



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 19132/2014

In the matter between:

MASIBULELE RAUTINI

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Third Respondent

Heard: 20 November 2023

Delivered (electronically): 22 January 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This case involves two legal issues for determination. *Firstly*, it concerns the legal ramifications of a joint pre-trial minute that parties signed before the trial hearing. *Secondly*, it raises the question as to whether this court can make a draft order an order

of court pursuant to a joint pre-trial minute where one of the parties failed to obtain the requisite mandate from its client to settle the matter.

The Background Facts

[2] The plaintiff is an adult male, born on 10 January 1990, and is currently 33 years old. On 19 November 2011, at or near the railway line between Du Toit Station and Lynedoch Station Cape Town, the plaintiff was seriously injured when he was pushed out of a moving Metrorail train operated by the defendant. In his summons, the plaintiff pleaded that the incident was caused by the sole negligence of the defendant or its employees acting within the course and scope of their employment with the defendant.

[3] Plaintiff further contends that the defendant's employees were, among other things, negligent in allowing the train to travel between stations without ensuring that the doors were closed. Moreover, the lack of adequate maintenance of the train doors contributed to the train becoming overcrowded. In addition, the plaintiff alleges that the defendant failed to post security guards on the train when it should and could have done so.

[4] As a result of the accident, the plaintiff suffered serious injuries, such as severe left ankle fractures, severe right tibia fibula fractures, as well as spinal fractures, bruises, and abrasions all over the body. In the amended summons, the plaintiff claimed a total of R10 121 285.00 in damages, inclusive of R1 600 000 for general damages, R1 531 495

for loss of earnings, and R6 489 790 for estimated future medical and related expenses. The plaintiff's claim for general damages is based on the treatment that the plaintiff has received in the past and will have to receive in the future. It is also based on the fact that the plaintiff has suffered loss of amenities of life, experienced pain, suffering, disfigurement, and disability in the past and will continue to experience in the future on a permanent basis.

[5] In accordance with rule 33(4) of the Uniform Rules, the parties have agreed to bifurcate the issues of liability and quantum. The issue of liability has been resolved. The High Court dismissed the plaintiff's claim on liability, but on appeal to the Supreme Court of Appeal, the plaintiff's case was successful. The Supreme Court of Appeal has ordered that the plaintiff be compensated for 100% of his still-to-be-proven damages resulting from the train accident. This court is only enjoined to determine the amount to be awarded for general damages, past and future loss of earnings, and estimated future medical and related expenses.

[6] Several expert reports, including orthotists, industrial psychologists, orthopaedic surgeons, and occupational therapists for both the plaintiff and the defendant, as well as Actuarial reports, have been obtained. Subsequent thereto, the parties' respective experts of similar vocation, in turn, prepared joint minutes. As far as future medical expenses are concerned, the plaintiff's orthopaedic surgeon, Dr Jaffe, in the joint expert report, expressed a view that differed from the orthotists that there was a possibility that the plaintiff may require to have an amputation of his lower limb. In the joint expert report,

Dr Jaffe was reluctant to advise amputation of the plaintiff's right lower limb. The defendant's orthopaedic expert, Prof Vlok, did not foresee amputation of the plaintiff's lower limb but instead, suggested corrective osteotomy and repair of the non-union.

[7] On 15 November 2023, Doctor Jaffe filed an addendum report wherein he revised his previous opinion concerning whether he would support a below-the-knee amputation of the plaintiff's right leg. Further, Dr Jaffe recorded in his addendum that he supports corrective surgical procedures. Dr Jaffe's conclusion in his addendum report contradicted his opinion as recorded in the joint expert report between the orthopaedic surgeons, where he expressed a reluctance to advise on amputation.

[8] In light of Dr. Jaffe's revised conclusion, the plaintiff was required to undergo an additional examination by Prof. Vlok, the defendant's orthopaedic surgeon. Prof. Vlok was tasked with providing this court with his assessment of whether he concurs with Dr. Jaffe's conclusion or whether a corrective osteotomy and repair of the non-union would be more suitable to address the plaintiff's orthopaedic injuries. Consequently, the involved parties reached a consensus to defer the hearing of future medical and associated costs until the conclusion of a report authored by Professor Vlok.

