THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number :
508/05
Reportable

In the matter between :

MICHAEL NAYLOR FIRST APPELLANT
ATOMAER (RSA) (PTY) LTD SECOND APPELLANT

and

P J JANSEN RESPONDENT

CORAM : CLOETE JA, THERON *et* CACHALIA AJJA

HEARD : 15 AUGUST 2006

DELIVERED : 31 AUGUST 2006

Summary: Defamation – offer of settlement, rule 34(12) – discretion as to costs – when an appeal court will interfere. The damages awarded by the trial court were reduced on appeal to an amount less than that tendered by the defendants. The trial court nevertheless refused to amend the costs order in favour of the plaintiff. This court refused to interfere and further refused to give a costs order in favour of the defendants in respect of the previous appeal.

Neutral citation: **This judgment may be referred to as Naylor v Jansen [2006] SCA 92 (RSA).**

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The plaintiff in the court *a quo*, Mr Jansen, was a manager employed by Atomaer (RSA) (Pty) Limited, the second defendant in the court *a quo*; and he was the local person in charge of the South African operations of the group of which Atomaer formed a part. The first defendant in the court *a quo* was Mr Naylor, the CEO of Atomaer's holding company and all subsidiary companies in the group. It would be convenient to refer to the parties by name, and to Naylor and Atomaer jointly as 'the defendants'.

[2] In September 2002 Naylor came to South Africa and discovered that Jansen had breached his service contract in various respects. Naylor confronted Jansen, who was less than frank about what he had done. Jansen was suspended. Also in September, Naylor attended a meeting with a number of employees of Iscor which was presided over by Iscor's engineering manager at Vanderbijlpark, Mr Bezuidenhout. Jansen had, from late 2000, been involved in negotiations with Iscor in connection with the joint development of technology by Atomaer and Iscor, and he enjoyed a good relationship with its management. His absence from the meeting obviously required an explanation, which Naylor gave in the following terms (as recorded in Iscor's minutes of the meeting):

'Mr Naylor informed the meeting that Mr Jansen of the South African local office had been suspended from his position because he had misappropriated Atomaer funds to a company of which he holds a directorship.'

This announcement had a profound effect on those present at the meeting, and Bezuidenhout subsequently telephoned Jansen to ask him 'hoekom het jy gesteel' and to inform him that he was *persona non grata* at Iscor.

[3] In October 2002 Jansen took an ex parte order against Naylor to confirm the jurisdiction of the Johannesburg High Court. As envisaged in the order, Naylor put up security. The High Court subsequently ordered Jansen to pay the costs of those proceedings.

[4] Early the following month, Jansen issued summons against Naylor and

Atomaer in which he claimed damages in an amount of R250 000 for defamation. In his particulars of claim, Jansen alleged inter alia:

'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 action was defended. In their plea, the defendants repeatedly denied that Naylor had uttered the words appearing in Iscor's minute of the meeting. As one of several alternative defences, the defendants pleaded that if the words had been uttered, they were true and that their publication was in the public interest.

[5] Shortly before the trial commenced before Willis J in the Johannesburg High Court, the defendants made a without prejudice officer in terms of uniform rules of court 34(1) and (5)[1] to settle the plaintiff's claim for R15 500 and to pay the plaintiff's costs in the event of the tender being accepted. The offer stated, as envisaged by rule 34(5)(a), that it was made 'without prejudice as an offer of settlement'; and it went on to say that it was also made 'without any admission of liability on the part of the defendants'.

[6] The trial proceeded for five days in the Johannesburg High Court. The trial judge found in favour of the plaintiff and ordered the defendants to pay damages in an amount of R30 000 together with costs, or to apologise in specified terms to

[1] '(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.
(5) Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state—
(a) whether the same is unconditional or without prejudice as an offer of settlement;
(b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;
(c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;
(d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.'

Jansen and to pay attorney and client costs. (The defendants never exercised the apology option, and the propriety of the alternative order need not be considered further.)[2] The defendants appealed with the leave of the trial judge, who also gave leave to Jansen to appeal against the costs order made against him in respect of the application to arrest Naylor to confirm the jurisdiction of the court.

