

SOUTH AFRICA / JUDGMENT

Mafumana v Road Accident Fund (4900/2017) [2019] ZAGPPHC 144 (26 April 2019) [2019] ZAGPPHC 144

COURT

North Gauteng High Court, Pretoria

BEFORE

Strydom

CASE / FILE NUMBER

4900/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

CASE NO: 4900/2017

26/4/2019

In the matter between -

NOBANTU CONFIDENCE MAFUMANA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

STRYDOM AJ

- [1] This is a matter in which the plaintiff, now deceased, is claiming damages from the Road Accident Fund (the defendant) as a result of injuries sustained by him in a motor collision. It should be noted that the plaintiff was not substituted by his estate as a party but this point was not taken due to the matter becoming settled on merits and quantum. For purposes of this judgment I will still refer to the plaintiff as such.
- [2] The only outstanding issue relates to costs. Not the defendant's unwillingness to tender same as this was done, but rather on which scale the court should order the defendant to pay the plaintiff's costs: on the High Court scale or on the Magistrate Court scale.
- [3] During argument it became clear that the contentious issue was not whether the plaintiff should have instituted the action in this court but rather whether the plaintiff should have caused the matter to be transferred from the High Court to the Magistrate's Court at some stage after the plaintiff passed away. And further whether the plaintiff should have informed the defendant of the death of the plaintiff leaving it with a choice to decide whether to transfer the matter.
- [4] It was argued that the plaintiff died on or about 26 June 2017 and soon thereafter the plaintiff's attorney should have realised that the estate of the plaintiff would never be able to prove damages, if the merits were proven or settled on a 100% liability basis or less, beyond the jurisdiction of the Regional Magistrate's Court, which stood at the amount of R400, 000 (four hundred thousand) at the time.
- [5] As long ago as 26 August 2016, an offer was made by the defendant to settle the merits on an apportionment of 80% I 20% in favour of the plaintiff. This offer was not accepted at the time. The matter was set down to be heard on 18 April 2019. Only on 25 March 2019, the defendant's 2016 offer was accepted by the plaintiff. This offer made no mention of any tender as far as costs are concerned.
- [6] After the need for the trial on the merits fell away the quantum of damages remained in dispute and the matter remained on the trial roll.
- [7] On 17 April 2019, one day before the trial, the amount of damages was settled. The settlement amounted to R43, 238.40 (forty three thousand two hundred and thirty eight rand and forty cents) which represented the plaintiff's loss of earnings before he died. The court was informed that his death was natural and unrelated to the collision. The plaintiff could not have proven an amount higher than this. This settlement amount is significantly lower than the R400, 000 (four hundred thousand rand) jurisdictional limit determined for damages actions to be instituted in the Regional Magistrates Court. The settlement of the amount of damages came with an offer to pay the plaintiff's costs on the Magistrate's Court scale and not on that of the High Court. This was not acceptable to the plaintiff and the

parties argued before me to make a determination on which scale costs should be awarded to the plaintiff.

- [8] At the first pre-trial conference, held during or about 19 September 2017, the parties were in agreement that the scale of costs would be that of the High Court. This is evidenced by the agreement to the effect that the plaintiff's attorneys cost for attending the pre-trial conference should be allowed and taxed on a party and party High Court scale. It was argued from the bar by counsel representing the defendant that no reliance should be placed on this concession as at that date the plaintiff was already deceased and the defendant was not informed of this. It was only during a second pre-trial conference held on or about 11 April 2019, i.e. about seven days before the trial that defendant was informed about the death of the plaintiff. No information was placed before me in this regard to enable me to establish whether the plaintiff's legal representatives knew at the time when the first pre-trial conference was held that their client had passed away. According to a letter of authority signed by the Master of this Court, an executor for the estate of the plaintiff was appointed on 17 November 2017, a date after the first pre-trial conference was held and more than a year after the plaintiff's passing.

- [9] It was argued on behalf of the plaintiff that considering that the plaintiff's injuries were extensive, and also in light of the

concession on behalf of the defendant to the effect, that the plaintiff was entitled to institute the action in the High Court and that there was no duty on the plaintiff to transfer the matter to the Magistrate Court even when it became clear that the quantum that this court could award would fall comfortably within the jurisdiction of the Magistrate Court. The plaintiff insisted that the appropriate cost order would be one on the High Court scale. This argument in essence boils down to a view that once a matter was properly instituted in the High Court, it could remain there despite changed circumstance causing the amount of damages to fall within the jurisdiction of the lower court.

