

SOUTH AFRICA / JUDGMENT

Dutton v Road Accident Fund (EL901/2016, ECD2201/2016) [2017] ZAECELLC 18 (18 October 2017) [2017] ZAECELLC 18

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

EL901/2016, ECD2201/2016

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IN THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO: EL 901/2016

ECD 2201/2016

In the matter between

THOMAS OWEN DUTTON

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

HARTLE J

1. The sole issue for determination before me in this motor vehicle accident claim is whether the plaintiff is entitled to a special costs order for the reasonable qualifying expenses of Dr. Schaefer, specialist psychiatrist, whose services were engaged by the plaintiff's attorneys with a view to giving expert evidence on the plaintiff's behalf in the trial of this action. It is trite law that without an order of this court or the consent of all interested parties the fees of such a witness cannot be allowed on taxation.[1]
2. Dr. Schaefer need not testify any longer because the parties have in effect reached a settlement and the defendant has made an offer in respect of the plaintiff's remaining claim for loss of earnings which he finds acceptable. The nature of that offer essentially implies that the plaintiff is the successful party herein and should be given a full indemnity for all costs reasonably incurred by him. The only question left for consideration is this aspect of the special costs award for the qualifying expenses of Dr. Schaefer.
3. The defendant made a formal offer in terms of Rule 34(1) on 30 August 2017. The plaintiff's attorneys made a counter offer to that offer to include a special costs order for the experts engaged on his behalf who would have testified at the trial. Had they accepted the defendant's formal offer to simply pay party and party costs, it would not have been competent for the plaintiff to claim the qualifying expenses of these experts without an order of court.[2]
4. The plaintiff's counter offer, which was accepted by the defendant, made allowance for the special orders sought in respect of the costs of three of the plaintiff's experts. Dr. Schaefer's name was left off, but I was assured by Mr. Wood, who appeared for the plaintiff, that this was an oversight or a typographical error according to his instructing attorney, which was only brought into focus a day or two before the trial when the inclusion of Dr. Schaefer's qualifying expenses in the proposed draft order became an issue.
5. The circumstances under which Dr. Schaefer came to be involved are the following:
 - 5.1 prior to the matter proceeding on trial earlier this year, on 24 May 2017, it had not been an issue that the loss of earning capacity suffered by the plaintiff was attributable to the injuries suffered by him in the accident.
 - 5.2 however just before the hearing in May 2017, the defendant gave notice of its intention to amend its plea, the effect of which, inter alia, put the cause for the plaintiff's loss of earnings at the foot of his bipolar disorder.
 - 5.3 The plaintiff's attorneys objected to the late filing of the notice, which resulted ultimately in the trial being amicably postponed. The wasted costs occasioned thereby were reserved, but are not in contention today. The defendant has offered to pay them.
 - 5.4 Having regard to the new stance adopted by the defendant in this respect, the plaintiff's attorneys had intimated by letter as early as 23 May 2017 that they intended to have the plaintiff examined by Dr. Schaefer and to file a report in due course.[3]

5.5 The proposed amendment was delivered on 30 May 2017.

5.6 The report of Dr. Schaefer was only delivered on 31 August 2017. It confirms that the plaintiff can still do menial work despite his bipolar condition and supports the contention made on his behalf that the loss of his earning capacity is as a result of the injuries sustained by him in the collision, and not because of this disorder.

6. I should point out that the brief summary referred to above was gleaned from documents placed before me and on the strength of submissions made from the bar. Neither party adduced any evidence.
7. The issue arises in this matter because Dr. Schaefer's report was only delivered after the defendant's offer in terms of Rule 34 was made.
8. The fact that a witness does not testify, or as occurred in this situation Dr. Schaefer's report was not filed before the defendant tendered the amount which the plaintiff accepted as constituting his loss of earnings, does not automatically disqualify the plaintiff from being entitled to recover his qualifying expenses although it is a factor in the overall consideration of whether the court is satisfied that the incurring of such fees was reasonably necessary. The court in *Stauffer Chemical Co v Safsan Marketing Distribution Co*[4] set out the approach to be adopted in this regard as follows:

