

SOUTH AFRICA / JUDGMENT

Merafe v Road Accident Fund (4954/2017) [2021] ZAFSHC 180 (19 August 2021)

[2021] ZAFSHC 180**COURT**

Free State High Court, Bloemfontein

BEFORE

JP Daffue

CASE / FILE NUMBER

4954/2017

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Source record**SAFLII****Note: Certain****personal/private details of parties or witnesses have been redacted
from this document in compliance with the law and SAFLII****Policy****IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 4954/2017****In**

the matter between:

SECHABA
MOKETE MERAPE
and
ROAD
ACCIDENT FUND
Plaintiff
Defendant
CORAM: DAFFUE,
ADJP
HEARD

ON:

9 JUNE 2021

JUDGMENT

BY: DAFFUE, ADJP

DELIVERED ON: 19 AUGUST 2021

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII.

The date and time for hand-down is deemed to be 09:30 on 19 AUGUST 2021.

I

INTRODUCTION

[1] This is yet another matter in which an injured person seeks compensation for injuries suffered in a motor vehicle collision where the Road Accident Fund ("RAF") failed to instruct legal representatives to appear on its behalf at the trial. Therefore, judgment by default will be granted.

II THE PARTIES

[2] Mr Sechaba Mokete Merafe, a 32 years old male person residing in the small town of Dealesville some 65 km west of Bloemfontein is the plaintiff. He was 25 years old when he sustained injuries in a motor vehicle collision that occurred on the R64 road between Dealesville and Boshof. He was represented at the trial by Adv MJ Potgieter of Pretoria, he being instructed by VZLR Inc, Pretoria.

[3] A strange phenomenon, but to which we have become accustomed in the Free State Division of the High Court, is the fact that three sets of attorneys feature in this matter. It appears from the Contingency Fee Agreement presented to me by Mr Potgieter that the plaintiff instructed Grimbeek Van Rooyen & Partners Inc of Kroonstad as well as Van Zyl Le Roux Inc ("VZLR") of Pretoria as his attorneys of record. Contrary to what one would have expected as the RAF's head office is in Pretoria, the action was not instituted by VZLR in Pretoria, but in Bloemfontein. A third set of attorneys, to wit Du Plooy Attorneys of Bloemfontein were appointed to act as the local correspondents. A plaintiff

is fully entitled to make use of any firm of attorneys which he/she/it prefers, but that does not mean that there may not be consequences when payment for costs is sought from the losing defendant. I shall deal with this issue again later herein.

[4] The RAF is juristic person created in terms of s 2(1) of the Road Accident Fund Act,[1] ("the RAF Act"). It was previously represented by Maduba Attorneys of Bloemfontein, but since the withdrawal of instructions to this firm of attorneys, nobody appeared for the defendant at the hearing of this matter. I must point out Mrs Bornman attended the proceedings in court whilst Mrs Cannon also attended to my chambers on 8 June 2021. These ladies made it

clear that they did not have any authority to either appear in court on behalf of the RAF or to appoint counsel to appear on behalf of the defendant during the trial. They had nothing more than a watching brief although they apparently facilitated settlement negotiations between the parties which in this case did not bear any fruit.

III THE

ISSUES

[5] On 6 July 2014 and on the R64 public road between Boshof and Dealesville plaintiff was a passenger in a motor vehicle that overturned as a result of which he sustained certain injuries. As long ago as 21 August 2018 defendant conceded the merits 100% in favour of the plaintiff and an appropriate court order was made on that day.

[6] The plaintiff's serious injury report was rejected by the defendant and although the plaintiff's legal representatives initially took the stance that this court could determine the claim for general damages at this stage, counsel conceded eventually that this portion of the claim could not be determined and had to stand over for later

adjudication if required.

[7] Although an amount of R10 000.00 was claimed in respect of past medical and hospital expenses it became clear that the plaintiff did not suffer any damages in this regard. Therefore, the only issues to be adjudicated are:

7.1 whether the plaintiff is entitled to an undertaking in terms of s 17(4)(a) of the RAF Act in respect of future medical, hospital and related expenses relating to injuries incurred in the motor vehicle collision of 6 July 2014;

7.2 the amount to be awarded for past and future loss of earnings.

IV THE EVIDENCE

[8] Bearing in mind the extra costs involved if I would have insisted on the presence and oral evidence of the experts employed by the plaintiff, I agreed to accept the affidavits of the experts, confirming the contents of their reports. These affidavits were contained in a bundle and handed in as exhibit "C". The reports of

the plaintiff's experts were previously filed with the court and for purposes of the record I marked them as exhibits "A",

"B" and "B1" respectively. I reiterate that in accepting the affidavits I took into consideration that this was a matter where default judgment would be granted eventually in light of the fact that the defendant filed no expert reports whatsoever whilst I knew from experience that the RAF would fail to instruct a legal practitioner to appear at the trial and cross-examine any of the plaintiff's experts.