[9] The trial proceeded on the two remaining heads of damages only, namely, general damages and loss of earnings. Before the hearing of this matter, the legal representatives of the parties, Mr Roux SC, and Mr Salie SC (who was absent at the hearing but was assisted by Mr Abass), appearing for the plaintiff and defendant respectively, debated the

disputed issues in particular the general damages and loss of earnings and prepared a joint pre-trial minute that narrowed down the issues. In the pre-trial minute, the parties dealt with the plaintiff's disputed heads of damages *ad seriatem*. For completeness, I will summarise the parties' agreement as reflected in the joint pre-trial minute.

General damages:

[10] Regarding general damages, the parties noted and considered the agreement by the experts that the plaintiff sustained grievous injuries as a result of the accident. The parties recorded that at the time of his injury, the plaintiff was a young man of 21 and in the prime of his life. He suffered severe injuries with lifelong and life-changing consequences for a young man. The joint pre-trial minute also recorded that the plaintiff had been left with a severely disabled leg and, as a result, was in chronic pain. An imminent amputation of his lower limb is anticipated.

[11] In addition, the pre-trial minute also recorded that the parties debated the quantum of general damages with reference to the applicable case law and the joint expert reports. At the hearing of this matter, the parties referred the court to several comparable cases dealing with the award of general damages, particularly for amputated legs. The said cases are also quoted in the joint pre-trial minute. Considering all factors, the parties agreed in the joint pre-trial minute that an award of R1 100 000. 00 (one million one hundred rand) would be equitable with respect to general damages. The parties implored

the court to consider granting the proposed award as envisaged in the joint pre-trial minute.

Loss of Earnings

[12] The parties referred the court to the joint minute of the Industrial Psychologists, Ms Colley and Mr Malherbe. As regards the plaintiff's probable uninjured career, the two experts agree that the plaintiff would probably have continued working in unskilled and manual labour roles for the remainder of his career. The two experts agree on the plaintiff's probable pre-accident earnings. I pause to mention that in their individual reports, both recorded that the plaintiff worked as a gardener at Spier Wine Estate before the injury, earning R1500 per month.

[13] Regarding the plaintiff's injuries sustained, they agreed that the plaintiff had been rendered unemployable in the open labour market. The only issue in this regard was the appropriate contingencies to be applied to the actuarial calculations based on the joint minute. The parties recorded in the joint pre-trial minute that they debated the issue of contingencies. As regards the contingencies to be applied to the postulated uninjured earnings, the parties agreed that the contingency of 10 per cent should be applied for the past earnings.

[14] Regarding the postulated future uninjured earnings, the parties agreed that a 20 per cent contingency would be fair. The parties referred the court to the decision of *Rabie*

v MEC for Education, Gauteng,¹ where Koen J referred to several cases in which a 15 per cent contingency deduction was considered to be the standard contingency to be applied in respect of a young claimant like the plaintiff. The court nevertheless applied a contingency of 20 per cent to the future earnings to cater for any uncertainties. The parties recorded in their joint pre-trial minute that a similar approach was adopted in the present case. The parties agreed that if the abovementioned contingencies are applied, it results in a past loss of earnings, of R439 120,00 and future loss of earnings/ earning capacity of R1004 880, 00.

The legal effect of the joint pre-trial minute signed by the parties dated 20 November 2023

[15] As stated above, the plaintiff and the defendant's legal representatives reached an agreement on certain admissions which were reduced to writing and incorporated into a pre-trial minute. The agreement reached between the two Counsels is premised on Rule 37 of the Uniform Rules read with the Practice Directives of this Division. Paragraph 41 of the Practice Directives of this Division provides that 'at a pre-trial conference the parties must genuinely endeavour to achieve the objects of Rule 37 by defining triable issues and thereby curtailing proceedings, the minute must reflect this'.

