

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/5/15
Case no: 59682/13

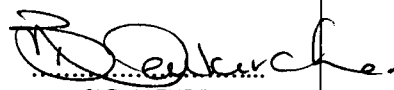
In the matter between:

NONZINYANA, FULIWE

and

ROAD ACCIDENT FUND

DEFENDANT

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED. ☒
14/5/2015 DATE	
 SIGNATURE	

JUDGMENT

1. This is a Road Accident Fund ("RAF") matter. Upon receipt and perusal of the court file two aspects were glaringly obvious:
 - 1.1. the "Special Pleas", which are, in all respects, simply carbon copies of each Special Plea in every RAF matter that I have heard this week;
 - 1.2. the complete lack of thought that went into the holding of a proper pre-trial conference.
2. I will deal with these issues in due course.

3. The merits were conceded by the Defendant at the start of the trial – why this could not have been done earlier is rather puzzling as the Defendant has absolutely no experts or witnesses of its own to refute any of the evidence put forward by the Plaintiff, and the trial proceeded on quantum only.
4. The main issue regarding quantum was the report of the Industrial Psychologist who points out that the Plaintiff ran an informal business sewing and selling traditional dresses for women and girls as well as duvet sets, chair covers and peg bags which she sold on order and at social grant pay points and from door-to-door.
5. Unfortunately, as the business was a cash one, there is no proof of income and the Plaintiff also did not have a bank account.
6. As a result Defendant was not disposed to admitting Plaintiff's income which was alleged to be between R7 000,00 and R13 000,00 per month, nor was Defendant disposed to admit the actuarial calculation for future loss of income in the amount of R1 003 633.
7. In paragraph 1 (*supra*) I raised the issue of the Special Plea and the pre-trial and I will deal with these issues first.
8. I have seen too many of these RAF matters in which the same Special Pleas are repeated verbatim in one matter after another. What makes it even more irksome and frustrating is the fact that, in this particular

matter, it is clear that the Special Pleas were filed without any regard to the documents placed at the disposal of the Defendant and were abandoned without further ado at commencement of the trial.

9. The issue of the pre-trial is even more frustrating:

9.1. Judges in North Gauteng are burdened with an ever-growing number of RAF matters which are set down daily;

9.2. the roll of 6 May alone had 29 RAF matters standing down from earlier in the week and 109 RAF matters set down on the day roll.

10. Judges in this division are now also additionally burdened with having to hold RAF pre-trials because practitioners are not doing their own work.

11. Of the matters allocated to me, this morning's RAF matter settled once allocated but contained a pre-trial minute that was not deserving of the description and then this matter in which the pre-trial minute is equally deserving of censure.

12. The present pre-trial minute is a document of some 26 pages in length.

13. Other than it stating in the beginning that both parties' versions are set out in their pleadings and other than the admissions made by

Defendant in respect of documents and the experts to be called by Plaintiff, there are simply no answers provided to the admissions sought by the Plaintiff.

14. Similarly, under a heading "Admissions Required and Enquiries to be directed by the Defendant" the response is

"To be advised".

Suffice it to say that no admissions were sought by the Defendant.

15. This minute is dated and signed 17 January 2014.
16. Neither of the two counsel provided me with a more current pre-trial minute and I thus assume that the second pre-trial was not held.
17. Rule 37 has as its purpose the curtailing of issues so that a Court is placed in a position where it knows exactly which issues will proceed and what evidence is required and similarly, not required.
18. The pre-trial minute is also there to provide a guideline on the duration of trial once all necessary admissions have been made. (My emphasis).
19. Pre-trial minutes in the format given to me are deserving of censure and given this I intend to show my displeasure by disallowing the costs

of the calling of attending, drafting, perusing and signing of the pre-trial meeting and pre-trial minute for both parties.

