

SOUTH AFRICA / JUDGMENT

Mnembe v Road Accident Fund (6129/2015) [2017] ZAECHGC 72 (9 June 2017) [2017] ZAECHGC 72

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson

CASE / FILE NUMBER

6129/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO: 6129/2015

DATE HEARD: 01/06/2017

DATE DELIVERED:

09/06/2017

In

the matter between

MASIXOLE

MNEMBE

PLAINTIFF

and

ROAD

ACCIDENT

FUND

DEFENDANT

JUDGMENT

ROBERSON J:-

[1] In this action the plaintiff's claim is for damages arising from a motor vehicle accident which occurred on 30 November 2012. The matter was enrolled for trial on 1 June 2017. On that day it was agreed that the matter be removed from the trial roll. The plaintiff's attorneys prepared and signed a draft order which recorded that the matter was removed from the trial roll, that the defendant had conceded the merits of the plaintiff's claim for 100% of his proven damages and that the defendant was to pay the costs of the action to date on the party and party scale. In the draft order it was recorded that these costs included costs of photographs, an inspection-in-loco, the qualifying expenses of various expert witnesses and "costs of the first day of trial". The defendant's attorneys indicated that they were satisfied with the terms of the draft order with the exception of the last item, namely the "costs of the first day of trial". In an email to the plaintiff's attorneys they proposed that this term should read "costs of trial in accordance with the tariffs allowed by the Taxing Master." They referred to paragraph 15 of the Taxing Master's 2017 guidelines.

[2] I was provided with a copy of these guidelines which have the title "Guidelines to Taxations for the Eastern Cape High Courts." Paragraph 15 is headed "Counsel's fees when a matter is settled or removed from the roll or postponed and for attending court". Paragraph 15.1 to 15.4 provides:

"15.1 Counsel's fees for trials are to be assessed on a time basis. Counsel is not entitled to a day fee unless he is engaged in a matter up to and until lunch (14h00), at least. Counsel's day is presumed to start at 08h00.

15.2 By way of illustration, should a trial settle by 10h00, then counsel can charge his hourly fee from 08h00 to 10h00.

15.3 However, on an attorney and own client taxation, the Taxing Master must have regard to counsel's travelling time to determine a day fee for out of town counsel.

15.4 If counsel have kept themselves available for the day and are unable to proceed with any fee generating work on the day reserved for trial, then they must prove in writing that they turned away work which could have been done on the day the matter was set down for hearing."

[3] The plaintiff did not agree to the defendant's proposed change to the draft order and this aspect of the costs was the subject of argument before me.

[4] The concern expressed on behalf of the plaintiff was that if the guidelines applied, counsel's fee for 1 June 2017 would be taxed off because the guidelines only allow for counsel's fee on an hourly basis. If the plaintiff agreed to the wording proposed by the defendant, it would appear, so it was submitted, that the plaintiff agreed to these guidelines.

- [5] In my view the proposal by the defendant would not be appropriate. A simple order for the costs of 1 June 2017 would suffice. The additional words would be an encroachment by the court on the function of the Taxing Master. By the same token, the plaintiff's dilemma cannot be resolved by, for example, the court making an order allowing counsel's fee for 1 June 2017. Such an order would circumvent a decision which still has to be made by the Taxing Master. The plaintiff's remedy, should counsel's fee for 1 June 2017 be taxed off in accordance with the guidelines, would be to utilise Uniform Rule 48 which provides for a review of taxation in the event of a party being dissatisfied with a decision of the Taxing Master.
- [6] Although the plaintiff initially (in the draft order) was content with costs on the party and party scale, when the matter was argued it was further submitted that the costs of 1 June 2017 should be awarded on the attorney and client scale. It seems that this change of heart was triggered by the defendant's specific reference to paragraph 15 of the guidelines and the realisation that counsel's fees might be taxed off. Nonetheless submissions were made concerning the defendant's conduct of the litigation which it was submitted warranted a punitive costs order.
- [7] The quantum of the plaintiff's claim is substantial and includes R2 000 000.00 for general damages and R4 300 000.00 for future loss of income. The relevant history of the matter to date is as follows: the defendant's plea was delivered on 30 March 2016. The plaintiff's expert notices have been delivered, the last on 20 January 2017. The expert reports are those of an orthopaedic surgeon, a counselling psychologist, a neurosurgeon, an industrial psychologist, an occupational therapist and an actuary. On 24 January 2017 the plaintiff gave notice that he intended to amend his particulars of claim whereby the total amount of his claim, R1 949 400.00, was substituted with the amount of R7 249 400.00. The most recent Rule 37 conference was held on 20 February 2017. According to the minutes of this conference, inter alia, the defendant had made an offer based on an apportionment and had tendered an undertaking in terms of s 17 (4) (a) of the Road Accident Fund Act 56 of 1996. Mr Louw, who appeared for the plaintiff, placed on record that the merits had been conceded on 31 May 2017 and it was agreed that the defendant be allowed an opportunity to investigate further the issue of quantum. The plaintiff was examined by the defendant's expert on 25 April 2017 and the defendant's attorneys informed the plaintiff's attorneys on 29 May 2017 that the report will not be available until 9 June 2017. There is a possibility of examination by a further expert.