"The general rule is that the Court will grant an order for the qualifying fees of a witness only where it is satisfied that the payment of such qualifying fees was reasonably necessary (The Government v The Oceana Consolidated Co 1908 TS 43 at 48). As far as I am aware, there is no authority for the proposition that normally the Court will not make an order in respect of qualifying fees paid to persons not called as witnesses. In fact such authority as I have encountered is contrary thereto (see

eg Netlon South Africa Ltd and Another v Pacnet (Pty) Ltd 1974 BP 237 (CP) at 279D - E; Letraset International Ltd v Transfertech (Pty) Ltd and Others 1981 BP 17 (CP)). The true position, it seems to me, is that the fact that the person concerned was not called as a witness is merely a factor to be considered, in the context of all other relevant circumstances, in determining whether the payment of his qualifying fees by the party applying for the order was reasonably necessary. In the absence of any explanation, the failure to call the person as a witness would generally lead to the inference that the payment of the fees was not reasonably necessary. Where, however, as in the present case, it appears that the party in question originally intended to call the person as a witness and that, in the light of the issues then subsisting the person's evidence would have been relevant, but that subsequently the issues were narrowed down or eliminated by reason of the attitude adopted by the other party to the case in such a way as to render the calling of the person as a witness unnecessary, then, in my view, the non-appearance by such person in the witness stand would not of itself lead to such an inference. Indeed in such a case, depending on all the circumstances, the Court might well come to the conclusion that the payment of the qualifying fees was reasonably necessary."[5]

9. The defendant submits that Dr. Schaefer's report is superfluous because the offer which it made had no regard to its contents and did not influence the amount of the award tendered. Rather the defendant used the information which was available to it at the time to assess the plaintiff's claim for loss of earnings, excluding the information in Dr. Schaefer's report, which tender the plaintiff did not seek thereafter and on the strength of the very same report to controvert. Ms. Kopke who appeared for the defendant submitted that if the late report of Dr. Schaefer had been so crucial, then the plaintiff would not have accepted the offer. Contrariwise it was submitted by Mr. Wood that the report was not unnecessary because the plaintiff required it to decide whether to accept the offer or not. It thus served a vital purpose.
10. Ms. Kopke submitted further that the plaintiff also delayed in producing the report after it became available.[6] She also criticized the plaintiff for having taken more than three months in any event to obtain the report and questioned

whether the defendant was under these circumstances expected to wait for it. Evidently, it had come as a surprise to the defendant that the costs of Dr. Schaefer were in contention at all when the defendant's offer was being negotiated. Finally Ms. Kopke submitted that, assuming the report had any value, it served the plaintiff's personal purposes only and should be regarded as an attorney and client expense.

11. The issue of Dr. Schaefer's report being filed after the making of the formal offer is not in my view decisive of the matter which I must decide, although it is a factor to be taken into consideration as noted above.
12. In *Randall v Baisley*[7] the court helpfully provided an analysis of what the qualifying expenses of a witness entail as follows:

"In the Supreme Court qualifying expenses are regulated by item 6 of schedule E of the tariff under Rule 70:

'Evidence: Such just and reasonable charges and expenses as may, in the opinion of the Taxing Master, have been properly incurred in procuring the evidence and attendance of witnesses whose fees have been allowed on taxation: Provided that the qualifying expenses of a witness shall not be allowed without an order of Court or the consent of all interested parties.'

As pointed out by Smith J in *The Government v The Oceana Consolidated Co* 1908 TS 43 at 47-8, the costs incurred in putting a witness (including a professional man giving expert evidence) into a position to give evidence may well be considered as part of preparing the case and laying it before Court. There could not be any question,

the learned Judge stated, as to the desirability of permitting a party to recover any such costs as the Court thinks were necessarily

incurred in placing his case before the Court. (There was at the time no statutory enactment or Rule of Court on the matter.) On such basis, qualifying expenses would fall within the ambit of party and party costs. Qualifying expenses would in fact be recoverable under the general provisions of item 6 (supra), but for the proviso thereto that a special order of Court is required for such expenses. In its context, the mention of such expenses is not an extension of the litigant's rights to costs, but a limitation thereof. The requirement in regard to qualifying expenses is therefore an exception to the rule that necessary and proper costs of preparation for trial are covered by an award of costs."

13. The analogous item of the tariff under consideration now provides as follows under the heading "D – Miscellaneous":

"5. Testimony: Fair and reasonable charges and expenses which in the opinion of the taxing officer were duly incurred in the pronouncement of the evidence and the attendance of witness whose witness fees have been allowed on taxation : Provided that the preparation fees of a witness shall not be allowed without an order of the court or the consent of all interested parties."

14. The court in *Randall v Baisley*[8] also outlined the range of the work of a professional or expert witness comprising qualifying expenses, or preparation fees, as

follows:

"To me, however, the enquiry does not turn on whether or not he was an expert, but rather on whether his services were in respect of 'qualifying' himself as a witness.

