

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Khoza (65231/12) [2015] ZAGPPHC 613 (28 August 2015)

[2015] ZAGPPHC 613

COURT

North Gauteng High Court, Pretoria

BEFORE

P.M. Mabuse

CASE / FILE NUMBER

65231/12

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 65231/12

DATE:

28 August 2015

THE

ROAD ACCIDENT FUND

Applicant

V

FIKILE

PORTIA KHOZA

Respondent

JUDGMENT

MABUSE J:

- [1] The applicant, the Road Accident Fund, seeks leave of this Court to withdraw a deemed admission it purportedly made during a pre-trial conference held on 26 August 2014. This application is opposed by the respondent.

[2] The parties are currently engaged in an action in which the applicant is the defendant and the respondent is the plaintiff. The said action is still currently pending and for that reason, the current application is merely an interlocutory application. I will refer to the parties as they chose to call themselves in the main action.

[3] The relevant admission refers to the allegations made by the plaintiff in the particulars of claim that her injuries are serious

and therefore qualify her for payment of her proven or agreed general damages. According to the plaintiff paragraph 5.2 of her particulars of claim states as follows:

“Die Eiseres se ongeluksverwante beserings het ‘n geheel persoonsinperking van die Eiseres van 30% of meer tot gevolg en/of

het ernstige langtermyn inperking of verlies van liggaamsfunksie van die Eiseres tot gevolg en/of het permanente ernstige skending van die Eiseres tot gevolg en/of het ernstige langtermyn sielkundige of ernstige langtermyn gedragsafwyking by die Eiseres tot gevolg en kwalifiseer die Eiseres gevolglik tot die mate wat die regtens van haar vereis kan word vir betaling van nie-vermoënsregtelike

skadevergoeding (algemene skadevergoeding) uit hoofde van die bepalinge van regulasie 3(1)(b) (ii) en/of regulasie 3(1)(b)(iii) van die Presidensiële proklamasie R769 van 2008 saamgelees met artikels 17(1) en 17(1A)(a) & (b) van die Padongeluksfondswet, 56 van 1996 (soos deur die Wysigingswet op die Padongeluksfonds, Wet 19 van 2005 gewysig).”

This allegation by the plaintiff was based on the Serious Injury Assessment Report (“Assessment Report”) by Dr. DJJ de Klerk dated 31 October 2010. In the said Assessment Report, the said medical practitioner had assessed the seriousness of the plaintiff’s injuries at 30%.

[4] According to Mr. Geach, who appeared for the plaintiff, once the seriousness of the plaintiff’s injuries have been assessed at 30%, the narrative test becomes redundant and superfluous. The narrative test only applies in the event of the assessment of the seriousness of injuries being less than 30%.

[5] At the pre-trial conference held by the parties’ legal representatives on 26 August 2014, the following question was put to Mr. Phaleng, who at the time represented the defendant:

“4.#.4 Without waiving any rights that the plaintiff has acquired to date hereof and might acquire henceforth the defendant is requested to agree that failure by the defendant to within 30 calendar days from date of this pre-trial take any lawful steps at its disposal to challenge the plaintiff’s RAF-4 assessments will automatically

result in the resolution of the dispute whether the plaintiff complies for payment of non-patrimonial general damages or not in

favour of the plaintiff with the result that only the quantification of the plaintiff’s claim for general non-patrimonial damages remains in dispute.”

The answer that followed on the same day was:

“The defendant agrees to this proposition but requires 60 calendar days and not 30 days as proposed.”

And lastly, this is what was recorded in the said minutes:

“The plaintiff hereby affords the defendant 60 days are requested.”

[6] The said period of 60 days was in addition to the initial period of 90 days that the defendant had had since the claim was lodged.

First the defendant had 90 days from the date on which the plaintiff’s legal representatives lodged the RAF-4 claim for and on behalf of the plaintiff and a further period of 60 days, as asked for and granted from 26 August 2014 to reject Dr. De Klerk’s

assessment or to direct that the plaintiff should be assessed by its own expert, failing which it would automatically be resolved in the plaintiff’s favour that her injuries qualified her for payment of her proven or agreed non-patrimonial damages.