- [9] Save for some remarks to be made when I evaluate the submissions of plaintiff's counsel and the evidence, I am in principle in agreement with the most contentious issues.
- [10] The plaintiff testified through an interpreter and was also questioned by me in order to clarify some aspects. The plaintiff is married and he and his wife have one child who is presently 6 years old. He passed grade 10, but left school at the end of 2010 after having failed grade 11. At that stage he was 21 years old. He worked as a general worker for a company known as Enzani Technologies, based in Gauteng, for a period of 11 months in the period prior to 2014. He was part of a team digging trenches and laying cables for solar panels to be installed at the Krugersdrift Dam between Bloemfontein and Dealesville. Clearly this was not a permanent job. In February 2014 he started employment with Megatron, a Vereeniging based firm. He basically did the same work for this company for about 4 months until he was injured on 6 July 2014. Again, he was not a permanent employee. He did not receive any payslips from this employer, but only notifications on his cell phone every time his salary was paid into his FNB bank account. According to him he received a salary of R2 500.00 per fortnight and overtime from time to time. He did not give any details in this regard. About a month after the collision he returned to work and although he could not carry out the work previously done, he was utilised as a "store-boy".

After a further month he resigned as he could not cope with the work.

- [11] From 14 February 2017 the plaintiff obtained employment with C-Max Construction. He was employed for a period of 5 months until the end of July 2017. The payslips in respect of this employment were handed up in a bundle which I accepted as exhibit "D". The plaintiff received a salary of R5 400.00 per month and in some months overtime that ranges between R405.00 and R945.00 per month. He could not keep up with the work and resigned at the end of July 2017.
- [12] He also worked at the Arbor Acris Chicken Farm as a storeman for a period of 3 to 4 weeks from May 2018. The employment period of 3 months indicated in the report of Mr Moodie is incorrect if the viva voce evidence of the plaintiff is considered. He also worked as a general worker and not a storeman as mentioned by Mr Moodie.

The plaintiff only received an amount of R900.00 in respect of the full period, although he was promised between R4 000.00 and R5 000.00 per month. He did not sign an employment agreement.

- [13] During his evidence the plaintiff's counsel requested leave from me to show the plaintiff's scarring to his left shoulder and upper arm. It appeared during this presentation that the plaintiff could not lift his arm above shoulder height.

- [14] Contrary to an allegation made to some of the medical practitioners that the plaintiff worked at the Arbor Acris Chicken Farm on a contract basis from 2011 to 2012, he did not mention this employment during his viva voce evidence. I specifically asked the plaintiff whether he did any other work before being employed with Megatron and he only mentioned Enzani Technologies. He did not mention employment at Arbor Acris Chicken Farm during the period from 2011 to 2012.
- [15] It is apparent from the plaintiff's evidence as well as the information conveyed to the medical experts that he did contract work from time to time, but that he was never permanently employed. It is also apparent that he was from time to time unemployed during the pre-morbid phase. The plaintiff indicated that if money was made available, he would be prepared to undergo medical treatment in the form of operations in order to rectify the problem experienced with the left shoulder. I point out that Dr Oelofse specifically dealt with this aspect in his report and will return thereto later herein.
- [16] The plaintiff testified that he was never employed again since his last employment at the Arbor Acris Chicken Farm in the middle of 2018. Upon my question as to how he and his family survived ever since then, he testified that they live on the child grant (R500.00 per month) and that his wife earns a gross income of R150.00 to 200.00 per day from baking and selling of fat cakes (vetkoek). He could not explain, when asked by Mr Potgieter, what his nett income was. Upon further questioning he confirmed that he and his wife assist each other in this regard and it is therefore apparent that they have been working together in trying to make a living. According to the plaintiff this business was started as recently as February 2021.
- [17] I also considered the evidence of experts on the basis as set out above. Dr D Hoffman, a Plastic, Reconstructive and Cosmetic Surgeon examined the plaintiff on 14 March 2018. He explained that the effect of scarring is not merely physical, but has a psychological component as well. He confirmed that the scar on the plaintiff's left cheek will benefit from surgical revision, but no surgical revision is indicated for the large scar on the left shoulder. [2] From his point of view the plaintiff would be able to work to his normal retirement age of 65 years, although he would need to take sick leave in order for conservative treatment and surgery.
- [18] Dr LF Oelofse, an orthopaedic surgeon diagnosed the orthopaedic injuries as follows[3]:
- "United clavicle fracture with:*
1. Acromioclavicular (AC) joint injury
 2. Residual shoulder pain
 3. Atrophy of the deltoid muscle
 4. Disfigurement."