[7] Jansen successfully prosecuted the costs appeal in which he was the appellant,[3] but abided the decision of this court and did not appear in the defamation appeal in which he was the respondent. Several of the defences raised at the trial by Naylor and Atomaer were abandoned on appeal. In particular, it was no longer in issue that the words reflected in the Iscor minute of the meeting had been uttered by Naylor; and the defence of justification was not persisted in. The defences which were persisted in, were rejected by this court although the amount of damages ordered by the court *a quo* was reduced from R30 000 to R15 000.[4] The reasoning adopted by this court in making the reduction may be summarised as follows: Although Jansen had not been guilty of stealing money from Atomaer and diverting it to a company in which he had an interest (the sense in which this court held the Iscor employees would have understood the words uttered by Naylor), Jansen had breached the duty of good faith he owed to Atomaer; that conduct, like theft, involved dishonesty; there was a direct link between the making of the defamatory statement and Jansen's conduct; and the trial court should have taken this conduct into account in assessing the damages awarded. On the question of costs, Scott JA said the following:[5]

'To sum up, none of the defences raised by the defendants can be sustained and, to this extent, the appeal must fail. 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.'

No order was made in regard to the costs of the appeal.

[8] The costs orders made by Willis J and this court were made in ignorance of

[2] See *Dikoko v Mokhatla*, a decision of the Constitutional Court in case CCT 62/05 given on 3 August 2006 and especially paras 63-70 and 109-121.

[3] *Naylor v Jansen*; *Jansen v Naylor* 2006 (3) SA 546 (SCA) paras 20 to 32.

[4] Id paras 15 to 17.

[5] Id, para 18.

the defendants' without prejudice tender which preceded the trial.[6] Rule 34(12) provides:

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

The defendants duly gave notice of the order to the registrars of the Johannesburg High Court and this court, and requested both reconsideration of the order for costs made by the High Court and also an order for costs in their favour by this court in respect of the previous appeal.

[9] The matter was argued before Willis J who, for reasons I shall deal with presently, did not alter the costs order he had made in favour of Jansen. Scott JA, who had presided over the appeal in this court, initially directed that if the parties did not reach agreement on the question of costs, each party was to submit a draft of the order it contended should be made together with submissions in support thereof; and that the draft and submissions were to be served on the other party, who, if he wished, might file a reply.[7] Once Willis J granted leave to the defendants to appeal against his refusal to alter the costs order made at the end of the trial, the previous direction was substituted with a direction that the issue of the costs of the earlier appeal would be considered at the same time as the appeal from the judgment of Willis J.

[10] It would be convenient at this stage to dispose of the defendants' argument that the appeal should be dismissed because of the provisions of s 21A of the Supreme Court Act, 59 of 1959. That section provides, to the extent relevant for present purposes:

'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will

[6] Rules 34(10) and (13) provide:
'(10) No offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.
(13) Any party who, contrary to this rule, personally or through any person representing him, discloses such an offer or tender to the judge or the court shall be liable to have costs given against him even if he is successful in the action.'

[7] This is the usual practice: See eg *Gentiruco AG v Firestone South Africa (Pty) Ltd* 1972 (2) SA 772 (A); *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A).

have no practical effect or result, the appeal may be dismissed on this ground alone.
…
(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'

I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee*[8] to express the view that a failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance. I still adhere to that view — for if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order, simply because an appeal would be concerned only with costs; and that obviously cannot be the effect of the section. Indeed, I understood senior counsel representing Jansen on appeal, who was not responsible for the heads of argument in which the point was taken, effectively to concede the point.

[11] In view of the attack launched by the defendants on the judgment of the trial court, it is necessary to set out the law in regard to the nature and proper exercise of the discretion vested in a trial judge when it comes to the making of an appropriate order as to costs and the circumstances under which an appeal court can interfere with the exercise of that discretion.

[12] Where a plaintiff in an action sounding in money has not succeeded in obtaining an award which exceeds an offer made without prejudice, there are two important considerations to be borne in mind by the judge exercising the discretion. The first is the purpose behind the rule. The second is that the rule in no way fetters the judicial exercise of the discretion.

[13] The purpose behind the rule is clear. It is designed to enable a defendant to avoid further litigation and failing that, to avoid liability for the costs of such litigation.[9] The rule is there not only to benefit a particular defendant, but for the public good generally as Denning LJ made clear in *Findlay v Railway Executive*:[10]

[8] 1998 (3) SA 1071 (W) at 1075J-1076A.
[9] *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) at 477A-B.
[10] [1950] 2 All ER 969 (CA) at 972E-F, approved in *Garner v Cleggs* [1983] 2 All ER 398 (CA) at 403a-c.

