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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 188 /2017
Date heard: 14 June 2018
Date delivered: 28 June 2018

In the matter between

N A

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

GOOSEN, J.

- [1] The plaintiff was injured in a motor vehicle collision which occurred on 11 March 2015 at the intersection of Centenary Road and Paris Avenue, Lorraine, Port Elizabeth. At the time the plaintiff was the driver of a motorcycle which she collided with a motor vehicle, driven at the time by a Mrs Jooste, the insured driver. The collision occurred at approximately 19h00 hours on the evening in question.
- [2] The plaintiff instituted action against the defendant in which she claimed general damages, past hospital and medical expenses, future medical expenses and both past and future loss of income and earning capacity. In prosecuting the claim from the outset the plaintiff employed the services of two counsel. The total claim was in an amount in excess of R3.9 million.

- [3] The defendant defended the action. The negligence of the insured driver was, however, ultimately conceded. In an amended plea, the defendant pleaded that the plaintiff was contributorily negligent and that the plaintiff's claim ought therefore to be apportioned. The quantum of the plaintiff's claim was denied and accordingly that issue also remained alive between the parties.
- [4] Prior to the commencement of the trial the parties reached agreement in respect of the quantum of the plaintiff's claims in respect of the different heads of damages. The agreement in respect of the quantum of the plaintiff's claim, which it was agreed was the sum of R2 658 041.90, as also the defendant's undertaking in terms of s 17 (4) (a) of the Road Accident Fund Act, Act 56 of 1996 was subject to the determination of the defendant's plea in respect of an apportionment of the damages. The parties could not reach agreement as to whether the plaintiff was entitled to the costs of two counsel. Accordingly, those two issues, namely the apportionment of the loss and the entitlement to the costs of two counsel were the only issues to be determined at trial.
- [5] In the light of the fact that the *onus* rested upon the defendant to establish that the plaintiff's negligence had contributed to the collision, the defendant commenced adducing evidence. Mrs Jooste, the insured driver, testified. She stated that on the evening of 11 March 2015 she was returning home from the gym that she had attended. She explained that the intersection between Centenary Road and Paris Avenue consists of a T-junction, which is controlled by a stop sign located in Paris Avenue. She said that she drove her motor vehicle in Paris Road in the direction of Centenary Road. When she got to the intersection she stopped her vehicle. She looked to her left and right, saw no vehicles approaching and thereafter proceeded to drive into Centenary Road executing a right turn in the process. As her vehicle crossed the centre line of Centenary Road she heard a very loud bang on the right rear of the vehicle. She immediately stopped the vehicle, got out

and saw a motorcycle lying on the road surface near the intersection and the plaintiff lying in the roadway a short distance away. She said she approached the plaintiff was lying on the ground and that she, the plaintiff, was shouting at her. There were other onlookers who assisted.

[6] Mrs Jooste explained that the impact between the two vehicles occurred in the lane of travel of vehicles in Centenary Road approaching from a direction to the right of Paris Road. She explained that her vehicle had not yet crossed the white line in the middle of Centenary Road when the collision occurred. The damage to her vehicle was in the vicinity of the rear wheel and the rear passenger door on the driver's side.

[7] In cross-examination she conceded that since the intersection is regulated by a stop sign in Paris Avenue, vehicular traffic in Centenary Road has right of way. She also conceded that the distance that her vehicle travelled from Paris Avenue to where the point of impact was in Centenary Road was a very short distance. She explained that it was dusk, that the weather conditions were good and that the streetlights in the area were on. She confirmed that she looked both to her left and right and that she did not see the motorcycle driven by the plaintiff. She conceded, therefore, that she could make no comment as to the speed at which the motorcycle was travelling. Nor could she comment upon or dispute that the headlights of the motorcycle were on. She could not explain why she did not see the vehicle approaching in Centenary Road.