[19] Dr Oelofse recommended conservative treatment with nonsteroidal anti-inflammatory drugs and analgesics, physiotherapy and treatment by a biokinetic. If these treatments are not successful, local steroid injections might be provided and if this still does not produce positive results an excision of the AC joint and arthroscopy of the shoulder with acromioplasty should be undertaken.[4] Finally the surgeon makes the following point:[5]

“It is my opinion that the patient MUST BE accommodated in a light-duty, shoulder-friendly position until successful treatment has been achieved (as determined by an Occupational Therapist)”. (emphasis added)

[20] Mrs Yani de Klerk, an Occupational Therapist of Rita van Biljon Occupational Therapists examined the plaintiff on 18 June 2018. She did a series of tests and concluded that the “plaintiff is not suited to the requirement for occasional weight handling of items up to 10 kg due to limitations in the left dominant

shoulder.”[6] Although she mentioned that the plaintiff is no longer an equal competitor in the open labour market, she continued as follows: “The plaintiff should be able to continue in his current occupation provided that the weight handling requirements do not increase”.[7] At that stage she was informed that the plaintiff was employed as a storeman. Obviously, she considered the plaintiff’s prospects in the condition she found him and without regarding the chances of successful treatment as explained by Dr Oelofse.

[21] Mr Moodie, the industrial psychologist who elected to quote extensively from the reports of Dr Oelofse and Mrs De Klerk, opined that “at best he (the plaintiff) will be able to continue with his current employment (that of storeman) albeit with pain and discomfort.”[8] He did not consider any improvement in the plaintiff’s medical condition as a result of the medical intervention advised by Dr Oelofse.

[22] The actuary, Mr Johan Sauer relied on two scenarios in his latest actuarial report dated 31 May 2021. In the second scenario he calculated the loss of income based on no future earnings post- morbid. It is not necessary to deal with this scenario further as Mr Potgieter confirmed during his oral argument that he would not rely thereon. In the first scenario Mr Sauer calculated past loss of earnings by making provision for contingency deductions of 5% in both the pre-morbid and post-morbid scenario’s, arriving at a loss of R259 724.00. In respect of future loss of earnings he relied upon contingency deductions of 15% and 75% in respect of pre-morbid and post-morbid scenario’s respectively and consequently arrived at a total loss of future earnings in the amount of R1 311 587.00. Based on this scenario he calculated the total loss of earnings to be R1 571 311.00.[9] In order to justify the percentage of 75% the actuary considered factors such as “increased employment vulnerability, labour incapacity, uncertainty, possible long periods of unemployment and early retirement.”[10] I shall pertinently deal with these assumptions hereunder. I merely mention at this stage that the expert failed to recognise that the plaintiff did in fact earn an income during 2021 as he testified in court. More importantly, he did not consider Dr Oelofse’s report, but elected to rely only on information presented by Mr Moodie.

V EVALUATION OF THE SUBMISSIONS BY COUNSEL

- [23] There is no doubt that the usual undertaking should have been provided long ago. The plaintiff suffered a significant injury to his left shoulder and if he was in a position to undergo physiotherapy and biokinetics at an early stage, he might have been able to start working again, especially if injections and medication as suggested by Dr Oelofse could have been afforded. Furthermore, if all these conservative interventions failed, the surgical procedures identified by Dr Oelofse could have been undertaken. The orthopaedic surgeon did not indicate that the suggested surgical procedures might not be successful. In fact, according to him a mere two months and four months light duty should be allowed for the excision of the AC joint and the shoulder arthroscopy respectively.[11] If the expert believed that there was no or limited chance of successful surgical intervention due to the extent of the injuries, I would have expected him to say so.
- [24] Mr Potgieter admitted that a contingency spread and differentiation pre- and post-morbid of 60%, i.e. 15% in respect of pre-morbid and 75% in respect of post-morbid as the actuary relied upon, would be fair to both parties. I have considered his submissions carefully, but I am of the view that a more conservative approach should be followed, given the facts in casu.
- [25] In my view the plaintiff who obtained a grade 10 certificate only, would always suffer to obtain permanent employment even if uninjured. As a general worker he would apparently have to be satisfied with contract work from time to time as happened in casu. Obviously, the type of work is such that an employee is not guaranteed continuous and permanent income. The actuary relied on Mr Moodie's report and in my view he was influenced by what Mr Moodie stated, although he did not specifically mention this. Mr Moodie's submissions that the plaintiff "will automatically be disqualified as there are literally thousands of job seekers which are strong, healthy, and young and unemployed which will be a better candidate for prospective employers" and the plaintiff's "chances of obtaining and sustaining employment are very slim"[12] must be seen in proper prospective. The plaintiff's prospect of being completely healed has been ignored. Many thousands of job seekers with grade 12 and even better qualifications prepared to be employed as general workers and who are better qualified as the plaintiff were unemployed during the period under consideration and this trend will continue in all likelihood. The economy suffered during the recent past and the future does not appear to be rosy at all. The poor, uneducated and marginalised people in our country will unfortunately continue to live in dire financial straits. The plaintiff in his uninjured state could not obtain permanent employment and had to be satisfied with irregular contract work. The factors mentioned by the actuary such as employment vulnerability, uncertainty and long periods of unemployment would continue to exist even if the plaintiff remained uninjured.
- [26] In my view the pre-morbid contingency of 15% in respect of future earnings should be increased to 20% and the loss should be calculated as follows:

Future earnings (uninjured)

R2 185 979.00

Less 20% contingency deduction

R 437 196.00

Total loss of future earnings pre-morbid

R1 748 783.00

[27] The future loss of earnings post-morbid should be calculated by applying a contingency of 65% and not 75%. My reasons are twofold:

27.1 There is no reason why the plaintiff may not be able to make full use of his left upper limb once surgery has been undertaken as stated by Dr Oelofse, the orthopaedic surgeon. As mentioned, there is no indication that surgery would be futile. In any event, Dr Oelofse regards surgery as the ultimate medical intervention in so far as he is of the view that physiotherapy, biokinetic treatment, analgesics as well as injections should be provided to the plaintiff in the first instance.

27.2 It is apparent that the plaintiff and his wife presently earn income in so far as they have embarked upon the business of making and selling fat cakes which earns them a gross income between R3 750.00 and R5 000.00 calculated on 25 working days per month.

[28] The future loss of earnings post-morbid should in my opinion be calculated as follows:

Future earnings (injured)

R2 185 979.00

Less 65% contingency deduction

R1 420 886.00

Total loss of future earnings post-morbid

R 765 093.00

[29] The past and future loss of earnings is therefore:

Total future loss of earnings pre-morbid

R1 748 783.00

Less total future loss of earnings post-morbid R 765 093.00

Total future loss of future earnings

R 983 690.00

Plus total loss of past earnings

R 259 724.00

Total loss of past and future earnings

R1 243 314.00

VI IMPROPER

ORDERS

[30] I have been provided with a draft order during Mr Potgieter's oral argument. I indicated to him both in court and earlier in chambers that I am not prepared to make orders providing for the payment of two sets of attorneys. The plaintiff did his schooling in Bloemfontein and is staying in Dealesville, a small town some 65 km west of Bloemfontein. There are numerous attorneys in Bloemfontein specialising in personal injury work. There is no reason whatsoever why plaintiff should be entitled to obtain payment of his costs on a party and party scale providing for two sets of attorneys in casu. There is also no reason why provision should be made for travelling and accommodation expenses of plaintiff in order to be examined by experts in Gauteng. No reason has been advanced as to why the plaintiff made use of experts outside Bloemfontein. I dealt at great length in *Salemane v Setsoto Local Municipality*[13] with similar issues where the parties even entered into an agreement. I quote extensively from the judgment:

"[9] I respectfully agree with the sentiments expressed by Madlanga J in Eke v Parsons that an expedited or early end to litigation may not only be in the parties' interest, but serve the interests of the administration of justice as well. However, the learned judge emphasised that early settlement does not mean that anything agreed to by the parties should be accepted and made an order of court.

[10] A court is not a rubber stamp and/or duty-bound to confirm all draft orders or settlement agreements presented to it without proper scrutiny. A mechanical adoption of the terms of the settlement agreement should be avoided. As mentioned in *Eke v Parsons*, the agreement must not be objectionable and its terms must be capable, both from a legal and a practical point of view, to be

included in a court order; its terms must accord with both the Constitution and the law and not be at odds with public policy.

[11] In *Barkhuizen v Napier* Ngcobo J, the scribe of the majority judgment, held that the proper approach to the constitutional challenge of a term in a contract is to determine whether the term is contrary to public policy as evidenced by constitutional values, in particular those found in the Bill of Rights. He accepted that the doctrine of *pacta sunt servanda* was still part of our law, but cautioned that courts should decline to enforce contractual terms in conflict with constitutional values. Therefore, although agreements should be honoured as a general rule, it does not follow that immoral agreements that violate public policy should receive the court's proverbial stamp of approval even though the parties may have consented thereto. The question to be decided in casu is whether it would be contrary to public policy to mulct

an organ of state with unnecessary legal fees and expenses.

- [12] It is emphasised that this is not a review of the decision of a taxing master in accordance with rule 48 of the Uniform Rules of Court. It is accepted that in such a case, a court should be reluctant to interfere with the decision of the taxing master where he/she has exercised a discretion in allowing, reducing or rejecting items in a bill of costs. The applicable principles have been set out in *Visser v Gubb* and do not have to be repeated. Numerous annotations indicate that the principles set out in the judgment have been stated and restated during the following four decades. Subrule 70(3) of the Uniform Rules of Court stipulates that the taxing master shall

“allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.”

- [13] Subrule 70(8) also requires attention. It reads as follows:

“Where, in the opinion of the taxing master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him.” (Emphasis added)

Obviously, the taxing master has a discretion to consider whether the services of more than one attorney was required. That being said, this is not a review on taxation. I, having to consider whether a settlement agreement should be made an order of court, am entitled to consider whether the agreement, also pertaining to costs, accords with the law, is not at odds with public policy and thus objectionable.