'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.'

It is therefore important that courts should take account of the purpose behind the rule, and not give orders which undermine it. Clayden FJ put the position thus in *Doyle v Salgado (2)*:[11]

'In cases in which the continuance of the action cannot be justified on some ground apart from the recovery of money, as for example to establish a disputed right, the Courts, in exercising the discretion to award costs, must obviously be concerned to ensure that the rules do not fail in this purpose.'

[14] 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.[12] 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*.[13] and *Mdlalose v Road Accident Fund*.[14] 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. Where the law has given a judge an unfettered discretion, it is not for this court to lay down rules which, whilst purporting to guide the judge, will only have the effect of fettering the discretion. If therefore there are factors which the trial court in the exercise of its discretion can and legitimately does decide to take into account so as to reach a different result, a court on appeal is not entitled to interfere ─ even although it may or even probably would have given a different order.[15] The reason is that the discretion exercised by the court giving the

[11] 1958 (1) SA 41 (FC) at 43A.

[12] *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd*, above n 9, at p 477B.

[13] 1969 (4) SA 360 (E) at 366 *in fine* – 367B.

[14] 2000 (4) SA 876 (N) at 885B-C.

[15] The principle has often been stated by this court ─ see eg *Fripp v Gibbon and Co* 1913 AD 354 at 361, 363 and 365; *Penny v Walker* 1936 AD 241 at 260; *Molteno Bros v South African Railways* 1936 AD 408 at 417; *Merber v Merber* 1948 (1) SA 446 (A) at 452-3; *Cronje v Pelser* 1967 (2) SA 589 (A) at 592H-593A.

order is not a 'broad' discretion[16] (or a 'discretion in the wide sense'[17] or a 'discretion loosely so called'[18]) which obliges the court of first instance to have regard to a number of features in coming to its conclusion, and where a court of appeal is at liberty to decide the matter according to its own view of the merits and to substitute its decision for the decision of the court below, simply because it considers its conclusion more appropriate.[19] The discretion is a discretion in the strict or narrow sense[20] (also called a 'strong' or a 'true' discretion).[21] In such a case the power to interfere on appeal is limited to cases in which it is found that the court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.[22] Put differently, an appeal court will only interfere with the exercise of such a discretion where it is shown that

'… the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and

[16] *Dikoko v Mokhatla*, above n 2, para 59.
[17] *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800C-D.
[18] *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (4) SA 799 (W) at 804J.
[19] *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 360D-362G; *S v Basson* 2005 (12) BCLR 1192 (CC) para 154.
[20] *Ganes v Telecom Namibia* Ltd 2004 (3) SA 615 (SCA) para 21.
[21] *S v Basson*, n 19 above, para 110; *Dikoko v Mokhatla*, above n 2, para 59.
[22] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and cases there cited.

principles.'[23]

[15] In the present matter, the trial judge was acutely aware of the fact that he was exercising a discretion. He was also aware of the parameters of that discretion. He referred to the *Omega* cases[24] and said:

'This series of judgments affirms that ordinarily where a tender has been made which is above [the amount] 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.'

He immediately went on to point out:

'Nevertheless, it was said in [the first *Omega* 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.'

The trial judge then emphasised that the action was a defamation action, and said that 'in defamation actions the quantum is largely irrelevant' and 'it is well settled law that in a defamation action the quantum most often essentially takes the form of a *solatium*'. He then went on to say that costs on the High Court scale are ordinarily allowed in defamation actions despite the fact that a plaintiff's level of success falls within the jurisdiction of the magistrate's court, and said that 'this principle seems to me 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'. After these introductory remarks, the trial judge applied his mind to the facts of the particular case before him. He first pointed out that Jansen in his particulars of claim had pertinently made the allegation that he had 'been damaged in his reputation generally and within the industry within which he operates', and went on to make the additional allegation that he had 'suffered damages in the sum of R250 000'. The trial judge then expressed the view that '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'. Second, the trial judge emphasised that the tender upon which the defendants relied contained no admission of liability, no acknowledgement that a defamatory statement had been made and, more particularly, no acknowledgement that the statement had been made wrongfully. Third, the trial judge underlined the fact that the tender contained no apology and expressed his conviction that the question of whether or not an apology accompanies a tender is relevant to the exercise of the discretion in regard to costs. The trial judge concluded his judgment as follows:

'It seems to me that although the plaintiff ultimately succeeded in proving damages in an amount of R15 000 whereas the defendants had tendered R15 500, the plaintiff nevertheless needed to persist

[23] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 11.
[24] Above, nn 7 and 9.