The scope of the act of qualifying as a witness was fully considered by Harcourt J in *Köhne and Another v Union & National Insurance Co Ltd* 1968

- (2) SA 499 (N) at 499-501. I refer to a number of principles conceived by the learned Judge to be applicable to the question of qualifying expenses, viz in the general way it may be said that an expert witness 'qualifies' when he reads up, or otherwise masters the details of the particular case on which he is to give evidence (501F); qualifying fees are regarded as part of the costs of production of reasonably required evidence (501H); they are part of the expense of procuring information which might bear upon the issue in dispute and includes the costs of witnesses preparing themselves for examination (502A-B); although the practice has not been entirely consistent, it has long been accepted that expert witnesses are - subject to there being an order of court or agreement
- entitled, as between party and party, to 'qualifying' fees in addition to payment under any tariff of remuneration of witnesses (502C); an expert witness is not one who can be subpoenaed to give his expert opinion, in doing this he is a volunteer and there

is no objection on the grounds of public policy to an agreement that he should be paid additional remuneration for the work necessarily

required to be done in preparation for giving expert opinion evidence (502E); a professional witness may make his own terms for doing the research work which is necessary in order to qualify himself for expressing his opinion in the case, such remuneration is not for attending in court, but for qualifying himself to give evidence (502G); the scope of 'qualifying fees' is not precisely defined in any single case but should be taken to include, inter alia, the attendances involved in the inspection of persons, places, or things necessary to ensure that a scientific witness, however eminent, is far more useful to those conducting the case if in fact he has had the advantage of viewing the locus in quo (503A-B); it is expected of experts to read relevant authorities and scientific journals to enable them to express well-founded opinions with reference to learned authority which they may adopt as the evidence for the assistance of the court (503C); it is also clear that the qualifying fee covers expenses of the expert necessarily and properly incurred in experiments and investigations

involved in qualifying himself (503H). 'Qualifying expenses', it seems, covers all acts performed by the expert which relate to the opinion which he would express in court. This may include the observation of persons and places, or the investigation of or experiments on the corpus delicti. It does however not include pre-trial examinations or investigations which go to direct proof of the factum probandum. The pre-trial activity of the expert may relate to both qualifying and non-qualifying preparatory acts; indeed it may be difficult to unravel the one from the other. But the basis of the distinction however is clear: qualifying acts bear upon the expert's opinion, all other acts fall outside the scope of the concept."

15. There is no question in my mind that Dr. Schaefer performed the function of a specialist psychiatrist and that he qualified himself in order to express the views set forth in his report. The only question remaining is whether what he had to say in his report had any role to play in the matter.
16. The accepted criterion is whether his preparation was necessary and proper for the attainment of justice or for the defending of the rights of the plaintiff.[9] The answer must in my view be in the affirmative. The appointment of a specialist psychiatrist was necessary at the time of the filing of the defendant's notice of intention to amend to negate this new contention of no causality being raised for the first time. The plaintiff's attorneys advised the defendant's attorneys of its strategy in this regard. Despite this the defendant did not abandon its intention to amend but followed through, indicating thereby that its defence on this aspect would be persisted with upon trial. It was not therefore a situation where the plaintiff was reacting to an informal indication by the defendant that it was going to make an issue of the plaintiff's psychiatric disorder relative to the quantification of his claim for loss of earnings.[10] The plaintiff obviously bore the onus to prove his damages and expected that he would now need to disprove the theory that his bipolar condition was the cause of his loss of earnings.
17. It was not suggested to me when the plaintiff consulted with Dr. Schaefer, but I believe that this court can take judicial cognizance of the fact that in matters of this nature the process of engaging an expert is not instantaneous. One must first secure an appointment with the

specialist and then await his report. Even though that report came at a time after the defendant's formal offer was made, the costs had already been incurred by the plaintiff by then. The defendant could further not have been unaware of the plaintiff's intentions and cannot claim to have been surprised by their receipt of this report.