- [14] I considered the following authorities in order to ascertain whether the costs of two sets of attorneys and the travelling and accommodation expenses of the first two applicants should be payable on a party and party scale:

14.1 In *Sonnenburg v Moima Ackermann J* held that the plaintiff would have been entitled to instruct an attorney in the place where he lived, ie Potgietersrus, who could utilise the services of a correspondent attorney in Pretoria where the action was instituted, but as he had not done so, but rather elected to instruct an attorney in Johannesburg, he had thereby defeated the purpose of the rule of practice and forfeited the benefit of that rule. Consequently, the court held that the plaintiff could have used the Pretoria attorney only. The litigation was conducted in the plaintiff's name by his insurer. The matter was dealt with as a review on taxation in accordance with rule 48 of the Uniform Rules of Court. Leave was granted to the plaintiff's attorney to draft one bill of costs on the basis of instructions to one attorney only and to present that to the taxing master.

14.2 In *Niceffek (Edms) Bpk v Eastvaal Motors (Edms) Bpk Wright J* approached the matter differently in yet another review on taxation. In that case the plaintiff company that had its principal place of business in Bethlehem in the Free State where the cause of action had arisen,

decided not to instruct its local attorney in Bethlehem, but its Johannesburg attorneys. Its registered office was in Boksburg close to Johannesburg. The Johannesburg attorneys generally conducted its litigation. The court held, as a general principle, that a litigant who does not reside at the place where the action is instituted, is entitled to instruct an attorney in his/her home town as well as at the seat where the action is instituted. The court held further that consideration had to be given to the circumstances of each case and a realistic and common-sense approach had to be followed in determining whether the plaintiff in that case (the respondent in the application for review of taxation) was indeed entitled to make use of the services of the attorneys who practiced in Johannesburg near its registered head office. It went further to say that it was probably much more convenient to instruct local attorneys close to its head office where the main day-to-day business of the company was conducted, rather than to instruct the Bethlehem attorney who worked for the respondent less regularly. In conclusion the court emphasised that each case had to be considered in light of the particular circumstances of the case and that it was impossible to lay down a fixed set of rules as to when exactly a second set of attorneys could be employed.

14.3 In *Tanker Project Solutions CC v Matjhabeng Local Municipality* the court held as follows in a review of taxation:

“[13] In most, if not all, cases involving “country-attorneys” such attorneys hold primary instructions from their clients and appoint correspondents and counsel on instructions from such clients. They have sound knowledge of the matters in order to give instructions to correspondents and counsel. The general rule, however, requires more than the foregoing in order to entitle them to party and party costs for attending court or consultations at the seat of the court.

[15] ... If the fact that the “country attorney” holds primary instructions per se entitles him to attend trial and consultation at the seat of the court regardless of the availability of the appointed local attorney then all “country-attorneys” are entitled to the relevant costs..... I however, do not believe that this is the case.

[16] Without strong reasons for the attendance by the Welkom attorney of the consultation in question being disclosed it cannot be said that the taxing master did not exercise his discretion properly or that he applied the wrong principle and, as such, was clearly wrong.”

14.4 In *Friedrich Kling GmbH v Continental Jewellery Manufacturers; Guthman and Wittenauer GmbH v Continental Jewellery Manufacturers* the successful plaintiff sought the costs of its Cape Town attorneys of record as well as its Johannesburg attorneys. The court held that

“there must be very strong reasons before fees are allowed for attendance of an attorney not practising at the seat of the Court”

and continued as follows:

“I am not disposed to grant the special order sought. Not only were no unusual circumstances brought to my attention, but in my view the decision as to whether a litigant is entitled in a particular case to recover the costs of an out-of-town attorney as well as those of the attorney engaged at the seat of the

Court is pre-eminently one (at least in the first instance) for the Taxing Master. That this must be so follows ineluctably from the wording of Rule of Court 70(8), which provides: 'Where in the opinion of the Taxing Master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him.' In an appropriate case, where the services of the litigant's out-of-town attorney had necessarily to be performed by him and could not just as well have been done by giving instructions direct to the attorney at the seat of the Court, the Taxing Master may, depending on the facts placed before him, apply the provisions of Rule 70(8). See Schoeman v Schoeman 1990

- (2) SA 37 (E) at 43E-G. But this is certainly not the function of the Court making the costs order. I shall therefore simply order that the defendant is to pay plaintiff's costs."