[7] The defendant had until 25 October 2014 to take certain steps, if it was dissatisfied about the aforementioned assessment. When the defendant failed to reply to the said question within the said period of 60 days, the defendant was deemed to have admitted that Dr. De Klerk’s assessment was correct. Consequently on 26 October 2014 the parties resolved by agreement, firstly, that the injuries that the plaintiff had sustained were of a serious nature and furthermore that, based on the seriousness of her injuries, the plaintiff was entitled to payment of her proven or agreed non-patrimonial damages. The aforementioned admission is the one that the defendant now wishes to withdraw.

[8] I now turn my attention to the defendant’s grounds for withdrawing the said admission. It is common cause between the parties that on 22 October 2013, the plaintiff served a medico report and a serious injury report RAF4 by the said Dr. De Klerk on the defendant. Furthermore it is common cause that three pre-trial conferences were held in casu, the first one on 24 April 2013, the second one on 26 August 2014 and the third and last one on 19 September 2014.

[9] After the third and last pre-trial conference had been held, the matter was then set down for trial on 7 November 2014, according to the defendant, for the determination of the issue of liability only. The issue of whether the plaintiff was entitled to payment on non-patrimonial damages was, according to the defendant, expressly excluded. On 30 October 2014 the defendant then made a written offer of settlement to the plaintiff. On 4 November 2014 the plaintiff’s attorneys sent a draft order on an urgent basis to the defendant’s attorneys.

[10] On 7 November 2014, the parties’ legal representatives had a parley in connection with the draft order. The defendant’s

legal representative, to her surprise, had noticed that the said draft order contained, among others, an agreement in terms of which the plaintiff qualified for general damages. The defendant's legal representative's attitude to the said agreement was that there was never an agreement reached at the pre-trial conference, certainly not on 19 September 2014 or at any time thereafter; that it was never his or her intention to conclude such an agreement; and that he or she had no such instructions to concede that the plaintiff qualified for general damages. The defendant's legal representative regarded the inclusion of the clause that qualified the plaintiff for general damages as the plaintiff's ill guided attempt to circumvent the statutory requirements.

[11] It is of supreme importance to point out that the defendant's application to withdraw the aforementioned deemed admission was founded on the affidavit by one Leonie Dichabe, an adult female attorney who was employed at attorneys AP Ledwaba, the applicant's

attorneys of record. It is furthermore of equal importance to point out that the said Leonie Dichabe was not present at the

pre-trial conference of 26 August 2014 and that instead it was one Mr. Victor Phaleng who attended the said pre-trial conference.

Therefore only Mr. Phaleng was au fait with the contents of the pre-trial conference minutes of 26 August 2014 and their implication. It is important to note furthermore that the affidavit of the said Mr. Phaleng has not been attached to this application by the defendant. The defendant, through the affidavit of the said Leonie Dichabe, concedes the contents of the relevant paragraph 4.#.4 of the pre-trial conference minutes of 26 August 2014. The defendant conceded furthermore that the said Mr. Phaleng, its representative, never responded to the relevant paragraph, admittedly within the 60 days, as requested and as agreed on 26 August 2014 as he had left the firm. Leonie Dichabe concludes her affidavit by stating that:

"10.1 The application of the law of the Republic of South Africa is well established. Parliament has the supreme authority. Courts enforce the law of the land. The Respondent want to circumvent all of this by way of an "agreement" and thereby, being clever, trying to prove that the Respondent is entitled to non-patrimonial damages, in essence avoiding trial procedures to prove her claim."