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.'

[16] The defendants' counsel sniped at some of the introductory remarks made by the learned judge. Indeed, as counsel representing Jansen correctly conceded, they are open to some criticism. But what is important is not so much whether these remarks state the law completely accurately in the unqualified form in which they were made, but the purpose for which they were made. The golden thread running through the trial judge's entire reasoning process, which ultimately led to his decision to exercise his discretion as he did, was that Jansen was obliged to come to court to clear his name. I am unable to fault this approach. I propose dealing with the criticisms advanced by the defendants' counsel to demonstrate why I am of this view.

[17] It was submitted that the trial judge was wrong in stating that quantum in defamation matters is largely irrelevant, and reference was made to cases which say that the amount awarded in a defamation case should carry with it a complete vindication of the plaintiff's character. That argument is misplaced. In the present matter, Naylor had effectively called Jansen a thief. By denying that the defamatory words had been spoken, a defence which was persisted in at the trial, the defendants call into question Jansen's veracity as well. And by pleading justification in the alternative, the defendants repeated the defamation. The offer was expressly said to be 'without any admission of liability'. If Jansen had accepted the offer, Naylor could have persisted in the falsehood that Jansen had never been defamed, or continued to assert that the defamatory statement he had made was true. The amount offered was not so significant that it carried with it an obvious admission that the defences pleaded were without substance ─ ie those who came to hear of the offer would not conclude that the defendants must have defamed Jansen, for otherwise they would not have offered to pay out compensation: R15 500 is not so substantial an amount and it could quite easily be explained on the basis that defending the action was simply an unattractive commercial proposition. In these circumstances, whilst it is correct to say that where a defamation has been admitted

or proved, the amount awarded by the court serves inter alia to vindicate a plaintiff's reputation, it is wrong to say that acceptance of the same amount – offered secretly, without admission of liability and coupled with a public denial of wrongdoing – achieves the same result. It manifestly does not. The attitude of the defendants that Jansen should have been satisfied with the money is reminiscent of the Roman character Lucius Veratius,[25] who walked the streets slapping the faces of his fellow citizens, and then ordered a slave who was following him with a bag of money to pay each 25 asses (the amount prescribed by the Twelve Tables) in compensation.[26]

[18] The defendants' counsel submitted (I quote from the heads of argument) that Jansen 'came to court for money. He asked for nothing else. He did not ask to have his reputation vindicated. Had that been the focus of his concern, he could and should have included the necessary declaratory orders in his prayers for relief'. The defendants' counsel also submitted that there is not in existence a rule of practice entitling a plaintiff to the costs of the issue of liability, and that an argument to the contrary has been rejected.

[19] In support of the argument that Jansen should have asked for a declaratory order that he had been defamed and for an apology, if that is what he indeed wanted, the defendants' counsel referred to the decision of *Mineworkers Investment Co (Pty) Ltd v Modibane*[27] and the unreported case referred to in para 16 of that judgment. But those cases reflect a novel approach, the correctness of which has not yet been approved by a higher court.[28] It cannot be inferred from the fact that

[25] Referred to by Aulus Gellius, *Noctes Atticae* 20.1.13:
'And therefore your friend Labeo also, in the work which he wrote *On the Twelve Tables*, expressing his disapproval of that law says: "One Lucius Veratius was an exceedingly wicked man and of cruel brutality. He used to amuse himself by striking free men in the face with his open hand. A slave followed him with a purse full of asses; as often as he had buffeted anyone, he ordered twenty-five asses to be counted out at once, according to the provision of the Twelve Tables".' (Translation by Rolfe, *The Attic Nights of Aulus Gellius*, Loeb Classical Library, vol III p 411.)

[26] Jolowicz, *Historical Introduction to the Study of Roman Law* (3rd ed) 273; Schulz, *Classical Roman Law* p 594; Van Oven *Leerboek van Romeinsch Privaatrecht* (3rd ed) 346; Zimmermann *The Law of Obligations* p 1052.