¹ *Member of the Executive Council of Gauteng Responsible for Education v Rabie (A758/06) [2008] ZAGPHC 71 (7 February 2008).*

[16] The purpose of rule 37 is ‘to promote the effective disposal of the litigation.’² It is intended to expedite the trial and to limit the issues before the court.³ The primary objective of Rule 37 is to reduce the length of a trial, consolidate matters, minimise expenses, and facilitate settlements. Parties are obligated to make a sincere effort to achieve a settlement, either regarding matters that could potentially reduce the duration of the proceedings or by resolving the primary concerns.⁴

[17] The legal effect of a pre-trial minute in terms of Rule 37 was clearly articulated by the Appellate Division, as it then was, in *Price NO v Allied-JBS Building Society*,⁵ in which a legal representative for the appellant conceded the validity of a special plea of prescription. The aforementioned concession was incorporated in the pre-trial minute. On appeal to the Appellate Division, the appellant's Counsel sought to withdraw that concession and contended that Counsel at the trial had erred in agreeing to amend the pleadings, the effect of which was to concede the validity of the plea of prescription and that it was permissible for him to withdraw such concession on appeal.

[18] This argument was rejected by the appeal court, which determined that the parties were bound by their pleadings and admissions at this juncture. The court emphasised that a pre-trial conference in terms of Rule 37 is designed to provide parties, amongst other things, to endeavour to find ways of curtailing the duration of the trial by redefining

² *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga*.2010 (4) SA 122 (SCA) at 126E.

³ *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 166E.

⁴ *Kriel v Bowels* 2012 (2) SA 45 (ECP) at 48J–49A.

⁵ 1980 (3) SA 874 (A) at 882D-H).

the issues to be tried. One of the methods of doing so, the court noted, is by way of admissions of fact, which could lead to eliminating one or more of the issues raised in the pleadings.

[19] In recent times, the Supreme Court of Appeal in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another*,⁶ emphasised the fact that rule 37 was introduced to shorten the length of trials, to facilitate the settlements between parties, narrow issues, and curb costs. The court also stressed that the admissions of fact made under Rule 37 constitute sufficient proof of those facts and that a party or his legal representative may sign the minute of a pre-trial conference. The court also noted that Rule 37 conference is thus of critical importance in the litigation process, and this is the reason, the court observed, it 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.

[20] In the present matter, the parties have provided a definition of the issues in their joint pre-trial minute dated 20 November 2023. The legal representatives of the parties signed the joint pre-trial minute. Significantly, it was incumbent upon the legal Counsels of both parties to promote the cause of their respective clients. A legal practitioner acting in his professional capacity owes a duty of care and loyalty to his client. This duty requires the legal practitioner to be diligent and be careful in performing work for clients.⁷

⁶ 2010 (4) SA 122 (SCA).

⁷ *Honey and Blanckenberg* 1966 (2) SA 43 (R) at 46F-G.

[21] As Mr Abass astutely noted, this enhances the credibility of any pre-trial negotiations, provided that an agreement is reached with each party (Counsel) promoting the rights of their respective clients. In *Road Accident Fund v Shabangu and Another* (SCA),⁸ Cloete JA, as he then was, observed that 'the attorney-client relationship imposes a duty on an attorney to advance the interests of his client, even when that course will cause harm to the opposite party; and in general, an attorney will incur no liability to the party on the other side in doing so.'

[22] The concession and the relevant admissions made by the parties in this matter at the Rule 37 conference are binding and constitute sufficient proof of those facts. Both Counsels confirmed the minute of the pre-trial conference in open court and requested that the admissions therein be made an order of court in terms of a draft order. In my view, the joint pre-trial minute addressed all the issues in dispute between the parties. Their admissions recorded in the pre-trial minute constitute sufficient proof of those facts, thus alleviating the need to lead evidence on the aspects where joint admissions were recorded.