[8] After the evidence of Mrs Jooste was presented the defendant closed its case. The plaintiff thereafter brought an application for absolution from the instance in relation to the defendant's plea in respect of contributory negligence on the part of the plaintiff. After hearing argument in respect of the request for absolution, I granted the order absolving the plaintiff. The plaintiff thereafter closed

her case and counsel on behalf of the parties addressed argument in relation to the plaintiff's entitlement to an order for costs, including the costs of two counsel. In the light of the order for absolution, I granted an order, the terms of which were framed in a draft order prepared by the plaintiff's counsel, in the following terms:

1. The Defendant shall pay to the Plaintiff the sum of R2 658 041.90 (TWO MILLION SIX HUNDRED AND FIFTY EIGHT THOUSAND AND FORTY ONE RAND AND NINETY CENTS), as and for damages.
2. Payment of the capital shall be made within 14 days of the date of this Order, failing which, interest on the outstanding capital sum shall accrue at the prevailing legal rate per annum to date of final payment.
3. The defendant shall furnish the plaintiff with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act, No 56 of 1996, to pay to the plaintiff the costs of future accommodation in a hospital or nursing home, or the treatment of, or the rendering of a service to, or the supplying of goods to the plaintiff as a result of injuries sustained by her in the collision which occurred on 11 March 2015 in the district of Port Elizabeth and the *sequelae* thereof.

[9] I reserved judgment in relation to the costs. Before turning to that question it is necessary briefly to outline the reasons for granting absolution from the instance in relation to the defendant's plea of contributory negligence on the part of the plaintiff.

[10] In the defendant's amended plea, dated 7 June 2018, it is alleged that the plaintiff's contributory negligence consisted of the failure to keep a proper lookout; the failure to apply the brakes of the motorcycle timeously or at all; the failure to exercise proper care and control over the motorcycle; the failure to avoid a collision when, by the proper exercise of reasonable skill, care and caution she

could and should have done so, and that the plaintiff failed to drive at a reasonable speed under the circumstances.

[11] The outline of the evidence of the insured driver set out above constitutes the only evidence upon which the defendant sought to rely in order to establish one or more of the grounds of negligence attributed to the plaintiff. That the insured driver drove her vehicle negligently and that such negligence caused or contributed to the collision is not to be doubted. Indeed it was conceded by the defendant. Mrs Jooste's evidence was that she did not see the plaintiff's motorcycle at all. Her evidence, accordingly, it cannot found a basis for finding that the plaintiff drove her motorcycle at a speed which was excessive in the circumstances, or that the plaintiff did not keep a proper lookout, or failed to apply the brakes of a motorcycle timeously or at all. Indeed, the evidence of the insured driver provides no basis upon which any inference of negligent conduct on the part of the plaintiff could reasonably be drawn.

[12] The position of the insured driver's vehicle when the impact occurred; the point of impact on the road surface, namely in the lane of travel of the motorcycle; and the damage to the insured driver's vehicle all indicate that the insured driver drove the vehicle into the path of travel of the plaintiff at a point when it was plainly inopportune to do so. Since there was no evidence upon which a reasonable court might find that the plaintiff was negligent in the driving of the motorcycle, and that such negligence contributed to the collision, the plaintiff was absolved from the instance.

[13] I turn now to consideration of the argument in relation to the plaintiff's entitlement to the costs of two counsel.

- [14] A party's entitlement to an order for costs which includes the employment of two counsel, is generally determined on the basis of deciding whether the employment of two counsel was "a wise and reasonable" precaution to take in the circumstances of the matter (see *Van Wyk v Rondalia* 1967 (1) SA 373 (T); *Hendry v A A Mutual Insurance Association Ltd* 1979 (2) SA 105 (C)). The factors to be taken into account in determining whether it was indeed a reasonable and prudent precaution have been discussed in many judgments. Those factors include the importance of the issues to be determined; the complexity of legal or factual issues to be decided; the quantum of the claim and the volume of evidence to be considered (cf. *Koekemoer v Parity Insurance Co Ltd and another* 1964 (4) SA 138 (T); *Basil Red (Pty) Ltd v Beta Hotels (Pty) Ltd* [2000] 1 All SA 1 (C); *Barlow Motors Investments Ltd v Smart* 1993 (1) SA 347 (W)).
- [15] I have already indicated that the plaintiff's claim consisted of a claim for general damages; a claim for past and future medical expenses and a claim for past and future loss of earnings and earning capacity. The injuries sustained by the plaintiff were very serious injuries involving fractures of her right radius and ulna; an injury to her pelvis; fractures of both the medial malleolus and lateral malleolus of her right ankle. The treatment for these injuries involved external and internal fixation of the fractures to the right radius and ulna; an external skeletal fixation applied to her pelvis and a plaster of paris applied to her right leg. She subsequently had to have the external skeletal fixation removed surgically.
- [16] The plaintiff presently presents with significant scarring on the anterior aspect of the right forearm, the centre posterior of the right forearm, her lower abdomen and she experiences severe pain in the pelvic area and will continue to experience such pain on a permanent basis.

