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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

Case Number: 66640 /16

9/3/2018

In the matter between:

ANNIE VAN RENSBURG -

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

NOWOSENETZ AJ

- [1] This is an action by the plaintiff for damages for loss of support arising from the death of her common law husband in a multiple motor vehicle accident on 28 June 2013. The accident happened in the Western Cape. The parties agreed to separate the issue quantum and only the merits were to be determined on trial set down to be heard on 8 March 2018.
- [2] On 6 March 2018 the plaintiff filed and served a notice of motion and a substantial affidavit requesting a postponement of the trial on the basis that it was prejudiced by the conduct of the defendant if the matter proceeded. The application included a prayer for costs on a punitive scale.

Shortly before the roll call the defendant conceded the merits and conceded a postponement. The only outstanding issue was costs in respect of which argument was heard. This judgment is pursuant thereto.

- [3] The plaintiff presented a detailed and thorough review of the conduct of the defendant during preparation of this litigation. The salient non-compliances and prejudicial conduct of the defendant's attorneys were the following:
- [4] First pre trial meeting 22 February 2017. The defendant made no admissions of substance on any of the issues. This was aggravated by the plea being mostly bare denials. The defendant had not yet investigated the accident but undertook to do so and consult the driver. No further action was taken.
- [5] The plaintiff sent notices in terms of Rule 21 and 37(4) on 14 December 2017 to the defendant. There was no response from the defendant at all.
- [6] Second pre-trial meeting - March 2018 , The defendant had still not appointed an assessor. The plaintiff gave the defendant the assessor's phone number to contact the assessor. The plaintiff agreed to rely on the assessor's report. The defendant had no instructions on the questions requested to be answered for trial purposes. The defendant was not in possession of the docket. The plaintiff provided it to the defendant.
- [7] On 6 March 2018 the defendant's attorney filed notices in terms of Rule 35(9) objecting to documents of the plaintiff including documents such as the death certificate of the deceased. The defendant still did not admit negligence and did not make any admissions on any aspect at all. The plaintiff had to then arrange to call up to 30 witnesses. Some had to fly from the Cape. The plaintiff warned the defendant that she was prejudiced and of the provisions of Rule 37 (9). The plaintiff faced difficulties in locating witnesses as even the police were unable to do so.
- [8] It was contended by the plaintiff that the defendant was in bad faith as evidenced by its non-compliances and its Rule 35 (9) notices. In addition the defendant had failed to make discovery. The unreported decision of Southwood J in this court in *Lucas Neo Jwili v RAF* (2009/112886) dated 6

May 2010 was cited. In that case the defendant's attorney had failed to prepare the case and relied on lack of instructions. It was stated that under such circumstances the attorney should have withdrawn. The defendant's counsel in argument did not rely on lack of instructions and made the disingenuous proposition that the application was unnecessary as both parties were unprepared. A punitive costs order was granted against the defendant's attorney and the defendant jointly and severally and the attorney was declared not entitled to receive any fees. The attorneys who handled the defendant's case were M Theron and M Sithole of the firm Lekhu Pilson Attorneys Pretoria.

- [9] Rule 37 (9) (a) (ii) is applicable in this case. It provides that a court at the hearing of the matter may consider whether it is appropriate to make a special order as to costs against a party or his attorney because the party or the attorney failed to a material degree to promote the effective disposal of the litigation. The defendant's attorney has not complied with the procedures and preparations in litigation expected of a reasonable attorney and in addition were obstructive and mala fide towards the plaintiff and her attorneys. Furthermore this has resulted in unnecessary costs and problems in preparation being occasioned by the plaintiff.

The following order is made:

1. The Defendant is 100 % liable to pay the Plaintiff's proven or agreed damages.
2. The aspects of quantum is postponed *sine die*.
3. The Defendant is ordered to pay the Correspondent and Instructing attorneys costs of suit to date on the Attorney and Own Client scale, which costs include (but not be limited to):
 - 3.1 The costs of the preparation of 6 trial bundles as per the Gauteng High, Court Practise Directive and as agreed upon in the Pre-Trial

Minutes:

- 3.2 The costs of counsel;
 - 3.3 The costs of the application for postponement;
 - 3.4 The costs of the Inspection in loco, including travelling and accommodation expenses if any;
 - 3.5 The reasonable costs of the attorney, which includes reasonable travelling costs, costs for preparing for Pre-Trial Conferences and costs for actual attendances of all Pre-Trial Conferences, all Rule 35(9) notices, Rule 36(1) notices, all filing notices, Further Particulars. Subpoena's, costs of formulating the draft order;
 - 3.6 The costs of the witnesses whom attended to court, including travelling and accommodation expenses;
 - 3.7 The reasonable costs for preparation for trial.
4. Should the Defendant fail to pay the Plaintiffs Attorney and Client costs as taxed or agreed with 30 (THIRTY) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay Interest at a rate of 10.50 % per annum, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.
 5. The plaintiff shall, in the event that the parties are not in agreement as to the costs referred to in paragraph 4 above, serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant seven court days to make payment of the taxed costs.
 6. The taxed or agreed costs, as referred to above, shall be paid into the trust account of Gildenhuys Malatji Incorporated. ABSA Bank, Brooklyn Branch, Account Number [...], Branch Code 335345 under Reference: T VLOK/ 01781880 .
 7. Attorneys M Theron and M Sithole and the firm Lekhu Pilson Attorneys, Pretoria are not entitled to receive fees from the defendant for the conduct of this case from inception of instructions until date hereof. Any fees received to date must be refunded to the defendant within 6 weeks hereof.

8. The registrar is requested to send a copy of this judgment, the trial bundles of documents and the postponement application to the Law Society of the Northern Provinces or its successor In title for investigation of attorneys M Theron and M Sithole and the firm Lekhu Pilson Attorneys, Pretoria for professional misconduct arising from this judgment and to investigate compliance with order in paragraph 7 above. In the event of non-compliance to report same to the registrar of this court as soon after 6 weeks hereof as possible.

L. NOWOSENZ
ACTING JUDGE OF THE HIGH COURT

CASE NO: 66640/16

HEARD ON: 8 March 2018

FOR THE PLAINTIFF: ADV. G. EDWARDS

INSTRUCTED BY: Gildenhuis Malatji Inc

FOR THE DEFENDANT: ADV. M.J. MATLHANYA

INSTRUCTED BY: Lekhu Pilson Attorneys

DATE OF JUDGMENT: 9 March 2018