14.5 In *Zeelie v General Accident Insurance Co Ltd* the full court dealt with the reasoning behind permitting a litigant to engage the services of an attorney at his place of residence or place of business in addition to an attorney at the court seat. In that case the appellant was resident in Uitenhage and in full-time employment in Port Elizabeth, being the seat of the court. She engaged the services of a Uitenhage attorney in addition to a firm of attorneys in Port Elizabeth. The court held that appellant had not made out a case entitling her to the costs of a second firm of attorneys on taxation, to wit the Uitenhage attorneys. However, in so far as appellant was represented over a period of about two and a half years by her Uitenhage attorneys before the Port Elizabeth attorneys' services were engaged, appellant would be severely prejudiced if the Uitenhage attorneys' bill of costs were to be disallowed entirely. Consequently, the court held as follows:

"The appeal is accordingly allowed with costs and the following order is substituted for the order of the Court a quo:

- (a) The Taxing Master erred in allowing the costs occasioned by the plaintiff employing a second firm of attorneys.
- (b) The matter is referred back to the Taxing Master to enable him to tax the two bills of costs on the basis that the plaintiff is only entitled to recover the costs of one firm of attorneys.
- (c) In so taxing, the Taxing Master is instructed to allow such items in the bill of costs of the plaintiff's Uitenhage attorneys as she would have been allowed on taxation had they been included in the bill of costs of her Port Elizabeth attorneys, whether they were incurred before attorneys in Port Elizabeth were instructed, or thereafter, subject to the proviso that the Taxing Master is not to permit any duplication of costs, nor is he to permit the plaintiff to recover any items which would not have been incurred had the plaintiff instructed her Port Elizabeth attorneys only."

14.6 Rampai J considered the judgments of Ackermann J in *Sonnenburg v Moima* and Wright J in *Niceffek (Edms) Bpk v Eastvaal Motors (Edms) Bpk* in yet another review of taxation. I agree wholeheartedly with the learned judge's sentiments that a rigid application of the rule in favour

of a local attorney as relied upon by Ackermann J in *Sonnenburg v Moima* can lead to absurd and unjust results. I also agree that it is more appropriate to consider each case in the light of its own peculiar circumstances. In the particular case the plaintiff lived and worked in Bethlehem about 250 kilometres from Bloemfontein. She made use of a Senekal firm of attorneys which town is approximately 160 kilometres from Bloemfontein as well as the correspondent attorneys in Bloemfontein. The defendant objected to the bill of costs of the Senekal attorney on the basis that the plaintiff unnecessarily saddled the defendant with an inflated and heavier bill of costs. Apparently there would be no objection if Bethlehem attorneys were appointed. The taxing master overruled the objection. The court upheld the decision of the taxing master and stated the following:

“It seems to me therefore unfair and inequitable to seek to deprive her of the costs in respect of her Senekal bill merely on the grounds as advanced by the defendant in his objection. I am a proponent of liberal, equitable and dynamic approach to legal rules. Therefore I am inclined to uphold the decision of the taxing master.”

14.7 Kroon J held as follows in *Schoeman v Schoeman*:

“As appears from the cases cited above the basis for permitting a litigant to incur, as against the other party, the costs of engaging

an additional attorney at the place where he resides or works is that for reasons of pressing convenience it is considered reasonably

necessary that he do so. By the same token he is disallowed the costs of engaging an attorney who practises far afield, the basis being that it is considered that in such circumstances he could as well give instructions direct to the attorney at the seat of the Court the corollary of which is that it is not necessary that he engage the other attorney.”

The learned judge continued as follows:

“On the facts of the present matter is (sic) would be highly technical and unrealistic to hold that the defendant could have recovered the costs of instructing a Somerset West attorney, but deny her the costs of an attorney in Cape Town where, as is not disputed, the position is that she was not as able to give instructions direct to her Grahamstown attorney as to the Cape Town attorney.”

14.8 In *Van der Burgh v Guardian National Insurance Co Ltd* Leach J (as he then was) considered the issue of a firm of attorneys acting as a “post box” at the seat of the court and concluded as follows:

“I cannot prescribe to litigants that they are obliged to directly employ attorneys at this Court nor, if they employ attorneys who practice elsewhere, the terms by which such attorney should instruct the attorneys of record. But where the terms of the mandate extended to the attorney of record by the instructing attorney employed by the litigant at another centre are such that it leads to a matter being postponed due to the attorney of record not being in a position to deal with a problem which arises during a Court hearing, that litigant should in my view bear the wasted costs.”

14.9 Sonnenburg was inter alia followed with certain reservations by the full court in *The Master v Gerber & Another; Thomas v Minister of Law and Order & Others*. In both matters the respective Government officials instructed the State Attorney in Port Elizabeth to act on their behalf in respect of litigation conducted in Grahamstown. The State Attorney instructed a Grahamstown attorney to act as attorney of record. In both matters the taxing master disallowed the costs of the State Attorney in Port Elizabeth. The court agreed with the taxing master and held on review that the successful litigants were not justified to recover the costs of the State Attorney in Port Elizabeth as well as the costs of the local Grahamstown attorney. In the one case before it, the Master of the High Court in Grahamstown was the successful litigant and in the other matter the successful Government officials resided in Pretoria. In fairness to the parties the court eventually ruled that the bills of costs of the Grahamstown attorney should not be set aside, but in so far as the State Attorney in Port Elizabeth incurred costs which the Grahamstown attorney would have incurred if he acted alone, the State Attorney was afforded the opportunity to resubmit its bills of costs whilst the taxing master was instructed to reconsider the matters and to allow the items which he considers would necessarily have had to be included in the bills of costs of the Grahamstown attorney if he alone acted for the Master and the other Government officials.

