

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO. 47/2017

Date heard: 25 March
2019

Date delivered: 7 May
2019

In the matter between:

PHUMLA PAMELA NTSALI

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

RUGUNANAN AJ,

- [1] This matter came before me on 25 March 2019. It involves an action by the plaintiff for damages for personal injury arising from a motor vehicle collision. When the matter was called I was informed by the parties that agreement had been reached on the *quantum* of the plaintiff's damages except for the issue of the costs of two counsel. At the hearing of the matter a draft order setting out the terms of the agreed settlement on

quantum was handed up. I made an order in respect thereof in the following terms:

- "1. Defendant is liable for 60% of plaintiff's damages.*
- 2. Defendant is to pay plaintiff the sum of R1 470 896.73 in settlement of plaintiff's claim for past and future loss of earnings and/or earning capacity.*
- 3. Payment of the aforesaid amount in paragraph 2 above, shall be made within fourteen days from the date of this order directly to plaintiff's attorney of record, P PBK Attorneys Inc., trust account.*
- 4. Failing payment of the aforesaid amount in paragraph 2 above defendant is to pay interest on the aforesaid amount in paragraph 2 above from a date 14 days from date of this order to date of final payment at the rate of 10.25% per annum.*
- 5. Defendant is to pay plaintiff's costs of suit on the party and party scale, up to and including 25 March 2019 as taxed or agreed, such costs to include:*

5.1 The costs of the reports and supplementary reports, if any, of:

- 5.1.1 Dr B McKenzie;*
- 5.1.2 Ms A van Zyl;*
- 5.1.3 Mr I Meyer;*
- 5.1.4 Dr P Whitehead;*
- 5.1.5 Dr TY Moodley;*
- 5.1.6 Dr F Rank;*
- 5.1.7 Dr H Vawda;*
- 5.1.8 Dr PA Olivier;*
- 5.1.9 Dr H Prinsloo;*
- 5.1.10 Dr CG Apostolis;*
- 5.1.11 Mr D Williams;*
- 5.1.12 Dr S Williams-Jones;*
- 5.1.13 Algorithm Consultants and Actuaries.*

5.2 The reasonable qualifying fees and expenses, if any, of:

- 5.2.1 Dr B McKenzie;*
- 5.2.2 Ms A van Zyl;*
- 5.2.3 Mr I Meyer;*
- 5.2.4 Dr P Whitehead;*

5.2.5 Dr TY Moodley;
 5.2.6 Dr F Rank;
 5.2.7 Dr H Vawda;
 5.2.8 Dr PA Olivier;
 5.2.9 Dr H Prinsloo;
 5.2.10 Dr CG Apostolis;
 5.2.11 Mr D Williams;
 5.2.12 Dr S Williams-Jones;
 5.2.13 Algorithm Consultants and Actuaries.

5.3 *The reasonable costs of consultations of plaintiff's counsel and plaintiff's attorney with plaintiff's experts and lay witnesses in the preparation for the trial.*

5.4 *The costs involved in attending a pre-trial inspection in loco with counsel.*

5.5 *The costs of the photographs.*

6. *Defendant is to pay interest on plaintiff's said text or agreed costs at the rate of 10.25% per annum from a date fourteen days after allocatur or agreement to date of payment.*

7. *The determination as to whether or not plaintiff is entitled to the costs of two counsel, where so employed, is reserved."*

[2] The costs of two or more counsel will be allowed only if a court specifically orders this to be the case failing which the costs of only one advocate is awarded. Our courts have in several decisions considered the factors which are relevant in deciding whether it was a wise and reasonable precaution for a litigant to have engaged two counsel in a particular matter. These factors include, the importance of the matter or issue, whether the case involves complex legal or factual issues, the *quantum* of the claim and the volume of evidence to be dealt with.¹