- [8] Mr Louw submitted that there was no explanation as to why the merits were conceded at such a late stage. The defendant could at an earlier stage have conceded the merits, informed the plaintiff that the expert report would not be available, and sought a postponement in respect of quantum. In the circumstances Mr Louw submitted that it would not be fair that the plaintiff would not be able to recover counsel's fees for 1 June 2017.
- [9] In *Van Dyk v Conradie and Another* 1963 (2) SA 413 (C) at 418E-F Corbett AJ (as he then was) said the following:

"It is clear that normally the Court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as those alluded to in the passage just quoted, viz. that the party has been dishonest or fraudulent, or was actuated by malice or has been guilty of grave misconduct either in the transaction under enquiry or in the conduct of the case."

- [10] It is so that if the merits had been conceded and the need for a postponement had been communicated at an earlier stage, the wasted costs of 1 June 2017 could have been avoided. However I do not think that there are grounds for concluding that the defendant has conducted the litigation in the manner described in *Van Dyk v Conradie* (supra). It has not sat back and done nothing to further the resolution of the claim. It has made the tender in terms of s 17 (4) (a) of Act 56 of 1996 (this is incorporated in the draft order), conceded the merits (up to this stage the merits and quantum had not been separated), and appointed an expert to examine the plaintiff. Even if it could have acted in a more expeditious manner, that would not, in the circumstances, amount to grave misconduct. It cannot be said that its conduct was calculated to take advantage of the taxation guidelines. It has agreed to pay the costs of 1 June 2017 and taxation of those costs is a separate matter. Further, in my view, the possibility that counsel's fee for 1 June 2017 will be taxed off, does not constitute a special ground warranting a punitive costs order. Put differently, a punitive costs order cannot be utilised to compensate a party for an anticipated adverse decision of the Taxing Master, where otherwise there are no grounds for a punitive costs order. As already mentioned, the plaintiff has the remedy of a review of taxation.

- [11] In the result I make the following order, in accordance with the draft order:

[11.1] Defendant concedes the merits and Plaintiff must succeed with one hundred percent of proven damages.

[11.2] The action is removed from the roll of trial actions set down for the 1st June 2017.

[11.3] Defendant shall pay costs of the action to date as between party and party, together with interest thereon calculated at the rate of 10.5% per annum from a date 14 days after allocatur to date of payment which costs shall include:

[11.3.1] Costs of photographs;

[11.3.2] Inspection-in-loco;

[11.3.3] The qualifying expenses, if any, of Dr P A Olivier, Ms A Cornelius,

Dr L L Lankester, Dr Ryan Botha, Dr H J Van Daalen and Dr R J Koch as may be agreed upon between the parties or as may be directed by the Taxing Master;

[11.3.4] Costs of the first day of trial.

[11.4] Plaintiff will apply to the Registrar for the allocation of a new trial date.

[11.5] The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on the 30th day of November 2012 at the road from Mqanduli to Elliotdale.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv S S W Louw, instructed by Whiteside Attorneys, Grahamstown

For the Defendant: Mr M Marabini, Netteltons Attorneys, Grahamstown

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