

SOUTH AFRICA / JUDGMENT

Salemane and Others v Setsoto Local Municipality (1356/2020) [2021]

ZAFSHC 31 (12 February 2021)

[2021] ZAFSHC 31

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue

CASE / FILE NUMBER

1356/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

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

Reportable:

YES

Of

Interest to other Judges: YES

Circulate to

Magistrates: NO

Case

number: 1356/2020

In

the matter between: TSOKOLO
CECILIA SALEMANE
BOITUMELO
VALENCIA SEJANE
NEHO
ALEXIS LETELA
and
SETSOTO
LOCAL MUNICIPALITY
1st
Applicant
2nd
Applicant
3rd
Applicant
Respondent

CORAM: DAFFUE, J
HEARD

ON: 28 JANUARY 2021

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 12 FEBRUARY 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 12:30 on 12 February 2021.

I

INTRODUCTION

- [1] The three applicants instituted action as plaintiffs against the respondent as defendant under case number 1356/2020 for damages suffered as a result of the death of the 10-year-old Kananlelo Salemane ("the deceased") who on 25 March 2017 fell in an open drain/uncovered manhole and drowned. The incident occurred in Clocolan, Free State Province, a town within the Setsoto Local Municipality.

- [2] On 18 March 2020 action was instituted against the municipality to recover damages. Although the action was initially defended by the municipality who filed a plea, denying liability, a settlement agreement was entered into soon thereafter. The terms of the settlement agreement concerned me as the judge who was asked to make a draft order, embodying the agreement, an order of court. I raised certain questions and directed that clarity be provided under oath. I received responses and shall deal therewith below.

II THE PARTIES

- [3] The first plaintiff in the action and first applicant in this application is Me Tsokolo Cecilia Salemane, the biological mother of the deceased. The second plaintiff and second applicant in this application is Boitumelo Valencia Sejane, the 19-year-old sister of the deceased. The first two applicants are resident in Clocolan, Free State Province. The third plaintiff and third applicant in this application is Neho Alexis Letela, a major male and uncle of the deceased, residing at Diepsloot, Gauteng.
- [4] The defendant in the action and respondent in this application is Setsoto Local Municipality.
- [5] In order to avoid confusion, the parties will be referred to as cited in this application. All three applicants were at all relevant times represented by De Vries Shields Chiat (“DSC”), a firm of Cape Town attorneys who instructed Rosendorff Reitz Barry of Bloemfontein as the correspondent attorneys. The respondent was represented in the matter by Mr Mukhawana of MW Mukhawana Attorneys in Ficksburg.

III THE RELIEF CLAIMED

- [6] Having settled the matter, the applicants applied on 3 December 2020 in the unopposed motion court for an order in terms whereof the draft order, annexed as annexure “A” to the notice of motion, be made an order of court. They also sought an order that the costs of the application be costs in the action instituted under case number 1356/2020. As could have been anticipated, bearing in mind the letter of respondent’s attorneys dated 16 October 2020, the application was not opposed.

IV THE EVENTS ON 3 DECEMBER 2020

- [7] Upon perusal of the papers in preparation for motion court, I felt extremely uncomfortable, for the reasons set out below, to grant an order in accordance with the draft presented to me. Consequently, I made the following orders:

“1. The application is postponed to 28 January 2021 to serve before the presiding judge Daffue J;

2. Affidavits shall be filed forthwith by the plaintiffs, the Cape Town attorneys (De Vries Shields Chiat), the Clinical Psychologist (Elspeth Burke), as well as the Defendant’s Attorney (Mr MW Mukhawana), to present the following evidence insofar as it concerns them:

2.1. Why was a local Clocolan or Bloemfontein attorney not instructed in the first place to institute action?

2.2. How did it come about that the Plaintiffs instructed a Cape Town Attorney?

2.3 Why was a Cape Town Clinical Psychologist instructed and not one practising in Bethlehem or Bloemfontein?

2.4 How many sessions with the Clinical Psychologist did the Plaintiffs attend to and in this regard a copy of the expert report is required?

2.5 Details of all travelling and accommodation expenses of plaintiff are required.

2.6 Why should the costs of the Cape Town and Bloemfontein Attorneys be taxable and paid on a party and party scale?

2.7 Defendant's attorney shall explain why defendant entered into the settlement agreement, bearing in mind the plea filed a few weeks earlier and the attorney is also expected to prove the instructions from the Municipality authorising him to settle the matter, alternatively the authority of the employee who settled the matter on behalf of the defendant.

