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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42987/2012

(1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
 (3) REVISED

Date:

WHG VAN DER LINDE

In the matter between:

A, A

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Judgment

Van der Linde, J:

- [1] This is a trial action in which almost everything has been settled, except the appropriate contingency provision to be made in the calculation of the plaintiff's having regard to scenario of future loss of earnings, and costs. Two issues require to be decided in respect of costs. They are whether the costs of two counsel was a reasonable precaution, and whether a special costs order should issue, by reason of the defendant's conduct in the litigation.
- [2] Neither party called any witnesses. The plaintiff handed up as exhibit D an agreed list of admissions. Also handed up and received as exhibits A, B, and C were trial bundles comprising the expert reports that the parties had caused to be prepared for the trial. Both parties then closed their cases.
- [3] Merits have been settled, with the defendant accepting liability for the injuries and damages. Past hospital expenses were not settled, but there is no opposition to the claim. There is no explanation by the defendant for not accepting liability for them, and yet not disputing them.
- [4] General damages are also not settled. The defendant had, at a late stage, decided to reject the plaintiff's certification that he had suffered a serious head injury, and that issue has been referred to the appeals panel of the HPCSA. That is not an issue that will engage us.
- [5] The plaintiff was a front passenger in a collision when he was 17 years old. He was traveling in a Golf motor vehicle. It was struck from the right front, and capsized. His orthopedic injuries involved the right hip, pelvis, lower back, and fracture of the left forearm. He also suffered a head injury, described as mild to moderate, with a resultant neuro-cognitive fallout.
- [6] At the time of his injuries, he was in grade ten. His sibling example indicated a three year tertiary education, possibly even one post-graduate degree. He had his heart set on becoming a forensic investigator.
- [7] The accident and injuries have changed that. He scraped through grade eleven and flunked grade twelve. He passed the second time. After falling around a bit, he landed a job as as an

apprentice motor mechanic at Mercedes Rosebank. He is currently in his third year there, but has been promoted only once. There is a factual dispute about the reason for that. The plaintiff contends that this is a function of his injuries. He is no longer as agile as before, nor is he able to engage in strenuous work. He suffers from PTS and it is common cause that he is no longer an equal competitor for employment in the open labour market. The defendant says that it is a function of the timing and availability of examinations. This is not a dispute that I can resolve; but the parties' list of admissions have provided much which is common cause, as will appear below.

[8] The plaintiff contends that an appropriate contingency provision is 40%, but the defendant argues for 28%.

[9] It is trite that a contingency provision is a function of the exercise of a discretion in the wide or loose sense, meaning that the court takes into account a number of factors and arrives at a view in respect of which another court is in as good a position to reach a conclusion. It may therefore be upset on appeal. It is not like the exercise of a discretion in the narrow sense, where the court is called upon to express a conclusion within a narrow band. In such an instance a court of appeal does not upset the exercise of a discretion unless it finds that some misdirection has occurred.

[10] It is not clear to me how the defendant arrives at its proposed 28% contingency provision. It is common cause that there should be a differential between the but for and having regard to scenarios, the but for provision being agreed at 20%. The question is then really whether the having regard to provision should be double the but for provision, or whether it should be half of the but for provision.

[11] I have not have the benefit of the seeing the plaintiff testify. All I have to go on are the medical reports and the admissions that were handed up by agreement. There is some limitation inherent in this, but this is not to say it is not laudable that the parties were able to contain the matter in this regard, and to this extent. As I have remarked, there is much

material that is common cause in the list of admissions that have been received as annexure D.

[12]I have come to the conclusion, on the basis of those common cause facts, that a provision double the normal is fair and reasonable, for these reasons. First, Dr Miller, a neurosurgeon, says that the plaintiff has suffered a mild to moderate head injury. That is a not inconsequential impairment. Dr Visser, a psychiatrist, opines that the plaintiff presents with chronic low mood, mood dysfunction, poor motivation, and low self-esteem. These are features that will likely make the plaintiff's employment prospects risky, particularly since Dr Visser says that the chronicity of these symptoms make complete resolution of the symptoms unlikely. Mr Sampson, a clinical psychologist, records mild deficits in psychomotor speed, perception scanning, visuomotor tracking, information processing ability, manual dexterity, and complex age-appropriate tasks.

[13]These are all facilities that he would ordinarily require to have a competitive edge in the employment scene. His shortcomings in those respects make for an individual that suffers from a significant impairment in the job market, and having to choose between either roughly 10% or roughly 20% more than the 20% usual contingency provision, I believe the upper margin of 20% more fairly presents the plaintiff's challenges.