[12] According to the plaintiff the minutes contained in the said paragraph 4.#.4 of the combined pre-trial minute dated 26 August

2014, represent the combined minutes recordings of the contents of the pre-trial held on 24 April 2013 and 26 August 2014. For reasons inexplicable to the plaintiff, the defendant does not ask for any relief designed to produce any substitution for the answer to the said paragraph. All that the defendant applies for is the complete withdrawal of the said admission. It is of paramount importance to state that the agreement that the parties reached that the plaintiff be paid her proven or agreed damages came about as a consequence of the question raised in the said paragraph; an acceptance by the defendant's legal representative that the defendant required a further period of 60 days to make up its mind and more importantly the failure by the defendant to decide. It is the defendant's failure to decide within the said period that kicked in the

agreement. Accordingly it was no conduct on the part of the said Leonie Dichabe that brought about the agreement. For this reason, the statement that she never had any intention or instructions to concede that the plaintiff qualified for general damages was purposeless in this application. This is so because the agreement was reached and concluded at the pre-trial of 26 August 2014 where she was not present.

- [13] The issue whether a party may resile from an agreement made by his attorney at a Rule 37 Conference was considered in *MEC v Kruizenga and Another* 2010(4) SA 112 (SCA) at paragraph 6 at p. 127. The Court stated per Cachalia JA that:

“It is important to reiterate what was set at outset - the issue in this matter is whether the appellant may resile from agreements made by his attorney, without his knowledge, at a rule 37 conference. The judgment does not deal with agreements reached outside of the context of conducting a trial in the normal course of events. The rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference. And when, as in this case, the agreements are confirmed by counsel in open court, and are then made a judgment or order of a court, the principle applies with even more force.”

- [14] The Court in *MEC v Kruizenga*’s case supra, emphasized what it stated in *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998(1) SA 606 (SCA) at p. 614. The law is that in the absence of special circumstances, a party is not entitled to resile from an agreement deliberately reached at a Rule 37 conference:

“To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation.”

See

p. 614 B-C.

- [15] It is now clear from the foregoing two authorities that a party can resile from an agreement deliberately reached at a pre-trial Rule 37 Conference if such a party satisfies the Court that special circumstances do exist. This is only possible if such special circumstances are set out in the applicant’s affidavit. The duty is on the party that wishes to resile from the agreement reached at the Rule 37 Conference to set out the facts that establish special circumstances. There is no definition of special circumstances and certainly a reasonable and acceptable explanation will suffice, considering that each case has to be decided on its own merits.

[16] I now turn to examining the affidavit of Leonie Dichabe to establish whether it sets out any special circumstances. In her affidavit, it behoved the applicant to explain precisely how it came about that the admission was made and to point out why it should not have been made. “The withdrawal of an admission is not to be had for the asking”. See *Bellairs v Hodnett and Another* 1978(1) SA 1109 (AD) at p. 1150.

The defendant does not challenge, at least not on any acceptable and credible grounds, the question raised in paragraph 4.#.4 of the pre-trial minutes. Instead of offering an explanation to the Court as to how the said admission was made, and why it should be withdrawn, the defendant chose to attack the plaintiff on the basis that she is “seeking by way of its cleverly worded pre-trial minute to establish liability on behalf of the plaintiff to pay non-patrimonial damages, in circumstances where obviously statutory amendments are enacted to limit a plaintiff’s rights to recause.”

[17] It was argued by Mr. Geach that the pre-trial minute was, from its reading, neither cleverly worded nor did it display any fancy footwork. Nothing in its wording was found to bamboozle the defendant. It embodied, on the contrary, an agreement that related to due and proper acceptance by the RAF-4 assessment deliberately and seriously concluded. I am satisfied, therefore, that the defendant has failed to place any special circumstances before the Court. See also *President Versekerings*

Maatskappy Beperk v Moodley 1964(4) SA 109 T at 110-1.

[18] What is of crucial importance in this matter is that the defendant has failed to decide within the time that he was allowed to, that as a consequence of his failure it was deemed to have admit the assessment by Dr. DJJ de Klerk; that failure to object to it resulted in an agreement between the parties be constituted and finally, that the defendant has failed to set out special circumstances that would have persuaded this Court to grant the relief that it seeks.

[19] In the result this application has no merit and is accordingly dismissed with costs.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Adv. L Coetzee

Instructed by:

AP Ledwaba Inc.

Counsel for the respondent:

Adv. BP Geach (SC)

Instructed by:

Salome Le Roux Inc.

Date Heard:

25 August 2015

Date of Judgment:

28 August 2015

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