2.8 Which authorities have been relied upon to agree on the quantum.

3. Heads of argument shall be filed in respect of the issues raised in paragraph 2."

V THE TWO CARDINAL ISSUES RELATING TO COSTS IN CASU

[8] In order to explain why numerous authorities are referred to and discussed below, it is important to take note that two primary considerations have arisen in casu, to wit:

8.1 The fees and expenses consequent upon the employment of two sets of attorneys, the one based in Cape Town and the other in Bloemfontein, notwithstanding the fact that the first two applicants reside in Clocolan, the third applicant in Gauteng and the unfortunate event causing the death of the deceased taking place in Clocolan within the boundaries of the Setsoto Municipality with its headquarters in Ficksburg, Free State Province. Clocolan is a little town about 1 200 km from Cape Town and about 165 km from Bloemfontein.

8.2 The travelling and accommodation costs of the first two applicants who consulted with a clinical psychologist of Cape Town. They travelled all the way from Clocolan to Cape Town where they had to be accommodated for a few days.

VI LEGAL PRINCIPLES

[9] I respectfully agree with the sentiments expressed by Madlanga J in *Eke v Parsons*[1] 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[2] 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*,^[3] 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*^[4] 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*^[5] 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.” (Emphasis added)

- [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*[6] 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*[7] 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.[8] 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.[9]

14.3 In *Tanker Project Solutions CC v Matjhabeng Local Municipality*[10] the court held as follows in a review of taxation:[11]

“[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*[12] 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:[13]

*“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*[14] 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.[15] 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:[16]

"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.[17] 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.[18] 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.”[19]

14.7 Kroon J held as follows in *Schoeman v Schoeman*[20]:

“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:[21]

“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*[22] 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:[23]

“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*. [24] 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.[25]

14.10 Sonnenburg was also more recently approved in *AD & Another v MEC for Health and Social Development, Western Cape*.^[26] In that case the plaintiffs sought certain special costs orders from the trial judge,^[27] 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.^[28]

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."^[29] Consequently, he was not prepared to grant a special order pertaining to travelling and accommodation in respect of those experts.^[30]

VII EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY COUNSEL

- [15] The applicants filed affidavits of the attorney, Ms Handrie Smalberger, third applicant, as well as the expert, Ms EM Burke in response to the court order of 3 December 2020 and I also received detailed heads of argument, drafted by applicants' Cape Town counsel, Mr A Laubscher. Mr Mukhawana filed heads of argument as well as an affidavit by the respondent's acting municipal manager, Mr Moletsane. I am indebted to the parties for complying with my directives.
- [16] Third applicant, employed as a data capturer in Gauteng where he also resides, alleged under oath that he had contact with an attorney in Clocolan on at least three occasions over a period of several months. He could not remember the attorney's name. This attorney could not assist, but eventually told him to instruct an attorney specialising in personal injury claims. He was prepared to refer the third applicant to an attorney in Bloemfontein, but the third applicant was not interested. Consequently, the third applicant, who is apparently clued-up with digital devices and the internet if one considers his job description, decided to surf the internet in order to find an attorney specialising in personal injury claims. He came across the website of DSC attorneys in Cape Town. An enquiry was lodged whereupon he was contacted and the firm appointed to act as attorneys for the applicants. It was explained to the third applicant that action had to be taken swiftly in so far as the claims were on the verge of becoming prescribed. He was also informed that DSC would have to appoint Bloemfontein attorneys to assist them and that this would entail extra costs. Notwithstanding this, he was prepared to instruct DSC. He was also the person who, acting as agent for first and second applicants, informed the attorney, Ms Smalberger, of all relevant facts in order to draft the particulars of claim and to institute the action against the respondent.[31]
- [17] It is apparent that arrangements were immediately made for the first and second applicants to travel to Cape Town. On 2 and 4 March 2020 they were assessed by the clinical psychologist, Ms Burke. Contrary to what Ms Smalberger tried to convey, it was not necessary to have the assessments undertaken before summons was issued. Nothing in particular is averred in the particulars of claim relating to the assessment of Ms Burke. Her report is not attached to the particulars of claim. It is merely alleged that the first and second applicants suffered emotional shock, grief and trauma, and would require future psychotherapy. The information provided by third applicant pertaining to the trauma experienced by first and second applicants and the sequelae thereof would have been sufficient for drafting of the particulars of claim and issuing of summons to avoid prescription.
- [18] Respondent's plea dated 3 July 2020 was filed with the court two months later, ie on 2 September 2020 only. It is not clear when it was received by the applicants' Bloemfontein attorneys. However, on 11 September 2020 the respondent's

attorneys were presented with a “without prejudice” letter from DSC, annexed to the papers in the present application, dealing explicitly with the manner in which the incident occurred as well as the medical treatment and expenses of first and second applicants. As a result of this detailed letter, respondent was probably advised to settle on the basis set out in the letter.