- [17] It was argued on behalf of the plaintiff that the nature of the injuries were serious and that the plaintiff accordingly was vested with a substantial claim for general damages, the proof of which would require that substantial body of medical legal evidence to be presented at trial. The reports of the several medico-legal experts qualified by the plaintiff, which were ultimately accepted as being the basis upon which the quantum of her loss was conceded, establish that the plaintiff suffers from significant functional restrictions resulting in the likelihood that she would have to cease working. These injuries and the *sequelae* accordingly founded a substantial claim for loss of earnings or earning capacity.
- [18] It was pointed out that this, from the outset, presented as a challenging and complex claim which faced significant difficulty of proof. The reason for this, accepted as part of the expert reports filed in the form of the industrial psychologists, was because, at the time of the collision, the plaintiff was self-employed as a tattoo-artist and had been so self-employed since 2013. Proof of her pre-morbid earnings to found a claim for projected earnings and therefore her loss of earning capacity, was bedeviled by the fact that she operated a cash business, without any bank account and without any tax returns to substantiate the earnings. The plaintiff furthermore had significant work experience in a wide variety of employment positions. She was accordingly possessed of a wide set of skills which would be indicative of a residual earning capacity.
- [19] A further complicating factor, borne out by the expert reports were filed by a clinical psychologist and the industrial psychologist, is the fact that the plaintiff had a pre-morbid psychiatric/psychological history. This complicated the determination of appropriate contingencies to be applied in calculating a future loss of earnings.

- [20] All of these factors feature as agreed factors relevant to the determination of the plaintiff's loss of earning capacity, and they are set out in some detail in a Joint Minute filed in respect of agreements concluded between the parties' Industrial Psychologists prior to the trial.
- [21] It was argued that on this basis, now accepted by the defendant, the prosecution of the plaintiff's claim against the defendant was one involving significant complexity, both in respect of the evidence to be adduced and in the proof of the plaintiff's claim. In the light of the fact that the plaintiff, who is no longer able to earn an income because of the *sequelae* of the injuries sustained in the motor vehicle collision, the award of damages in respect of her earning capacity was undoubtedly a matter of considerable importance to her.
- [22] It was argued that having regard to all of these considerations, the employment of two counsel from the outset of the matter was a wise and prudent precaution to take and on this basis, upon application of the principles which apply in respect of such costs orders, the plaintiff ought to be awarded the costs of two counsel.
- [23] On behalf of the defendant it was argued that the matter was not unduly complex and that it did not warrant the appointment of two counsel. As I understood the argument, this was on the basis that the clinical psychologist, Mr Ian Meyer's report in regard to her pre-morbid condition, was that it did not impact upon the claim for future loss of earnings. This is of course only one aspect of the matter. It was pointed out in reply by the plaintiff's counsel that it would not be appropriate to consider the merits in isolation from the quantum issues since they remained at issue throughout. Furthermore, the complexity in respect of the proof of a loss of earning capacity and the quantification thereof did not hinge upon the plaintiff's pre-existing psychiatric condition. This was but one factor which

required consideration. As I understood defendant's argument it was not suggested that the plaintiff's inability to furnish proof of her premorbid income did not present as a significant difficulty in the proof of the plaintiff's claim. Nor was it suggested that the potential residual earning capacity of the plaintiff, given her wide range of skills, did not present as an issue of complexity.

[24] The fact that a case is ultimately settled upon a certain basis does not, of course, mean that the plaintiff could have anticipated that such settlement would be reached. A plaintiff seeking to prosecute a difficult-to-prove claim or a complex claim, must make an election as to how to proceed at the outset of the case. In this instance the plaintiff elected to employ the services of two counsel on the basis that the prosecution of the claim, which was important to her, would require the services of two counsel. In my view, it cannot be said that the plaintiff was unreasonable in making such election. On the contrary, having regard to all of the circumstances of the matter and, in particular, that the issues remained in dispute until shortly before trial, such election was a wise and prudent precaution to take in the circumstances. It follows therefore that the plaintiff is entitled to the costs of two counsel.

[25] I therefore make the following order:

The Defendant shall pay the Plaintiff's party and party costs of suit on the High Court scale, as taxed or agreed, such costs to include the costs of two counsel and qualifying fees, if any, of any experts in respect of whom Plaintiff has given notice in terms of the provisions of Rule 36 (9) (a) and (b).

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff

Adv. J.J. Nepgen with Adv. K. D. Williams

Instructed by Pierre Kitching Attorneys

For the Defendant

Adv. B. Naran

Instructed by Smith Tabata Inc.