¹ Koekemoer v Parity Insurance Co Ltd and Another 1964 (4) SA 138 (T) at 144H-145A; Basil Reed (Pty) Ltd v Beta Hotels (:Pty) Ltd [2000] 1 All SA 1 (C) at paragraph [34]; cf. Internatio (Pty) Ltd v Lovemore Brothers Transport CC 2000 (2) SA 408 (SE) at page 414E; cf. Barlow Motors Investments Ltd v Smart 1993 (1) SA 347 (W) at page 352F-H; IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita [2003] 3 All SA 188 (W) at page 203c. See also various unreported decisions: Nomhle Gwayi v Road Accident Fund (740/2011) [2014] ZAECMHC; Smit v RAF (448/20130 [2014] ECHCPE; Nathan De Hart v RAF (Case No 654/20134) ECHCPE 25 March 2014; Marshall Gavin Dolf v RAF (3038/2014) [2014]

- [3] The plaintiff's cause of action arose on 26 May 2013 from the driving of a motor vehicle that collided with her at about 21h30 in Uitenhage Road, Despatch. The plaintiff was a pedestrian at the time. Counsel was briefed during December 2016 to draft particulars of claim and the plaintiff's action was instituted on 11 January 2017.
- [4] In the particulars of claim the plaintiff alleged that the collision was occasioned solely due to the negligence of the driver of the insured vehicle with registration FVV 535 EC. It is alleged *inter alia* that (i) he failed to keep a proper lookout; (ii) he failed to apply his brakes timeously or at all; (iii) he drove at an excessive speed; and (iv) he failed to exercise proper control over the insured vehicle.
- [5] Further, the plaintiff alleged that as a result of the collision she sustained injuries in the nature of (i) a pelvic fracture; (ii) a comminuted fracture of the right humerus; (iii) a fracture of the right lateral malleolus; (iv) a mild concussive TBI (traumatic brain injury); (v) multiple lacerations; and (vi) a bruised right eye. As regards the *quantum* aspect of her claim the plaintiff annexed to the particulars of claim, medico-legal reports by Dr B L Mackenzie, an orthopaedic surgeon dated 3 October 2014; Ms A van Zyl, an occupational therapist dated 8 December 2015 and 19 October 2016; Mr Ian Meyer, a clinical psychologist dated 29 January 2016; and Dr P Whitehead, an industrial psychologist dated 9 December 2016. It is noted that these reports were attached to the original particulars of claim to which the defendant initially pleaded prior to delivery of its amended plea.

ZAECPEHC; Lloyd Mhlanga obo Karen Rauramai Mhlanga v RAF (Case No 2682/2015) ECDGHT; Fezile Memani obo Aviwe Memani v RAF (Case No 3489/2013) ECLDPE; Quinton Bekker v RAF (Case No 1864/2015) ECLDPE; Van Niekerk v RAF (2521/2015) [2017] ZAECPEHC; Christian Lodewicus Moolman v RAF (Case No 2819/2015) ECLDPE; Gitesh Gajjar N.O. v RAF (1076/2016) ECLDPE; Ronald Roland Johannes Hendricks v RAF (Case No. 1380/2017) ECLDPE; Ufukazi Cleopatra Douse v RAF (Case No 228/2017) ECD; Natasha Adams v RAF (Case No 188/2017) ECDPE; Charl Philander obo Jose Charl-Junior Hardy v RAF (Case No 1591/2015) ECLDPE