- [19] The amounts claimed as damages contained in the aforesaid letter correspond with the amounts claimed in the draft order. I am satisfied, having been referred to the judgment of the Supreme Court of Appeal in *Komape & Others v Minister of Basic Education & Others*, [32] that the amounts agreed upon by the parties in respect of the quantum of the claims are justified. Even if a bit less was to be awarded eventually by the court after hearing of evidence, the extra legal costs of the litigation would have surpassed the difference. The only issue is the question of costs to which I will come in the next paragraphs.
- [20] Having been on circuit court in Ficksburg in July 2020 and having travelled through the towns of Clocolan and Ficksburg on more than one occasion during that period and even before then, I am fully aware of the poor condition of these two towns, especially the streets and infrastructure. The respondent, as is the case with many municipalities in the Free State, is cash-stripped. Where will the funds come from in order to settle this judgment? Obviously from the taxpayers who can still afford to pay their rates and taxes notwithstanding the economic climate in which the country and the specific region find itself. This court has a duty to ensure that the agreement entered into is in the interest of all the parties and also in the public interest: those people that foot the respondent’s purse.
- [21] Judicial notice may be taken of the expertise of several attorneys and counsel in Bloemfontein who would be quite capable to comply with applicants’ instructions and presumably, also to work on a contingency fee basis if necessary. Mrs Sander, who argued the matter on behalf of applicants, conceded that a large percentage of the 79 advocates practising at the local Bar would be able to draft the required particulars of claim. She personally has been instructed by several Bloemfontein firms of attorneys specialising in personal injury claims over the last few years. If third applicant surfed the internet as he said, looking for a specialist in personal injury claims in Bloemfontein, he would come across the names and addresses of several Bloemfontein firms of attorneys. However, he unequivocally elected, as he testified, not to make use of the services of a Bloemfontein attorney.
- [22] The applicants’ right to approach Cape Town attorneys in order to issue summons in Bloemfontein, notwithstanding the delict being committed in the Free State and the first and second applicants in particular being Free State residents, is not questioned at all. No court can prescribe to a litigant which firm of attorneys shall be appointed.[33] But it is a different issue as to whether such extra legal costs should be allowed on a party and party scale, especially where an organ of state has to settle the bill. There are clear reasons why there are differences between costs taxed on party and party scale and costs taxed on attorney and client scale. If a litigant elect to litigate on a grandiose scale such as in this case where legal and medical specialists in Cape Town have been instructed, while several similar specialists

practise in Bloemfontein, it is up to him/her to incur such extra costs, but if justice requires costs to be incurred on a moderate basis, such as is allowed on a party and party scale, then effect should be given to the interest of the opponent and particularly in this case, the public interest.

[23] A realistic and common-sense approach should be followed in determining whether the respondent shall be ordered to pay the costs of Cape Town and Bloemfontein attorneys as well as the applicants' travelling and accommodation expenses in casu, even where the acting municipal manager consented thereto.[34]

[24] It is common knowledge and judicial notice is taken that several clinical psychologists practise in Bloemfontein. No doubt, it would be quite possible to make use of the services of a local clinical psychologist for purposes of the litigation. It is not applicants' case that Ms Burke possesses extraordinary qualities and/or that she is much better equipped than her

Bloemfontein colleagues. I accept that a good working relationship has been in existence between DCS and Ms Burke[35] and that she was prepared to assist on short notice while it is not always easy to obtain consultations with experts in the field on an urgent basis, but that does not mean that the respondent should pay for the first and second applicants' transport and accommodation costs. Bearing in mind the goal to prevent prescription, that could have been achieved without relying on the

report of the expert. Expert reports are dealt with in terms of rule 36 of the Uniform Rules of Court and these are often filed after the close of pleadings only. It is quite clear from the particulars of claim that general allegations have been pleaded pertaining to the suffering of emotional shock, grief and trauma which were sufficient to comply with rule 18 as the respondent was placed in a position to reasonably assess the quantum of each claim. No psychotherapy was provided in the past ex facie the particulars of claim, although it is alleged that future psychotherapy would be required.