- [10] On behalf of the defendant, it was argued that shortly after the death of the plaintiff, the plaintiff's legal representative should have known that the amount of damages which the plaintiff could possibly be awarded could never have exceeded the amount of R400, 000 (four hundred thousand rand) and consequently, the matter should have been transferred for trial to the lower court by the plaintiff's representatives. If not, then the plaintiff would not be entitled to be awarded cost on the High Court scale. It was argued that the plaintiff was only earning approximately R2, 500 (two thousand five hundred rand) per month and any claim for loss of income would have fallen within the jurisdiction of the lower court. This aspect was not disputed by the plaintiff before me.
- [11] It was submitted that litigants should litigate cost-effectively and if the defendant was informed about the death of the plaintiff, the defendant might have applied for the matter to be transferred to the lower court.

- [12] As indicated, the defendant was only informed about the plaintiff's death during or about 11 April 2019. Whether the defendant would have transferred the matter to the lower court once it established that the plaintiff passed away, remains speculative as no such evidence was placed before me. Fact is the defendant, which at all relevant times were probably facing a cost order, would have had the option to transfer the matter.
- [13] Two questions arise in this matter: first, should the plaintiff have transferred the matter to the Magistrate Court? Second, should the plaintiff's legal representatives have informed the defendant about the death of plaintiff, sooner?
- [14] I will consider these questions together. It should be noted that this is not a matter where at all relevant stages it was clear that the amount of damages would fall within the jurisdiction of the Magistrate's Court. If this was the case and the matter came before me, I would have allowed costs on the Magistrate's Court scale only, unless there were other circumstances justifying the matter to remain in the High Court. The onus would have been on the plaintiff to justify his recourse to the more expensive tribunal. For instance, the plaintiff could have shown that there were other reasons than the amount of the damages which justified the matter to be adjudicated in the High Court. For instance, special complexity of law or fact, or public interest or alike. This was never argued in this matter. In casu, the issue is different. The parties were ad idem that the plaintiff would have been entitled to proceed in the High Court but, it was submitted, that after the death of the plaintiff, the matter should have been transferred to the lower court to save costs.
- [15] Rule 39(22) of the Uniform Rules of Court deals with the transfer of matters from the High Court to the Magistrate Court and reads as follows:

"By consent the parties to a trial shall be entitled, at any time, before trial, on written application to a judge through the registrar, to have the cause transferred to the magistrate's court: Provided that the matter is one within the jurisdiction of the latter court whether by consent or otherwise."

- [16] This section places no obligation on a party to transfer a matter from a forum which has jurisdiction to adjudicate the matter, to another with jurisdiction. It only provides for an entitlement. The intension of the rule maker was clearly not to place an obligation on a party to transfer a matter, but what the rule provides for is for a party to try to get consent from the other party to have the matter transferred. It leaves a party with a choice and thereby suggests that a party should not be penalized for exercising an option not to transfer the matter. But, on the other hand it does not deal with costs and the discretion of a court remains unfettered. I am of the view that a plaintiff with knowledge that the amount of damages he will be able to prove will not be more than the jurisdictional amount of the Magistrate's Court, should use his entitlement and transfer the matter. If this is not done a court should only award costs on a Magistrate's Court scale from the time when the matter should have been transferred.

[17] But it can be argued that that the defendant could have transferred the matter with consent, or even without it, on application to this court (see: *Veto v lbhayi City Council*[1]) but that it was never done. To consider a transfer, a party will have to be aware of the changed circumstances. In casu, this circumstance would be the death of the plaintiff rendering his claim substantially less than at the time the claim was instituted. The plaintiff for some unknown reason only informed defendant of the death of the plaintiff days before the trial. At that stage counsel would have been appointed on trial and the costs incurred in the High Court. I am of the view that there was a duty on the plaintiffs attorneys to inform the defendant as soon as they became aware of his death. The delay to inform defendant meant that the defendant could not even consider to transfer the matter. If the executor of the estate of the plaintiff failed to inform the plaintiffs legal representatives the blame is on the side of the plaintiff and not the defendant. This failure to inform the defendant, limited its option the exercise its entitlement in the terms of Rule 39(22) and the cost order I intend to make would reflect this court's disapproval of not informing the defendant timeously.

[18] This court was not informed on which date the plaintiffs legal representatives became aware of the death of the plaintiff. What the court does know is that on 17 November 2017, the executor for the plaintiffs estate was appointed by the Master of this Court. The executor of the plaintiffs estate should have instructed the plaintiffs attorneys to continue with this matter. The plaintiffs attorneys should have placed facts before the court why it decided not to transfer the matter to the lower court. This was not done. See in this regard the decision of *Vermaak v Road Accident Fund*[2] where Jones J found as follows:

“[5] ...