[27] 2002 (6) SA 512 (W).

[28] This is not the place to consider whether those cases are correct, or whether the South African law should be developed by judicial pronouncement to facilitate and place greater emphasis on an apology in defamation cases: *Dikoko v Mokhatla*, n 2 above, *loc cit*; contrast *Mthembi – Mahanyele v*

Jansen adopted the traditional and well-established method of formulating his claim, that he was not interested in vindicating his reputation. Although Jansen's claim sounded in money, it is quite apparent from his particulars of claim that he came to court to address his reputation generally and also his reputation within the industry where he operates, as well as to recover damages. An award of damages necessarily involves a finding ─ a public finding, usually by the High Court ─ that the plaintiff's reputation was impaired. The learned judge correctly emphasised the allegations in Jansen's particulars of claim regarding the impairment of his reputation. I have already referred to the cutting remark made by Bezuidenhout of Iscor and his barring of Jansen from Iscor's premises on the strength of the defamatory statement made by Naylor. Jansen did not appear in the appeal to resist the attack on the amount of damages awarded by the trial court, much less seek to increase the award in a cross-appeal. In the circumstances, the suggestion that all Jansen was interested in was money, is unwarranted.

[20] It is correct that there is no rule of practice entitling a plaintiff, in a matter such as the present, to the costs of the issue of liability. That used to be the English practice, but the Federal Supreme Court held in *Doyle v Salgo* (2)[29] that it could no longer be the practice in England[30] and that it was not the practice in the Federation, which had a rule similar in terms to the rule with which this appeal is concerned. *Doyle's* case, however, far from being in favour of the defendants, is against them. What happened in that matter is that the plaintiff husband did not succeed in obtaining an award of damages which exceeded the amount paid into court by the second defendant who had committed adultery with the plaintiff's wife. The court of first instance nevertheless awarded the costs of the third day of the hearing to the

Mail & Guardian Ltd 2004 (6) SA 329 (SCA) paras 117 and 118.

[29] Above, n 11.

[30] Subsequently in *Hultquist v Universal Pattern and Precision Engineering Co Ltd* [1960] 2 QB 467 (CA) at 481-2, Sellers LJ said that the cases cited in the Annual Practice in favour of such a practice 'must be treated as relying on their special facts' and went on to say: 'I do not think they can be regarded at the present time as authorities which require a judge to grant such costs, or which require this court to intervene if he fails to do so. The whole question must be dealt with in the discretion of the judge in accordance with the rule.' The law as to costs in England has since undergone substantial revision; for a summary in regard to defamation cases see *Gatley on Libel and Slander* (10th ed) chapter 35 section 5.

plaintiff because the second defendant had made the baseless allegation that the plaintiff had connived at the adultery. The full court held that this was a proper exercise of the discretion in relation to costs. On a parity of reasoning, where (as here) the whole trial was necessary to enable Jansen to clear his name, there could be no objection to a similar exercise of judicial discretion in respect of all the costs of the trial; and indeed, that was the view of the Federal Court as appears from p 44A where Clayden FJ said:

'*Gray v Jones*, 1939 (1) AER 798, was an action for slander, again a case in which the grant of costs to the plaintiff on the issue of liability would be justified.'[31]

[21] There is accordingly no merit in the criticism of the approach of the trial judge. The second main attack on the judgment was in regard to its overall effect. The first of two arguments in this regard was succinctly thus stated in the heads of argument:

'[The trial judge] declined to apply the normal rule. Instead, he formulated a new rule and a new set of principles' and 'His findings constitute radical departures from existing law.'

This argument is misplaced. It ignores the nature of the discretion vested in a trial judge when it comes to deciding on an appropriate award of costs. As I have already pointed out, there is no 'normal rule'. Nor did the trial judge formulate a 'new rule'. Nowhere did the trial judge suggest that the approach which he followed was the only approach which could legitimately be followed, or that it should be followed in similar matters. And the fact that he followed the approach which he did, creates no precedent binding on judges called upon to exercise the same discretion in future. If another court, in exactly the same circumstances as pertain in the present case, were to exercise its discretion in favour of ordering the plaintiff to pay the defendant's costs after the offer, this court would similarly not interfere. The reason is that the exercise of a narrow discretion necessarily involves a 'choice between permissible alternatives',[32] and accordingly, 'different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts'.[33]

[22] The second criticism based on the effect of the judgment was that if it is allowed to stand, defendants in defamation actions who deny the defamation and make no apology, cannot henceforth protect themselves against costs. I see no objection to that where a denial is a so-called 'tactical' denial ─ if a defendant denies

[31] See also the reasoning at 44E-G.