[23] I have perused the experts' reports and their joint minutes, and I was initially concerned with the revised addendum of Dr Jaffe, which differed from his view in the joint expert report. However, that issue (future medical expenses) has been postponed by agreement for a hearing in due course. I have no issue with the joint expert reports concerning general damages and past and future loss of earnings. The parties are bound

⁸ [2004] 2 All SA 356.

by the agreements reached by the experts in the joint minute, and this court is certainly entitled to accept the matters agreed upon by the experts.⁹

[24] All the disputed issues to be adjudicated at this stage have been addressed, and no *lis* is pending between the parties. The joint pre-trial minute is effectively evidence before this court. The only outstanding issue that remains is whether the court should make the draft order following the admissions an order of the court.

Should the draft order be made an order of court where the defendant's Counsel does not have a mandate for settlement?

[25] The court was informed during the hearing of this matter that the defendant's legal representatives do not have a mandate to negotiate a settlement for the claim against the defendant. They had the mandate to represent the defendant in court. Attempts were made to get those instructions, but they were unsuccessful. It was argued on behalf of the defendant that the defendant's organisational framework includes a hierarchical structure that governs the resolution of claims surpassing particular thresholds. It was further submitted that such hierarchical structure serves a rational purpose in that it creates oversight over expenditure, prevents settlement of fraudulent or baseless claims, and, most importantly, it ensures proper management of public funds to which the defendant as an organ of state has a constitutional obligation to implement.

⁹ *Bee v RAF* 2018 (4) SA 366 (SCA) at para 73.

[26] The failure to provide instructions for settlement, the contention proceeded, is not indolent on the part of the defendant. Any delay is not indicative of indifference towards the plaintiff's claim, rather, it is the result of specific checks and balances that must be satisfied, which could not be accomplished prior to the hearing of this case. Additionally, Mr Abass submitted that the damages outlined in the draft order reflect the fair value due to the plaintiff for loss of earnings and general damages, as determined by the joint reports of the expert witnesses. Mr Abass further submitted that the draft order essentially encapsulates the heads of damages detailed in the joint pre-trial minute.

[27] The Supreme Court of Appeal affirmed in *Hlobo v Multilateral Motor Vehicle Accident Fund*,¹⁰ the authority and function of a legal representative during settlement negotiations, provided that the legal representative refrains from settling a claim against the client's mandate. The court also confirmed that the conduct of a party's case at the trial of an action is in the entire control of the party's Counsel. Although the court dealt with the issue where a settlement was reached, it established the essential principle of the role of a legal representative, the mandate under which a legal representative operates, and the authority he or she has to compromise a client's case as long as they do not act contrary to instructions received.

[28] In this instance, notwithstanding the defendant's Counsel's inability to obtain a settlement mandate from the client for the amount specified in the draft order, in my view, the defendant's legal representatives bear a responsibility to both their client and this

¹⁰ [2001] 1 All SA 322.

court. Furthermore, the defendant's Counsel had instructions to appear and to represent the defendant in this court for the hearing of the matter. They did not have the instructions to settle, but they had the instructions to represent the defendant. These instructions, in my view, included the drafting of pleadings on behalf of the defendant, attending pre-trial proceedings, and attending court for the hearing of the matter.

[29] The instructions also involved the authority to make admissions and concessions and often agree on compromises and settlements. In the absence of any instructions to the contrary, I am satisfied that the defendant's Counsel was clothed with the necessary authority to discharge what was required of him at the pre-trial conference as he did, which is making concessions as are appropriate to narrow down the issues between the parties to curb costs and expedite the finalization of this matter.

[30] To summarise, the defendant's Counsel had instructions to represent the defendant in these proceedings. Pursuant to those instructions, a pre-trial was held, and discussions between the legal representatives took place. In accordance with those discussions, the defendant's Counsel assessed the evidence before the court in terms of the joint minute and applied his mind to the quantum. After duly considering the expert reports and the relevant case law, the defendant's Counsel then engaged in negotiations with the plaintiff's legal representatives and recorded in the joint pre-trial minute the defendant's potential liability.