14.10 Sonnenburg was also more recently approved in *AD & Another v MEC for Health and Social Development, Western Cape*. In that case the plaintiffs sought certain special costs orders from the trial judge, inter alia the costs of Johannesburg and Cape Town based attorneys and the fees and expenses of experts. The application was opposed. Rodgers J acknowledged the discretion of the taxing master in terms of rule 70(8) in respect of the allowance of the costs of more than one attorney and decided not to make a special order usurping the taxing master's function. However, he emphasised that he was not able on the material before him to find whether the second attorney (the Cape Town attorney) was necessarily engaged. In that case the plaintiffs elected to instruct a Johannesburg attorney as the principal attorney whilst the litigation was conducted in Cape Town. The learned judge made the point that in terms of the general rule mentioned in Sonnenburg, the plaintiffs were not permitted to recover additional costs occasioned by their choice of a Johannesburg attorney, there being no evidence placed before him that the plaintiffs could not find a competent law firm in Cape Town to act on a contingency basis.

Therefore no special order was made in this regard and it was left to the taxing master to decide whether further costs occasioned by the appointment and engagement of the Johannesburg attorney should be allowed.

14.11 The court in *AD v MEC for Health* also dealt with and explained the non-allowance of the travelling and other costs of experts based in Gauteng. The experts had to travel to Cape Town to testify while the plaintiffs and counsel had to travel from Cape Town to Gauteng to consult with them. The learned judge mentioned that the experts may well be persons with whom the Johannesburg attorney had a good working relationship, but there was no indication that "any of them boasted unique expertise which could not have been sourced in the Cape Peninsula."

Consequently, he was not prepared to grant a special order pertaining to travelling and accommodation in respect of those experts.”

[31] Four years ago I raised concerns and allowed the parties to address me on certain issues, including the costs of two sets of attorneys. I refer to my judgment in *Hlalele v Road Accident Fund*[14] and quote:

“[26] Plaintiff’s Pretoria attorney, Mr JB Grimbeek, decided against filing an affidavit by the plaintiff notwithstanding my directive. His firm acts as correspondent for many firms of attorneys, bearing in mind that the RAF’s head office is situated in Pretoria. The firm also acts as correspondent for Grimbeek, Van Rooyen and Partners of Kroonstad who instructed VZLR in casu. VZLR in turn instructed Bloemfontein attorneys, to wit Du Plooy Attorneys.

[27] Having been confronted with the congested court roll in Pretoria, particularly as a result of personal injury (RAF) claims, his firm decided to investigate what was the situation in other divisions. He ascertained that trial dates could be obtained in the Free State High Court within three to four months whilst the waiting period in Pretoria was between twelve and fifteen months in respect of merits, and much longer for quantum trials.

[28] There can be no objection if a client from Pretoria instructs Pretoria attorneys to issue summons against the RAF who then institutes action in the Free State High Court because the cause of action arose in the Free State, bearing in mind the alleged congested court roll in Pretoria and the overall convenience to have a matter heard in the jurisdictional area where the cause of action originated. Surely, this court has to adjudicate disputes arising within its jurisdiction, but this is not the issue that concerns me. I am concerned with the payment by the RAF of unnecessary costs as will be explained in the next paragraph.

[29] Two sets of attorneys will normally be entitled to fees in a case as here where the plaintiff resides in Senekal, a small town about 170 kilometres from Bloemfontein and action has to be instituted in the High Court. It cannot be expected of plaintiff to directly instruct a Bloemfontein attorney. For a reason unknown to me plaintiff decided not to instruct one of the local attorneys in Senekal, but a Kroonstad attorney. Here, three firms of attorneys are involved and counsel from Pretoria was briefed. If this is what the plaintiff wanted, neither the court, nor the taxing master has any say, unless plaintiff seeks to claim all these extra costs (that could have been avoided) on a party and party scale. Plaintiff’s attorney and client bill of costs is entirely a matter between him and his attorneys, but plaintiff shall not be allowed to claim from the RAF, and in essence the public purse, fees and expenses of three sets of attorneys and travelling and accommodation costs of counsel from out of town, whilst there are ample and efficient counsel at the local bar.

[30] In casu plaintiff shall be entitled to have the bills of costs of two sets of attorneys taxed. However, it would have been an entirely different matter if plaintiff was resident in Bloemfontein or within its district and the same scenario was repeated. The fees and expenses of one set of attorneys should be allowed in such a case.”