- [6] During the course of the action, the plaintiff filed an additional 11 medico-legal reports, which brought the total number of expert reports filed by her to 15. Supplementary reports totalling 7 in number were also filed. The defendant filed 2 expert reports, one by industrial psychologist Dr P Crous and another by occupational therapist Ms Ghida Bernard.
- [7] In a plea initially filed on 20 February 2017, on pain of a notice of bar, the defendant pleaded that it had “no knowledge” of the plaintiff’s allegations particularly as to the insured driver’s negligence. On this issue the defendant straightforwardly pleaded that the plaintiff is put to the proof thereof. Mr Paterson, who appeared for the defendant drew attention to the fact that on 6 May 2017 the defendant made an initial tender in terms of which it conceded liability on the merits on the basis of a 70% apportionment in favour of the plaintiff. Evidently, this was done without amending the plea with an allegation that the plaintiff was contributorily negligent in causing the collision. Contending that the plaintiff’s legal representatives could have applied themselves to the merits, and indeed the issue relating to the plaintiff’s contributory negligence before summons was issued, Mr Paterson went on to argue that the ultimate settlement based on an apportionment of 60% in favour of the plaintiff was self-induced. He contended further that the merits should have been settled in November 2017 because the defendant’s plea was at that stage, a plea of “no knowledge”.
- [8] I am unable to agree with the submissions by Mr Paterson. Mr Williams, who appeared together with Mr Frost for the plaintiff, stated that the defendant withdrew its initial tender. The withdrawal of the tender was indicative that the merits of the matter were disputed. To suggest that the matter ought to have settled on a proposed apportionment of 70% because the plea was one of no knowledge is simplistic. Mr Williams

pointed out that the withdrawal signified that the merits were being contested either because the plaintiff bore the *onus* to prove the insured driver's alleged negligence as pleaded, or that there was a likelihood of the plaintiff's claim being dismissed since she had no recollection of the actual collision (a condition Mr Meyer described in his report as "*retrograde amnesia*") possibly due to a compromised judgment induced by alcohol consumption on the night of the collision. It was in these circumstances that second counsel was briefed in November 2017. By then the matter had already been enrolled for trial on 6 February 2018.

- [9] On 23 January 2018, the defendant filed an amended plea. The amended plea alleged that the plaintiff was contributorily negligent in causing the collision. This meant that the merits were still in issue. Furthermore, all the plaintiff's injuries were admitted except for the mild concussive TBI. *Quantum* however was still in issue notwithstanding the defendant admitting that the plaintiff suffered general damages and will incur future medical expenses. Mr Williams, submitted that the extent of pre-trial preparation involved in the matter was not insignificant. On the merits, it was common cause that at the time of the collision the plaintiff was under the influence of alcohol having spent some time socialising at a tavern and that her recollection of the collision was questionable.

- [10] Preparation on the merits necessitated an inspection *in loco* and consultation with the plaintiff and her witness at the inspection scene. Such preparation also entailed anticipating an apportionment in the event the plaintiff was found to have been contributorily negligent. According to Mr Williams, every notional percentage apportioned against the plaintiff on the merits would proportionately diminish the *quantum* of her overall claim (see below).

- [11] On the *quantum* aspect, the plaintiff's claim for all heads of damages (i.e. general damages, future medical expenses and loss of earnings)

amounted to a total of R3 806 000.00. Of this amount, more than R3 000 000.00 accounted for the claim for past and future loss of earnings. The *quantum* aspect necessitated considerable preparation given the number of expert reports filed on behalf of the plaintiff. Each expert had to be consulted with and prepared for trial to testify on the nature and extent of the plaintiff's injuries, the *sequelae* and complications thereto, and the calculation of damages. Although the defendant usually tenders a certificate of undertaking for future medical expenses, it was nonetheless incumbent to ensure that the *quantum* of this claim was properly computed in the event of the matter proceeding to trial on 6 February 2018. The pleadings indicate this was achieved with expert input. In addition, Mr Williams submitted that the merits were of crucial importance to the plaintiff; theoretically every 10% apportioned against her would approximate to a R300 000.00 reduction on the *quantum* of her claim.

[12] On 26 January 2018, and by order of court, the parties reached a settlement. The defendant conceded liability on the merits with an apportionment of 60% in favour of the plaintiff; the defendant settled the claim for general damages in the amount of R300 000 (post-apportionment) and agreed to provide the plaintiff with an undertaking for future medical expenses limited to 60%; and further agreed that the remaining claim for past and future loss of earnings be postponed and that the issue relating to the costs of two counsel be reserved for later determination.