20. Counsel were not present at that pre-trial held on 17 January 2014 - had they been, I would have disallowed their costs of attendance as well as the minute is not worth the paper it is written on.
21. I turn now to deal with the merits of the matter.
22. At the outset, the Defendant conceded the merits of the matter as well as general damages in the amount of R350 000,00 and gave an undertaking as set out in paragraph 8.2 of the Particulars of Claim and such an order will thus be made.
23. The Plaintiff abandoned paragraph 8.1 of the Particulars of Claim (i.e. past medical and hospital expenses) and moved for an amendment of paragraph 8.3 of the Particulars of Claim so that it reads "R1 832 100,00". Mr Mathabatha, on behalf of the Defendant, objected to the amendment on the basis that his client is prejudiced. The objection was overruled as he had been in possession of the Report of Mr Minnaar (the actuary) since 14 April 2015 and thus there can be no possible prejudice suffered by the Defendant in this regard.
24. The only issues thus to be decided were the Plaintiff's past and future loss of earnings and the costs of suit.

The facts (none of which, nor the injuries, were disputed) are, briefly, the following:

25. On 17 November 2008 and at 06h30 when the Plaintiff was on her way to sell her wares at Idutwya at the social grant pay points, she was injured when two motor vehicles collided and one of them hit her.
26. She was rendered unconscious and woke up at the scene of the accident. From there she was taken to the Butterworth Hospital where she was treated for a large severe degloving injury of the left leg. She remained in hospital for three months and was then referred to the Frere Hospital in East London for a further two months.
27. It is common cause that she also sustained the following injuries: dislocation of her right knee, a fracture of the medial malleolus of the right ankle and ligamentous damage and a deep wound of the gluteal groove.
28. She underwent major split-skin grafting of the right lower leg. No treatment was given to the wound of the gluteal groove which took three years to heal.
29. The following experts gave reports and their qualifications and expertise is conceded by the Defendant:
 - 29.1. Dr G Read (orthopaedic surgeon);

- 29.2. Mr P W White (plastic and reconstructive surgeon);
- 29.3. Ms J van Zyl (industrial psychologist);
- 29.4. Mr Minnaar (Actuary).
30. Dr Read summarises the Plaintiff's injuries as follows: *"Internal derangement (instability). Right leg: severe scarring/soft tissue damage. Right ankle and foot: medial malleolus fracture and ligamentous injury"*.
31. Ms van Zyl has summarised the sequelae of the injuries at p 3 – 5 of her report. The most notable are the following (at p 24 – 26 of bundle):
- "The Plaintiff has difficulty sitting or standing for lengthy periods, she cannot bend and squat, she cannot lift and carry heavy objects, she experiences chronic pain in her ankle and knee, she experiences chronic pain in her right shoulder, she has dizzy spells, her memory is impaired. She suffers from depression."*
32. None of these were placed in dispute by Defendant. In fact, during cross-examination it was put to the Plaintiff that the sequelae were admitted by the Defendant.
33. Defendant however placed in dispute the Plaintiff's income and time of accident as there was no documentary proof of same.

34. Thus, the Defendant refused to admit either Ms Van Zyl's report or Mr Minnaar's report and these two experts had to be called so necessitating a further day of trial.
35. Ms van Zyl was called. Her evidence was simply that as contained in her report. She confirmed that Plaintiff did not provide her with proof of income and reported that, according to the Plaintiff, she earned R7 000,00 to R13 000,00 per month profit from her sewing business. The Plaintiff had supported her entire family for 14 years prior to the accident as her husband did not work and she had put all three children through school through her business and would have continue without this business for years to come which Ms van Zyl took to be age 65 but may well have been past that depending on her health and the availability of customers.
36. Given the lack of proof of income Ms van Zyl used the 2008 income of semi-skilled workers in the non-corporate/informal sector as a guideline for the quantification of Plaintiff's pre-morbid earning potential as set out in The Quantum Hearbook of Robert Koch (2008) which ranges between R12 800,00 and R98 500 per annum.
37. With a reported income of between R84 000,00 and R156 000,00 per annum , this placed Plaintiff within the upper percentile.
38. Ms van Zyl concludes by stating that Plaintiff's injuries have resulted in "functional limitations and permanent impairment" which has "probably

rendered her unemployable in all capacities in the formal and informal labour markets due to the sequelae of her injuries". She states that as a result, the Plaintiff has suffered a total loss of earnings calculated from date of accident until retirement.