[14]The past hospital and medical expenses have been calculated at R2470, and no submissions have been made as to why they should not be accepted. On this basis then the damages come to R5,806,615.

[15]That leaves the question of two counsel and special costs. In my view two counsel was a reasonable precaution, given the size of the claim, the number of experts involved, the breadth of their disciplines, and the need right up to the trial date to prepare on those issues. It is necessary to prepare and guide the experts in their own preparation for the trial, to prepare cross-examination, and to ensure the pre-trial processes have been complied with. In a trial of this magnitude that demands that attention be given to many matters, a

litigant would be well-advised that two counsel are required to ensure that they are all properly attended to.

[16]Special costs are sought, mainly on the bases that the defendant failed to co-operate in attending a meaningful pre-trial conference; delays in giving instructions to settle; and especially the frequent changing in position of the defendant's industrial psychologist. I deal with these three issues in turn.

[17]The failure to attend a meaningful pre-trial conference timeously meant that the Deputy Judge President had to direct the parties to hold a pre-trial conference when the matter was called on the day for which it had been set down for trial. That is a serious transgression. The defendant is a known litigant, familiar with court processes. In this division of the high court, in particular, it overwhelms the trial roll.

[18]It is no excuse whatsoever to assert that the defendant's attorney or counsel was not available. It is no excuse whatsoever to assert that a pre-trial conference was partly held by requesting that the list of questions that would be posed could be sent. The very point of a pre-trial conference is that legal representatives, properly briefed and properly mandated, should attend and debate the disputed issues face to face. It is, for instance, not acceptable at all that parties turn up at pre-trial conferences, swap questions, and walk away on the basis that they will consider their respective positions and revert. Likewise, and by way of extrapolation, it is not acceptable at all for a legal representative to say that s/he cannot attend the pre-trial conference because of too busy a program, and to ask instead that the questions to be asked be typed up and sent through for consideration and instructions.

[19]Legal representatives can of course choose to do that, but then their claim to be allocated a trial judge will simply be back-ranked, and they may be mulcted in costs, for failing to engage properly in the system, in accordance with rules designed to make civil litigation focus on issues that are truly in dispute, and are thus truly triable. That makes for saving of judicial time, a scarce resource, and is generally in the interests of the administration of

justice. In my view, much as one is disinclined to penalize the defendant because it fulfils a public function, this conduct cannot be permitted to be perpetuated.

[20]I am not in a position to comment on delays in the giving of instructions to settle. It is true that one gets the impression from the way RAF cases are generally conducted that there are quite unacceptable delays in getting ready for trial. One sees that frequently in the trial readiness certification courts, where the RAF preparation is more often than not way behind the preparation of the plaintiffs. It is not clear whether this is a deliberate strategy, perhaps to make litigation weary plaintiffs taste the tyranny of litigation. However, I cannot say whether in this particular case such a strategy was employed. The facts placed before me are just too parsimonious to come to that conclusion.

[21]Finally, there is the issue of the defendant's industrial psychologist who prepared, as I have it, and according to the submissions of counsel for the plaintiff, no less than seven versions of a proposed joint minute. That is very disconcerting conduct. It escalates costs inordinately, because the opposing experts must consider, over and over again, the freshly proposed minute. It also escalates costs on the side that calls the expert, because experts are remunerated on the basis of their time spent. The defendant argues that it should not be punished for its expert's remissness. That may be so, but why should the plaintiff be punished then? Perhaps a special costs order should be made against the defendant's industrial psychologist, but she was not notified that such an order would be sought against her.

[22]In all these circumstances I have decided to accede to the request for costs on a punitive scale, as between attorney and own client.

[23]Ms Docrat handed up a draft order that would apply in the event that I was amenable to making the orders that I have concluded above I would be making. In the result I make the following order:

I make an order in terms of the draft order attached hereto marked "X", completed by me, initialed and dated.

WHG van der Linde
Judge, High Court
Johannesburg

For the plaintiff: Adv FF Docrat
Adv N Motala

Instructed by:
Wadee & Wadee Attorneys
(c/o Yousha Tayob Attorneys)
1st Floor, 7 Bonanza Street
Selby, Ext 9
Johannesburg
011 854 2534

For the defendant: Adv M Panyane
Instructed by:
Maribana Makgoka Inc
13th Floor Marble Towers
208 – 212 Jeppe Street
Johannesburg
011 333 1845
Ref: Mr W Mailula/RAF1/HO/317

Dates trial: 24 and 25 November, 2016
Date judgment: 28 November, 2016