[13] On the remaining claim for loss of earnings (past and future), the matter was set down for trial on 22 March 2019 and rolled over to 25 March 2019. On that day the defendant made an offer of R1 389 110.40 (i.e. R2 315 184 before apportionment). The offer was rejected whereafter on the same day an increased offer of R1 470 896.73 (i.e. R2 451 494 before

apportionment) was forthcoming. This offer was accepted in terms of the order mentioned in paragraph 1 of this judgment.

[14] In relation to the claim for loss of earnings, Mr Paterson argued that there was a duplication of expert reports because the plaintiff had voluntarily resigned from her employment. For this reason he contended that the volume of expert reports played no significant role in justifying the employment of two counsel. I am not persuaded by this argument. There are two reasons for this. Firstly, it is generally accepted that the computation and proof of a claim for loss of earnings does involve complex issues of fact and law, and where the claim is considerable, as in this case, then it is usually a reasonable and prudent precaution for a plaintiff to engage the services of two counsel.² Secondly, as will be seen from the plaintiff's personal circumstances set out below, her resignation from employment was not anything foreseeable and came about as a direct result of the complications that arose from the injuries she sustained in the collision.

[15] The plaintiff was aged 26 at the time of the collision and in her second year of a learnership program for acquiring a qualification as a pharmacist assistant. Despite her injuries and having to endure difficulties brought about by her altered post-traumatic circumstances, the plaintiff completed her learnership in October 2014 and was offered a position as a post-basic pharmacy assistant at Livingstone Hospital.

[16] At some point she was informed that the hospital could no longer retain her in that position and she applied for and obtained employment at the Tshangana Street Clinic in New Brighton. The plaintiff was the only employee in the pharmacy at the clinic and the physical demands of the job were challenging. The report by occupational therapist Ms van Zyl

² *Gerrit Smit v Road Accident Fund* (448/2013) [2014] ZAECPHC 11 (6 March 2014) at paragraph [16]

details that the plaintiff was in charge of the storeroom as well as the dispensary. She was obliged to be on her feet for extended periods during her shift, to lift and carry boxes, to pack medicines, and to dispense medication. Her grievances raised with her employer went unanswered. Due to her post-traumatic compromised physical efficiency, she resigned from the clinic in November 2017. The plaintiff is also a single mother of two young children. During weekends she supplemented her income doing work as a locum pharmacy assistant at various “Clicks” retail outlets.

[17] Referring to the joint report prepared by Dr Whitehead and Dr Crous, Mr Paterson contended that the parties’ experts only disagreed on whether the plaintiff’s pre-morbid career path would lead to her working in either the public sector or the private sector and hence the plaintiff’s claim for loss of (future) earnings was not anything complex. Mr Williams pointed out that the scenarios postulated by the experts amounted to R2 835 634 *per* Dr Whitehead and R1 794 734 *per* Dr Crous and that the difference of opinion translated to a substantial R1 040 900 in actuarial terms. On this basis he submitted that the plaintiff’s claim for loss of earnings was not insubstantial and was sufficiently complex to justify the employment of two counsel.

[18] To conclude, all indications are that the matter was of considerable importance to the plaintiff. The dispute on the merits, the preparation undertaken regard being had to the accumulated volume of expert reports and the *quantum* involved, were not by any means simple. It seems to me applying my discretion that it would be wrong to hold that the employment of two counsel was not in all the circumstances of this matter a wise and reasonable precaution.

[19] In the result I make the following order:

[19.1] The costs to be paid by the defendant in terms of paragraph 5 of the order issued on 25 March 2019 shall include the costs of two counsel.

S RUGUNANAN
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv A. Frost and Adv. K D Williams, instructed by PBK
Attorneys, Port Elizabeth.

For Defendant: Adv. N Paterson, instructed by Friedman Scheckter
Attorneys, Port Elizabeth.