39. Cross-examination delivered nothing new nor anything of note.
40. The Plaintiff was a dignified, neatly dressed woman who clearly struggled to walk and required the assistance of a walking aid. She was clearly affected by her injury and broke down when describing what had happened to her and the consequences of the accident on her daily life.
41. She explained that at the time of the accident she was on her way, by foot, to a pension pay point and was carrying a large bag with the clothes etc, she had made to sell there.
42. She had been sewing and selling traditional garments since ± 1994/1995 and with the money she received she had supported her family including two sons and a daughter (the latter of which who also had an 8 year old child) and had put them each through school until Grade 12 each and had even paid for her daughter's college until she'd dropped out.

43. Her mother had passed away at the age of 84 and she had hoped to emulate her. She would have worked "... as long as my limbs would carry me..." as she put it.
44. She earned R7 000,00 – R10 000,00 from making and selling her garments but since the accident she could not longer sit for long periods, operate either a manual or electric sewing machine or carry her heavy bag to the pay points and she could not walk unaided.
45. Her husband has been unemployed since 1999, her eldest son lives in East London, her middle child (son) lives in Johannesburg and her daughter and granddaughter live with her.
46. The highwater marks of cross-examination delivered up the following evidence:
 - 46.1. that her sons do not support her financially but sometimes Siyabulela (the second son) will send her money if she asks him;
 - 46.2. that she also grows cabbage and potatoes to sell for extra income;
 - 46.3. that she wrote her garment orders down in a book which she discarded shortly after the accident as no-one told her she needed to keep it to prove her income;

46.4. that she did not keep receipts of the material purchased and she had sell the dresses she made for R250 – R350 each;

46.5. that she had gone to the RAF office in Port Elizabeth and was told that she needed to give them her business licence and bank statements to prove her income. That the RAF official had given her a form but the East London branch asked for three references. So she handed in the forms to the RAF official at Vryheid and gave one Zikiswa, one Zandela and a Ms Yoyo as references but the RAF had lost the form and this is when she became discouraged and discarded the order book she'd been using;

46.6. that she received a disability grant of R1 300 per month since 2010 and her husband also received a pension of R1 300,00 per month and she had a Nedbank account since 2010;

46.7. It was put to her during cross-examination that:

46.7.1. her injuries were not disputed by Defendant;

46.7.2. that it was not disputed that she gave three references on the RAF forms (which had subsequently been lost by the RAF);

46.7.3. that if the court accepted she had been working, that an agreed average monthly income of R10 000,00 could be used to calculate past and future loss of earnings.

46.8. She had been very healthy prior to 17 November 2008 and the only time she had needed to see a doctor was for a caesarean.

47. Mr Minnaar's, the actuary, evidence used R120 000,00 per annum (as agreed) as Plaintiff's average income to calculate pre- and post-morbid loss of earnings. He assumed that Plaintiff would have retired at age 70.

48. Mr Minnaar has made no allowance for interest on damages, for the effect of mortality from date of accident to present time or for contingencies and his calculation is the following:

Accrued loss	R828 467
Prospective loss (to age 65)	R416 515
Prospective loss (to age 70)	R587 118
Thus total prospective loss	R1 003 633

49. Cross-examination of Mr Minnaar delivered absolutely nothing of value.

50. Thus the question before me is whether I must accept Plaintiff's version of her income despite a lack of documentary proof? Mr Mathebathe submitted that Plaintiff was not the most reliable of witnesses and that given the fact that she discarded valuable evidence

and had not called any corroborating witnesses her evidence should be treated with caution. He submitted that the inference a court should draw from the fact that Plaintiff had discarded valuable evidence corroborating her income, was that if the documents were available, it would have reduced her income.