[31] Crucially, all the amounts contained in both the pre-trial minute and in the draft order are consistent with what is contained in the joint reports of the expert witnesses and the relevant case law applicable. Furthermore, upon perusing the joint pre-trial minute, it is evident that both Counsels have applied their minds and considered the relevant case law on general damages, future loss of earnings and the applicable contingencies to cater for the uncertainties. They have considered the expert reports filed on behalf of the plaintiff and those filed on behalf of the defendant.

[32] I am of the view that the Counsel for defendant acted in the interests of his client. Based on the totality of the evidence presented to this court, the defendant's Counsel would not have agreed to an amount in the joint pre-trial minute if he had not been convinced that the amount truly reflected what the defendant would be liable for. I repeat, I have no reason to doubt or question the bona fides of the parties.

[33] To this end, I share the views expressed in *Denby v Ekurhuleni Metropole Municipality*,¹¹ a case sharing striking similarities with the present, where the court observed that 'the defendant's legal representatives found themselves in the invidious position that they were unable to obtain instructions from their client to agree to a consent order but in the discharge of their professional legal duties both to the court and their client to engage constructively with the plaintiff's legal representatives in pre-trial proceedings, including in the making of appropriate concessions and admissions, had concluded there remained no discernible *lis* between the parties to be litigated.'

¹¹ 2021 (1) SA 190 (GJ), para 11.

[34] I have also observed that the amount agreed upon by the parties, as reflected in the joint pre-trial minute, is relatively lower than what was claimed by the plaintiff in his amended summons. I am of the view that the cumulative effect of the joint pre-trial minute has indeed saved the parties, particularly the defendant, the costs of the trial. Several witnesses, including expert witnesses, could have been called to this trial to prove and disprove the plaintiff's quantum of damages. The trial of this matter on quantum would have lasted for several days. The trial costs, in my view, have been alleviated.

[35] Furthermore, the expert witnesses' conclusions were consistent with one another. The actuarial report and reports of the occupational and industrial psychologists on the projected career path of the plaintiff quantify the amount for loss of earnings. Regarding general damages, the orthopaedic surgeons have clearly detailed the plaintiff's injuries and the pain he would endure in the future. Therefore, in terms of the joint pre-trial minute, which falls within their mandate to record either admission or concessions, I am of the view that the defendant's Counsel acted within his mandate and that the draft order before this court is reflective of the admissions and concession in the pre-trial minute. There is nothing to suggest that what the defendant's Counsel has agreed to is anything other than to act in the best interest of the defendant.

[36] Notably, the Supreme Court of Appeal made a distinction in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another (supra)*, between settlement agreements that were reached outside the context of customary trial proceedings (during which parties generally have the ability to revoke agreements

unknowingly entered into by their solicitors) and settlements facilitated through rule 37 conference. The court observed that the usual and customary powers associated with appointing a legal representative by the defendant would include instructions to defend the claim, draft a plea, and to attend all pre-trial proceedings. The pre-trial procedures involve making admissions and concessions and often agreeing on compromises and settlements.

[37] In the present matter, the parties signed a joint pre-trial minute, which resolved all the disputed issues between the parties. Consistent with the pre-trial minute, the parties prepared a draft order and implored this court to make it an order of court. Based on the aforementioned factors, I am of the view that the defendant's legal representative had the authority to attend the pre-trial conference and to make the necessary concessions and admissions incorporated in the joint pre-trial minute to curtail the duration of the trial and cut costs. I am further of the view that the defendant's Counsel had the necessary authority to conclude the joint pre-trial minute with the plaintiff's Counsel and to jointly seek that this court make the draft order an order of this court.

Order

[38] In the final analysis, an order is hereby made in terms of the parties' draft order marked "X"

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff: Adv J-H Roux (SC)

Assisted by A.J Du Toit

Instructed by DSC Attorneys

Cape Town

For the Defendant: Adv Y Abass

Instructed by: AMMM Attorneys