to assess the strength and weaknesses of its own case and to be able to assess an offer and the risks which it may create, on his own case. Where an offer is made on the eve of the commencement of a trial where preparation should have been completed (or at least very far advanced), the reasonableness of the offer should be capable of being dealt with almost instantaneously. A Plaintiff should decide whether or not to accept an offer as expeditiously as possibly – see *Mdlalose v Road Accident Fund* (supra) at 883C.
- [36] I am aware that a *spatium deliberandi* has been allowed in contested action even where made on the eve of commencement of the trial. In the present matter however, I am of the view that having regard to the nature of the claim, if the plaintiffs had prepared properly and assessed their quantum and risks adequately, as I have no doubt they did ably assisted by their legal team comprising experienced senior counsel, junior counsel and experienced attorney (specialising according to his letterhead in “medical malpractice and personal injury claims”), that the time available on 20 October 2006 after the offer was received was

sufficient for them to take a firm and final view on the reasonableness of the offer. I have no doubt that the amount offered was not even remotely attractive.

- [37] In the exercise of my over-riding discretion in terms of rule 34(12) I do not consider the terms of the offer of costs to the date of the service of the notice, thus effectively allowing a very limited spatium deliberandi of the remainder of the day the offer was made, to be unreasonable – see *Naylor v Jansen* (supra) and *Omega Africa Plastics (Pty) Limited v Swisstool Manufacturing Co (Pty) Limited* (supra) at 478 D - F; *Hassett v Santam Insurance Co Ltd* (supra) at 407 C - D; *Griffiths v Mutual & Federal Insurance Co Ltd* (supra) at 548 D – 549 B.
- [38] As regards the remainder of the plaintiffs' submissions, the effect of Nico being a minor, can never deprive a defendant of the right to invoke the provisions of Rule 34(1) and (5) in an endeavour to bring an end to litigation that is likely to be protracted and costly. I agree with the submission by the defendant that all it may do is to cast a bigger responsibility on the minor's guardian and his legal representatives not to proceed with litigation which may be risky having regard to the amount of the offer made, and that it may thus effect the duration of any spatium deliberandi. I have taken due note of this fact in reaching the conclusion which I have above regarding the spatium deliberandi.
- [39] Similar sentiments apply in respect of the arguments relating to the constitutional imperative contained in section 28(2) of the Constitution, the estimation of life expectancy, medical inflation and the like. These are all issues bearing upon the merits of the quantum claimed and the kind of uncertainties and imponderables which have to be weighed up in deciding on the likely quantum a court is likely to grant. The fact that they are difficult to estimate or calculate, is not peculiar to the plaintiffs. The defendant also had to do the best he can in assessing his prospects and estimating and calculating an amount to be offered by way of a secret tender.
- [40] The defendant has asked for, and in my view is clearly entitled to a reconsideration of the question of costs, by substituting the contents of paragraph 3 of my previous judgment with the following:

“3.1 The defendant is ordered to pay plaintiffs' taxed or agreed costs to 20 October 2006 on the party and party scale such costs to include:

the costs consequent upon the employment of two counsel;

the qualifying expenses (the amount of such expenses to be determined by the taxing master) of such witnesses in respect of whom the plaintiffs had given proper notice in terms of Rule 36 by 20 October 2006;

the plaintiffs jointly and severally, in their personal capacities are ordered to pay defendant's taxed or agreed costs in respect of the 4 days of the trial referred to in paragraph 16 of the judgment on the party and party scale;

subject to the order in paragraph 3.2 above, plaintiffs in their personal and representative capacities are ordered to pay defendant's

taxed or agreed costs as from 21 October 2006 on the party and party scale, such costs to include :

the reasonable costs of obtaining medico legal and actuarial reports obtained by the defendant after 21 October 2006;

the reasonable costs of those experts who attended joint meetings of expert witnesses after 21 October 2006;

the reasonable qualifying and reservation fees relating to attendance at court of the following expert witnesses :

Ms R Hardy

Ms T McFarlane

Dr R Campbell

Mr Fraser

Ms J Herbert

Mr C Coupethwaite

Ms Tracy Cumming

the costs of obtaining a transcript of the proceedings;

the costs of counsel will include his costs of preparation of written heads of argument.”

[41] The defendant has been successful with the application in terms of rule 34(12). Accordingly, the plaintiffs jointly and severally are directed to pay the costs of the application in terms of rule 34(12) insofar as it may not be included in the above order.

Date of Hearing : 3 October 2008

Date of Judgment : 15 December 2008

Counsel for Plaintiff : Mr W.P. de Waal SC

Ms W. Munro

Instructed by : Joseph's Inc.

Counsel for Defendant : Mr P.P. Delport

Instructed by : MacRobert Inc.

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