But as a general rule the proper exercise of the court's discretion on costs provides a powerful deterrent against bringing proceedings in the High Court which might more conveniently be brought in the Magistrates' Court, and this implies that the party who could have chosen to proceed in the lower court will have to satisfy the High Court that there are good and sufficient reasons for the exercise of discretion to what High Court costs in his or her favour.”

[19] The basic rule is that all cost awards are in the discretion of the court. The court has a wide discretion which should be exercised with due regard to all relevant considerations.

[20] The court takes cognisance of the fact that the offer to settle the merits was made more than two years before it was accepted by the plaintiff. The defendant was never informed about the death of the plaintiff right up to a week before the trial. The plaintiff's representatives must have been aware considering the low income of the plaintiff before the accident, that there was not even a remote chance that he would be awarded an amount for loss of earning higher than the Magistrate's Court jurisdiction. I am of the view in light of all these circumstances that the plaintiff, through his legal representatives, should have transferred the matter to the Magistrate's Court causing cost-effective litigation. It unfairly prejudiced the defendant not to transfer the matter and not to inform the defendants about the death of plaintiff enabling the defendant to choose to exercise its entitlement to transfer the matter.

In these circumstances it would be unfair to expect of the defendant to pay the plaintiff's costs on trial on the High Court scale. Moreover, this matter should have been settled long before the trial date to avoid cost on trial. The delay to settle the matter was caused by the plaintiff.

[21] As stated above, the plaintiff was initially entitled to litigate in the High Court. At a later stage however, it is the finding of this court that the matter should have been transferred to the Magistrate's Court. Insufficient facts were placed before the court, making it difficult to determine from which date the plaintiff, would only be entitled to Magistrate's Court cost. I am of the view that soon after the executor was appointed, on 17 November 2017, the matter should have been transferred and the defendants should have been informed about the death of the plaintiff. The court will allow two months during which it should have been done. The court is of the view that the following costs order should be made and be inserted in the draft order provided to me by the defendant which I will mark with an "X".

[21.1] The defendant is ordered to pay the plaintiff's costs on the High Court scale up to and including 27 January 2018.

[21.2] Costs incurred after 27 January 2018, including the trial costs, should be paid by the defendant on the Magistrates Court scale.

STRYDOM AJ

ACTING JUDGE

GAUTENG DIVISION

PRETORIA

Date of hearing: 23 April 2019

Date of judgment: 29 April 2019

Appearances:

For the plaintiff: Adv M. Thabethe

For the defendant: Adv D. Bekker

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION - PRETORIA]

On 18th April 2019, at Court 8G, before the Honourable Strydom AJ.

In the matter between:

NOBANTU CONFIDENCE MAFUMANA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

DRAFT

By agreement between the parties. the following order is made :

1. The defendant concedes to pay 80% of the proven damages resulting from a motor vehicle accident which occurred on the 12th December 2015 in which the Plaintiff was a driver.
2. The Defendant pays the sum of R 43 238.40 (FORTY THREE THOUSAND TWO HUNDRED AND THIRTY EIGHT RAND FORTY CENTS ONLY) in full and final settlement of the plaintiff's claim and the said amount is payable into the following bank account

Account Holder : Sivu Shongwe Attorneys

Bank Name :

Standard Bank

Branch Code : 018305

Account Number : [...]

Type of Account : Trust Account

3. The Defendant will not be liable for interest on the above amount provided that same is paid within fourteen (14) days, failing which interest at a rate of 10 .25 % per annum will be payable calculated from the date on which this order was made.
4. Defendant to pay the Plaintiff's taxed or agreed party and Party costs on a High Court scale up to and including 27th January 2018. Cost incurred after 27th January 2018, including trial costs, should be paid by the defendant on the Magistrate's court scale. In the event that the costs are not agreed, the Plaintiff agrees as follows:
 - 4.1. The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record;
 - 4.2. The Plaintiff shall allow the Defendant Fourteen (14) court days to make the said payment of the taxed costs; and
 - 4.3. Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10 .25 % on the taxed or agreed costs from date of allocatur to date of final payment .
5. The above costs will also be paid into the above trust account , which costs shall include the following:
 - 5.1. The fees of Counsel;
 - 5.2. The costs of obtaining report of Poneso (Actuary).

6. There is no contingency fee agreement.

BY ORDER

[1] 1990 (4) SA 93 (SE) at 95H.

[2] 2006 JDR 0182 (SE) at para 5.

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