18. Whilst I accept that the taxing master may well upon taxation disallow a fee for filing the report itself after the fact, the qualifying expenses preceding its delivery were certainly in my view reasonably and necessarily incurred.[11]
19. In the result I issue the following order:
 1. The defendant is ordered to pay the plaintiff the sum of R331 655.40 in respect of loss of earnings.
 2. The defendant is ordered to pay to the plaintiff interest on the aforesaid capital amount at the legal rate of 10.25% as from a date fourteen (14) days after the date of this order to date of payment.
 3. 3.1 the defendant shall pay the plaintiff's costs of the action as between party and party on the high court scale and any costs attendant upon the payment of the capital and the reasonable qualifying expenses of plaintiff's expert witnesses, if any, of:-
 - 3.1.1 Dr. P A Olivier;
 - 3.1.2 Dr H J van Daalen;
 - 3.1.3 Dr. D D Schaefer;
 - 3.1.4 Mr R J Koch.
 - 3.2 The costs of the action will include the reserved costs of 24 May 2017.
 4. 4.1 The plaintiff shall, in the event that cost are not agreed, serve the notice of taxation on the defendant's attorneys of record; and
 - 4.2 The defendant shall pay to the plaintiff interest on the taxed party and party costs calculated at the legal rate of 10.25% from a date fourteen (14) days after taxation to date of payment.
5. Payments are to be effected to the following account:

Bank

: Nedbank

Branch code : 126 317

Account name : Niehaus McMahon Attorneys

Account type : Trust account

Account number : [1...].

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 18 October 2017

DATE OF JUDGMENT: 18 October 2017

Appearances:

For the plaintiff: Mr. C Wood instructed by Niehaus McMahon, East London (ref. Mr. McMahon).

For the defendant : Ms. M Kopke of Bate Chubb & Dickson, East London (ref. Ms Kopke).

- [1] See the proviso to item 5, Section D of the tariff appended to Rule 70.
- [2] Stauffer Chemical Co v Safsan Marketing & Distribution Co 1987 (2) SA 331 (A) at 365 B – C, Van Wyk and Another v Protea Assurance Company Ltd 1974 (3) SA 499 (SWA) at 503 H – 504 A; and Thibela v Minister van Wet en Order en Andere 1995 (3) SA 147 (TPD) at 151 G – H.
- [3] In their letter they noted their surprise and indicated what they intended to do in this regard in the following terms: “2. Kindly note that the first time the issue of our client’s Bipolar disorder had been raised by yourselves was in the Filing Notice of the intention to amend the Plea, served on our offices on 15 May 2017. It is our contention that the Plaintiff is prejudiced by the filing of the said intention to amend the Plea at this late stage, as the Bipolar disorder had been recorded in the report of our industrial psychologist, Dr van Daalen dated the 2nd November 2016, served at your offices on the 28th November 2016. 3. We accordingly request that we be afforded the opportunity to further investigate this aspect and to consult our client’s treating psychiatrist, Dr Schaefer and if needs be, obtain a report from him. We may possibly also after further consultations with experts and upon yourselves effecting the amendment, proceed with a formal replication. 4. In the light of the aforesaid, we request that the case be postponed on the 24th May 2017 and that a further date for hearing of the case be obtained. It is our contention that the Defendant is to bear the costs of such a postponement in the light of the late notification of the intention to amend. 5. We await your urgent response thereto.”
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 5. We await your urgent response thereto."
- [4] Supra at 355 C – H.
- [5] See also Cassel and Benedick NNO v Rheeder & Cohen NNO [1991] ZASCA 25; 1991 (2) SA 846 (A) at 853 E – I.
- [6] The report itself is dated 15 August 2017 but was only served on the defendant on 31 August 2017. Evidently it was only filed with the registrar on 4 September 2017.
- [7] 1992 (3) SA 448 (EC).
- [8] Supra.
- [9] Rule 70 (3).
- [10] Indeed this is the converse of the situation in *Lorgat v Bastion Insurance Co. Ltd* 1967 (2) SA 175 (EC) where the court there held that the plaintiff's attorney's over-reaction to certain disclosures made in settlement discussions by the defendant's assessor having prompted them to make investigations of their own to negate prejudicial aspersions cast on their client, was the cause of their incurring the costs of such investigation. The court noted that the impugned items in a costs review had been incurred prematurely and over-cautiously. The proper course would have been for the plaintiff to await a notice of amendment in proper form.
- [11] For purposes of taxation it is obviously relevant to note that the plaintiff did not accept the offer on all its terms. It made a counter-offer which was accepted only on 19 October 2017. Thereafter the plaintiff sought to point out its mistake in not making provision for the qualifying fees of Dr. Schaefer and thereby eschewing the settlement. Even though the parties were ostensibly in agreement on all other aspects, technically this does not mean that the formal offer was accepted. To the contrary, everything was up for adjudication when the matter came before me on trial. In that sense the plaintiff was

perfectly within his rights to have filed Dr. Schaefer's report under cover of the customary notice in terms of rule 36(9),

which was timeous having regard to the trial date.

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