[25] I reject the argument that the applicants' travelling to Cape Town and their accommodation in the Mother City should be allowed on a party and party scale. I accept that the costs of the Cape Town expert may be on par with the costs of a similar expert in Bloemfontein and have no objection to such costs. However, the reference in paragraph 6.1 of the draft order to "experts" and reports like x-rays, CT scans, MRI scans, pathology reports and the like are totally irrelevant and indicative of a "copy and paste job." All these unnecessary aspects should be deleted from the draft order.

[26] Ms Smalberger's statement that the correspondent attorneys' "costs have been kept to an absolute minimum" and that they "were instructed to only serve as a service address / post box and assist with issuing and obtaining the signed Court Order in Bloemfontein" is not a true reflection of what is expected of the local attorneys. The instructions to Rosendorff Reitz Barry in Bloemfontein must be seen in proper perspective. There is not such a thing as a local correspondent acting as a "post box". Leach J (as he then was) explained why this cannot be so.[36] Kruger & Mostert[37] expressed themselves in similar vein and continued

as follows:

“In particular, it is the duty of the attorney of record to ensure that time limits are complied with and, when necessary, that appropriate

arrangements concerning indulgences and postponements have been made with the other side’s attorney of record.”

Much more is expected from the local attorney than fulfilling the role of post box. Once the pleadings are closed, the parties must attend to the pre-trial procedures contained in rule 37. Rule 37A(10) is of particular importance. It cannot be expected of the instructing attorney, often practising as far away as Pretoria, Johannesburg or Cape Town, to attend the pre-trial conference in terms of rule 37A(10). Often judges enquire from the legal representatives attending pre-trials about the status of litigation, developments such as for example, concessions made and/or when outstanding issues will be finalised. In order to actively participate, the local attorneys must be fully acquainted with the status of the litigation and problems experienced to get matters trial-ready. Therefore, all pleadings and all interlocutory applications need to be perused by the local attorneys in order to either instruct local counsel or obtain proper instructions from their instructing correspondents. It is in the final analysis the local attorneys that need to be aware of all local rules and practice directives and it will be they that will have to explain any non-compliance.

[27] In insisting that the court shall order payment of the fees and expenses of two sets of attorneys, the discretion of the taxing master is unnecessarily curtailed. I am aware that similar orders have been requested and granted in this division, especially involving RAF litigation. It is incomprehensible that a Bloemfontein resident (or someone resident in the Free State Province) utilises the services of a firm of attorneys based in for example Pretoria or Cape Town to institute action out of the Bloemfontein High Court in order to claim damages suffered as a result of injuries sustained in a motor vehicle collision (or in respect of any other course of action) that occurred in the district of Bloemfontein or even any other district in the Free State and then insists on payment of the extra legal fees and expenses. I personally have been confronted with similar requests in the past which I consistently refused to grant, except in one or two extraordinary circumstances. Unfortunately, settlement agreements are often placed before presiding officers by the legal representatives, confirming that they do not contain contentious issues whereupon orders are granted without scrutinising them. The warning of Madlanga J in *Eke v Parsons*[38] should not be ignored.

[28] There is no reason to diverge from the general rule established many decades ago. The costs of one set of attorneys only should be allowed and therefore, I direct that one bill of costs only - that of DCS - shall be presented for taxation. The taxing master shall be directed to allow the items which he/she considers would necessarily have had to be included in the bill of costs of DCS if it alone acted for the applicants. Such an order will prevent duplication on the one hand, but also ensure that necessary costs are taxed in line with the judgments and

orders of the full courts in the Eastern Cape.[39]

VIII

ORDERS

[29] The following orders are made:

1. In full and final settlement of the first, second and third plaintiffs' claims arising out of the relevant incident on 25 March 2017 ("the incident"), the defendant shall:

1.1 In respect of the capital pay to the plaintiffs' attorneys the sum of R612 360.00 (Six hundred and twelve thousand three hundred and sixty rand only) ("the capital"), by way of an electronic transfer to the trust account, details whereof are set out hereunder, such amount payable within 14 calendar days from the date of this order, failing which the defendant will be liable for interest at the prescribed statutory rate from the date 14 calendar days after this order to the date of final payment.

1.2 Pay the plaintiffs' taxed or agreed costs on the High Court scale as between party and party on condition that only the bill of costs of DCS attorneys shall be taxed subject to the following proviso: the taxing master shall allow such items which he/she considers would necessarily have had to be included in the bill of costs of DCS if this firm alone acted as attorneys for

the plaintiffs. Such party and party costs shall include the fees of the expert, Ms Elspeth Burke, the clinical psychologist as well as plaintiffs' counsel.