[32] *Media Workers Association of South Africa v Press Corporation of South Africa ('Perskor')Ltd* above n 17 at 800D-F; *Wijker v Wijker* 1993 (4) SA 720 (A) at 727J-728B.

[33] *Ganes v Telecom Namibia Ltd* above n 20, *loc cit*.; and see also *Knox D'Arcy Ltd v Jamieson*, above n 19 at 362D-E.

uttering words which were defamatory, well knowing that he did so, it seems to me a perfectly fair and proper exercise of the court's discretion to order the defendant to pay the costs despite a secret offer which exceeds the amount tendered but in which liability is not admitted. A hypothetical apology, for example 'if I said these words, I apologise' or 'if these words can bear this meaning, then I withdraw them and apologise' may well be permissible in cases of genuine uncertainty, provided there is included an admission that the defamatory charge is untrue (although where words are clearly defamatory on their face, a hypothetical apology is unlikely to appear sincere).[34] And a defendant could also without prejudice offer to make an apology, with or without an offer of monetary compensation.

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[23] Then finally, in regard to the judgment of Willis J, the defendants' counsel submitted that the fact that the defendants 'did not admit' the defamation and did not

[34] cf *Gatley on Libel and Slander* 9th ed para 31.2.

tender an apology, were relevant in the assessment of the amount awarded; and accordingly, so the argument went, should not play any part in determining an appropriate order as to costs. I fail to see why not. The facts mentioned are relevant in both instances. There is no duplication. It was submitted on behalf of the defendants that if this was so, the conduct of Jansen taken into account by this court in reducing the amount of damages awarded to him, should also have been taken into account by the court *a quo* when it reconsidered its costs order. This argument was not contained in the appellants' notice of appeal, was accordingly not dealt with by Willis J and cannot be raised now.

[24] The appeal accordingly falls to be dismissed. I turn to consider the question whether, as the defendants contend, an order directing Jansen to pay the costs of the previous appeal should be made. Rule 34(12) has no application to this court, but the practice of this court is to follow the uniform rules of court, so far as practicable, where its own rules are silent. Counsel submitted that had the respondent accepted the tender, the matter would not have proceeded to trial and no appeal would have been required. That argument was rejected by this court in *Griffiths v Mutual and Federal Insurance Co Ltd*[35] where the plaintiff achieved substantial success on appeal; although she did not beat the tender, she was awarded the costs of appeal. In the present matter, the trial court held for good and sufficient reasons that Jansen was justified in not accepting the offer and in incurring the costs of a trial to clear his name. On appeal, the limited success achieved by the defendants on the merits was held not sufficient to carry the costs of the appeal. In all the circumstances, I do not consider the additional fact that the offer made before the trial commenced exceeded the amount awarded, justifies an order for costs in favour of the defendants in the previous appeal.

[25] That brings me to the question of costs of the present proceedings. In the appeal there is no reason why the costs should not follow the result. The application for a costs order in the previous appeal, was a procedure separate from that appeal

[35] 1994 (1) SA 535 (A) at 549B-E.

and should carry its own costs: *Gentiruco A G v Firestone South Africa (Pty) Ltd*.[36] Both parties asked for the costs of two counsel where two counsel were involved. The defendants were originally represented by senior and junior counsel, who signed the heads of argument and the submission in support of a costs order in the previous appeal, although senior counsel did not appear before us; and junior counsel alone signed the heads of argument on behalf of Jansen, but was led by senior counsel when the matters were argued. In the circumstances I shall in both matters award the costs of two counsel, where two counsel were involved, to Jansen.

[26] I make the following order:

1. The appeal is dismissed, with costs.
2. The application for a costs order in the appeal previously heard by this court, is dismissed with costs.
3. In each instance the costs of two counsel, where two counsel were involved, shall be allowed on taxation.

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T D CLOETE
JUDGE OF APPEAL
Concur: Theron AJA
Cachalia AJA

[36] Above, n 7.