

SOUTH AFRICA / JUDGMENT

Joubert v Meyer (51155/2014) [2017] ZAGPPHC 586 (13 September 2017) [2017] ZAGPPHC 586

COURT

North Gauteng High Court, Pretoria

BEFORE

G T Avvakoumides

CASE / FILE NUMBER

51155/2014

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 51155 / 2014

DATES

OF HEARING: 10 AUGUST 2017

DATE

OF JUDGMENT: 13 SEPTEMBER 2017

In

the matter between:

JULIANA

JOUBERT

Plaintiff

and

DR

ANDRE

MEYER

Defendant

JUDGMENT

AVVAKOUMIDES, AJ

INTRODUCTION

[1] This is an application in terms of rule 34 (12) of the uniform rules of court, brought by the defendant pursuant to my judgment after the trial. The plaintiff had instituted a claim during or about July 2014 for damages arising from an abdominoplasty procedure performed on her by the defendant. The plaintiff claimed damages as follows:

- 1.1 Past medical and allied expenses - R132 341.76;
- 1.2 Estimated future medical, hospital and allied expenses - R200 000 .00;
- 1.3 General damages - R2 000 000.00.
- 1.4 Total-R2 332 341 .76

[2] On 4 March 2016 the merits of the case were disposed of by way the usual "without prejudice and without admission of liability

undertaking" by the defendant to pay 90% of the plaintiff's proven or agreed damages. The trial on the remaining

issues was set down on 4 March 2016 and was ultimately heard on 31 October 2016 and 1 November 2016.

[3] In my judgment I awarded damages for specific headings as follows:

- 3.1 R30 600.00 for psychotherapy (which includes the 10% reduction on the merits);
- 3.2 R65 988.00 for physiotherapy and associated aids (which includes the 10% reduction on the merits);
- 3.3 R114 000.00 for past loss of medical expenses which includes the 10% reduction on the merits);
- 3.4 R200 000.00 for general damages (in respect of which I omitted to reduce by 10%).

[4] I thus awarded a total of R417 920.00. At the hearing of this application my attention was drawn to the obvious error and both

parties had no difficulty that I deal with the error in this judgment and correct it, as I am entitled to do. The nett effect of the award after the correction is that the award comprises a total of R390 588.88 instead of R417 920.00. The final award is hereby corrected to a total of R390 588.88 insofar as may be necessary.

[5] On 9 March 2016 the defendant served a notice in terms of rule 34 (1) and (5) on the plaintiff wherein the following offer of settlement was made:

5.1 Payment in the sum of R480 000.00;

5.2 Taxed or agreed costs including senior counsel's fees;

5.3 Taxed or agreed costs pertaining to the reservation, preparation and qualifying fees of experts and reasonable costs of obtaining the experts' reports.

5.4 Taxed or agreed costs of obtaining instructions on the offer.

[6] The offer took into account the apportionment on the merits as agreed. The plaintiff did not accept the offer. The defendant

proceeded to set this application down for hearing on costs but because of unforeseen circumstances

relating to the plaintiffs counsel, an earlier date could not be arranged. In terms of rule 34 a court may reconsider the question of costs if an offer was made by one party and the trial court awards an amount which is less than that tendered. The court, as I understand it, has an unfettered discretion.

[7] Generally speaking, unless there is reason not to do so, the court's discretion is exercised by awarding the costs incurred after the date of the offer to the defendant although the court may decide that the circumstances do not warrant such an order. See: *Herbstein & Van Winsen - Civil Practice of the High Courts of SA 5th ed Volume 1* pages 624 to 627. In *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 22 G, the court highlighted two considerations to be borne in mind by a judge in exercising discretion for this purpose. The first is the purpose behind rule 34 and the second is the judge's unfettered discretion.

[8] The rule is designed to enable a defendant to avoid further litigation, failing which, to avoid liability for costs. Denning LJ expressed himself as follows in *Findlay v Railway Executive* 1950 (2) ALL ER 969 (CA): "...The public good is better secured by allowing plaintiffs to go onto trial at their own risk generally as to costs".

[9] It bears mentioning that the merits had been disposed of prior to the rule 34 tender, albeit a period of approximately one week. This is not a case in which the continuance of the action can be justified on some ground apart from the recovery of money which would enjoin a court, upon exercising discretion, to ensure that the rules of court do not fail. See: *Doyle v Salgo* 1958 (1) SA 41 (FC) at 43 A.

[10] The pivotal argument of the plaintiff on why the court should not interfere with the cost order is that there are no comparable

reported cases on awards for general damages for abdominoplasty procedures. I am not persuaded that the submission is sound on the basis contended. The parties were in the same position in considering the different heads of damages. Consequently, in the absence of any other

acceptable reasoning, other than that the court has wide discretion I am persuaded that the cost order should be reconsidered. It is however, in my view, reasonable under the circumstances to afford the plaintiff the full 15 day period spatium defiberandi to consider the offer, given that the trial date was some seven months down the line.

[11] I have already dealt with the correction of the globular amount in the sum of R390 588.88. I note from the plaintiff's heads of argument that, despite the rejection of the tender, the defendant still submitted that the plaintiff's costs should include the costs of senior counsel, for the period up to the date of the offer. Although I am of the view that the employment of senior counsel by the plaintiff was justified, I referred both counsel to the decision of City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg and Another (282/2013) [2014] ZASCA 5; [2014] 2 All SA 363 (SCA); 2014 (4) SA 10 (SCA) (12 March 2014) wherein

Leach JA stated the following:

"Secondly, the first respondent was represented in this appeal by a senior counsel who appeared alone. He asked for costs 'on the scale of senior counsel'. I know of no such scale. Should the complexity of a matter and the amount involved justify the employment of two counsel as a wise and reasonable precaution, a court will make a special order in that regard. Where a single counsel is employed, no special order is required and it is for the taxing master to determine a fair and reasonable fee to be allowed on taxation. Even where the matter is one deserving of the employment of senior counsel (which this clearly is) it would be wrong for a court to somehow attempt to fetter that discretion; just as it would be wrong for a taxing master not to consider the reasonableness of a senior counsel's fee in a deserving case merely as the court did not order that the fee of a senior counsel should be allowed. I therefore see no need to make any specific order as to costs".

[12] In the premises, having considered the application and submissions made in respect thereof, I make the following order:

[12.1] The defendant shall pay to the plaintiff the sum of R390 588.88, (this amount being the corrected amount) such amount having become due and payable on the date of my original judgment, namely 6 February 2017. This amount shall obviously attract mora interest at the applicable rate to date of payment.

[12.2] The defendant is ordered to pay the plaintiffs taxed or agreed costs up to 30 March 2016 which costs shall include the costs of counsel, reservation, preparation and qualifying fees (if any) of the quantum experts in respect of whom notice was given by the plaintiff in accordance with the provisions of rule 36

(9) and the reasonable costs of obtaining the reports from such experts.

[12.3] The plaintiff is ordered to pay the defendant's taxed or agreed costs from 31 March 2016 to 1 November 2016 which costs shall include the costs of counsel, the medico legal reports, combined reports, consultation, reservation and qualifying fees, if any, of Dr V Jandera and Mr M Peverett.

[12.4] The costs of the application in terms of rule 34 (12).

G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

DATE: 13 SEPTEMBER 2017

Representation for Plaintiff:

Counsel:

G. C. Botha S. C.

Instructed by: G. P. Venter Attorneys

Representation for Defendant:

Counsel:

M. Van Antwerpen

Instructed by: MacRobert Attorneys

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