2. The payment provisions in respect of the foregoing are as follows:

2.1 Payment of the capital payment shall be effected, on the date as specified hereinabove, direct to the plaintiffs' attorneys of record by means of electronic transfer to the account listed hereinbelow;

2.2 Payment of the taxed or agreed costs reflected above shall be effected within 14 calendar days of taxation / settlement ("the costs due date") and shall likewise be effected by electronic transfer to the account listed hereinbelow. The defendant will furthermore be liable for interest on the aforementioned costs and fees at the prescribed statutory rate after 14 calendar days of the date of taxation / settlement to the date of final payment.

3. In the event that costs are not agreed, the plaintiffs agree as follows:

3.1 The plaintiffs shall serve a notice of taxation on the defendant's attorney of record; and

3.2 The plaintiffs shall allow the defendant 14 calendar days from taxation / settlement to make payment of the taxed costs as recorded in paragraph 2.2 hereinabove;

3.3 Should the capital and costs not be paid by the respective due dates, the defendant will be liable for interest thereon at the prescribed statutory rate after 14 calendar days as recorded hereinabove.

4. The plaintiffs' attorneys' trust banking account details are recorded as follows:

Bank : First National Bank

Account Holder : DSC Attorneys

Branch : Portside

Account Number : [...]

Branch Code : 210 651

5. The respondent shall pay the plaintiffs' costs of the application to have the settlement agreement made an order of court on an unopposed basis, provided that one bill of costs shall be taxed and no costs shall be taxable and payable in respect of any fees and expenses incurred after 3 December 2020.

J P DAFFUE, J

On behalf of Applicants : Adv I Sander (the heads of argument having
been drafted by Adv A Laubscher)

Instructed by : De Vries Shields Chiat Attorneys

c/o Rosendorff Reitz Barry

Bloemfontein

On behalf of Respondent : Mr MW Mukhawana

Instructed by

: MW Mukhawana Attorneys

Ficksburg

[1] Eke v Parsons 2016 (3) SA 37 (CC) at para 22

[2] Ibid para 25

[3] Ibid para 26

[4]

[2007] ZACC 5; 2007 (5) SA 323 (CC) at paras 29, 30 & 87

[5] 1981

(3) SA 753 (C) at 754H – 755C

[6] 1987 (1) SA 571 (T) at 575F and further

[7] 1993 (2) SA 144 (O)

-
- [8] 147G – J; see also the several judgments and other authorities quoted
- [9] At 154H – 155C
- [10] 1273/2012 [2014] ZAFSHC 146 (28 August 2014)
- [11] Paras 13, 15 & 16
- [12] 1993
- (3) SA 76 (C); see also *Knipe v Venter* 1965 (4) SA 1 (C) at p 4 where the court came to a similar decision in a review of taxation.
- [13] Ibid 88D – G
- [14] 1993
- (2) SA 776 (E)
- [15] Ibid 778F - 779A
- [16] Ibid 780D -F
- [17] *E Murray v JJ Murray*, review number 855/2005, an unreported judgment delivered on 18 August 2005
- [18] Ibid para 14
- [19] Ibid para 15
- [20] 1990 (2) SA 37 (E) at 42F
- [21] Ibid at 43G
- [22] 1997 (2) SA 187 (E)
- [23] Ibid at 191E - F
- [24] 1989
- (2) SA 659 (E) at 663B - I
- [25] Ibid at 668B - C
- [26] 2017
- (5) SA 134 (WCC) at para 7 and further
- [27] Ibid para 3
- [28] Ibid para 13 and para 98, prayer 7
- [29] Ibid para 28
- [30] Ibid para 98, prayer 10

[31] Para 22 of Ms Smalberger's affidavit, record p 29

[32] 2020

(2) SA 347 (SCA)

[33] Per Leach J at para 14.8 supra

[34] Niceffek supra, read with the authorities on public interest quoted

[35] Paras 38 – 44 of Ms Smalberger's affidavit, record pp 31 & 32

[36] Para 14.8 supra

[37] Taxation of Costs in the Higher and Lower Courts – A Practical Guide (LexisNexis 2010) para 14.4 at 66

[38] Para 10 supra

[39] See the judgments of the full court in Zeelie and The Master v Gerber respectively at paras 14.5 and 14.9 supra

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2021/31.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/salemane-and-others-v-setsoto-unknown-topic-afshc-2021>

Prepared on 14 October 2026 · Esheria