[32] In so far as the order to be granted differs from the draft provided to me, I wish to reiterate that attorneys should resist in trying to persuade judges to grant orders which are either unnecessary or limiting the rights of the taxing master. Many provisions contained in the draft will not be incorporated in my order. Some have been discussed with counsel during argument, but others are just uncalled for. I merely wish to mention the following. Dr Menge was not called upon to file an affidavit and I do not believe that he was reserved to testify, bearing in mind my willingness to accept the experts' affidavits. Mr Moodie's reservation fees are claimed, but it has come to my attention that he attended the Free State High court for a different matter that was set down for hearing at the same time as the present matter and subsequently an order pertaining to his fees was made under case number 207/2018 on 8 June 2021. I do not intend to make any order pertaining to any of the experts' reservation fees, but the plaintiff's attorney may elect to persuade the taxing master otherwise, bearing in mind the agreement referred to above. There is no reason to grant an order for payment of the fees of senior junior counsel, especially bearing in mind that it was common cause at all time that judgment by default would be applied for.

VII THE CONTINGENCY FEE AGREEMENT

[33] A final word should be said about the contingency fee agreement. It is drafted in line with the standard agreement provided for in terms of the Contingency Fees Act.[15] However, two observations must be made. Firstly, the plaintiff appointed two sets of attorneys as mentioned, to wit Grimbeek Van Rooyen & Partners of Kroonstad and VZLR of Pretoria. This may mean that both firms as instructing attorneys would be entitled to claim the attorney and client fees agreed upon in clause 5 of the agreement. Provision is inter alia made "in respect of non-time based items for three times the party and party tariff as provided for in terms of Rule 70 of the Uniform Rules of Court." In clause 12 it is agreed that in the event of success the plaintiff would be liable to the attorney for the payment of double the

advocate's normal fees. The instructing attorneys have not been provided with an opportunity to deal with this aspect and consequently I do not intend to take the matter any further. However I trust that they will perhaps revisit the terms of the agreement.

VIII CONCLUSION

[34] It is a pity that this matter has to be adjudicated without having the advantage of expert opinion provided by the defendant's experts and/or cross-examination of the plaintiff and his expert witnesses. I need to point out that the reports of the plaintiff's experts, excluding that of the actuary, are three years old and no attempt was made to update any of these and/or to arrange for fresh examinations. I am also perturbed by the fact that the plaintiff could not provide the court with an employer's certificate, indicating the terms and conditions and duration of his employment with Megatron, the employer for whom he allegedly worked during the period February to August 2014. It has always been the responsibility of the attorney acting for the plaintiff in similar situations to obtain an employment certificate. I have

to rely on the viva voce evidence of the plaintiff and although I asked certain questions, I could obviously not enter the arena and cross-examine him as counsel for the defendant could have done. It is correct, as Mr Potgieter submitted, that I do not have any reason not to accept the plaintiff's version, but at the same time parties are reminded that courts do not necessarily have to accept versions of witnesses that are not contradicted, especially in a case where public funds are involved.

IX ORDER

[35] The following order is issued:

1. The defendant shall pay the plaintiff the sum of R1 243 314.00 (One million two hundred forty-three thousand three hundred and fourteen

Rand) in respect of past and future loss of earnings, such amount to be paid into the trust account of the plaintiff's attorneys

with trust account details as follows:

Account Holder : VZLR Inc

Branch

: ABSA Business Bank [....]

Branch Code

: [.....]

Type of Account : Trust

Account

Account Number : [.....]

2. In the event of default on the above payment, interest shall accrue on such outstanding amount at 7% per annum from the due date until date of payment;
3. The claim for general damages is postponed sine die and shall be referred to the HPCSA.
4. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the RAF Act in respect of future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 6 July 2014.
5. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale for one set of attorneys only, which costs shall include:

5.1 the fees only of counsel, excluding any travelling and accommodation expenses;

5.2 the reasonable taxable qualifying and preparation fees of the following experts:

Dr LF Oelofse

- Orthopaedic Surgeon

Dr D Hoffmann

- Plastic, Reconstructive and Cosmetic Surgeon

Ms Y De Klerk

- Occupational Therapist

(Rita van Biljon Occupational Therapists)

Mr B Moodie

- Industrial Psychologist

Mr J Sauer

- Actuary.

6. The payment with regard to costs shall be subject to the following conditions:

6.1 The plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on the defendant at least 14 days prior to the date of taxation.

6.2 The plaintiff shall allow the defendant 14 (fourteen) calendar days to make payment of the taxed costs.

J P DAFFUE, ADJP

On behalf of Plaintiff : Adv MJ Potgieter

Instructed by :

VZLR Inc

c/o Du Plooy Attorneys

Bloemfontein

[1] Act 56 of 1996

[2] Exhibit A, p 18 para 9

[3] Exhibit A, p 38 para 7.6

[4] Ibid, pp 38 & 39 para 7.7

- [5] Ibid, p 42 para 11.2
- [6] Para 11.6.1 of the report
- [7] 11.6.6
- [8] Exhibit B, p 120
- [9] Exhibit B1, p137
- [10] Ibid, p 139
- [11] Exhibit A, p 42 para 11,1
- [12] Exhibit B, p 120
- [13] (1356/2020)
- [2021] ZAFSHC 31 (12 February 2021)
- [14] (5668/2016) [2017] ZAFSHC 210 (18 October 2017)
- [15] Act 66 of 1997

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