51. I do not agree: any inconsistencies in Plaintiff's evidence were so minor that they had no serious impact on her credibility. She came across as a dignified and truthful witness and I have no difficulty in accepting her version especially in light of Defendant's concession that she had provided them with the names of three witnesses and they had lost this evidence.
52. Furthermore, the Plaintiff's evidence that she supported her husband and three children from her income as a seamstress, put her children through school, paid for her daughter's tertiary education and built on rooms and security at her home stands uncontroverted. How the Plaintiff would have done this on an income other than that put forward by her is not explained by the Defendant nor would any explanation other than that given by the Plaintiff be plausible.
53. Clearly Defendant did not investigate this claim properly or at all.
54. This being so, the Defendant has conceded that for purposes of the calculation to be made an average monthly income of R10 000,00 should be used.

55. If so, what of the contingencies? Mr Myhill submitted that given Plaintiff's age and her circumstances a contingency of 30% should be applied and is reasonable given all the circumstances.
56. Mr Mathebathe submitted that a contingency of 50% is reasonable and quoted the matter **Mutual Assurance Association Ltd v Maqula** 1978 (1) SA 805 (A) as support. However, in this matter the Plaintiff had an unstable work record which is not the case in the present matter. Thus the facts are completely different and the two cases are incomparable and can be differentiate.
57. I also accept that the Plaintiff would have worked to age 70 as the sole breadwinner (undisputed), in the informal sector.
58. I am of the view that a contingency of 30% is reasonable which places the amount to be awarded (R1 832 100,00 – R549 690,00) at R1 282 470,00.
59. The only outstanding issue is thus the question of costs : Mr Myhill submitted that the second day of the trial was solely necessitated by the conduct of Defendant who only conceded merits and general damages shortly prior to commencement of trial at 14h00 on 6 May 2015. Furthermore, had these concessions, so the argument goes, been made timeously on 6 May 2015 the matter could have proceeded and been finalised on the first day. This is further compounded by the Defendant's insistence that Ms van Zyl and Mr

Minnaar be called in circumstances where cross-examination failed to contribute anything of value to the matter

60. Mr Myhill referred me to Louw v Road Accident Fund 2012(1) SA 104 (GSJ) and sought an attorney and client costs order for the qualifying fees of Van Zyl and Minnaar and the second day of trial.
61. Mr Mathebathe submitted that had Plaintiff submitted proof of income, the calling of two experts would not have been necessary.
62. I do not agree with Defendant's submission. There was absolutely no necessity to insist that the Plaintiff call either van Zyl or Minnaar especially when cross-examination delivered nothing of value and resulted in an unnecessary waste of costs. It is my view that Plaintiff should not be out of pocket as a result of the Defendant's failure to timeously admit and concede merits and general damages.
63. In the circumstances I am inclined to agree with Mr Myhill's submissions.
64. Thus the following order is granted:
 - 64.1. the Defendant is ordered to pay the Plaintiff the amount of R350 000,00 for general damages;
 - 64.2. the Defendant will furnish an undertaking as provided for in section 17(4)(a) of Act 56 of 1996;

64.3. the Defendant will pay Plaintiff an amount of R1 282 470,00 for past and future loss of income;

64.4. the amounts set out in 62.1 and 62.3 (*supra*) will bear interest at 9% p.a from 14 days after date of judgment to date of payment;

64.5. the Defendant is ordered to pay costs of suit as follows:

64.5.1. the qualifying fees of:

(a) Dr G Read

(b) Mr P B White

(c) Ms J van Zyl

(d) Mr I J Minnaar

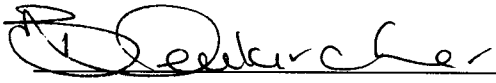
on a party and party scale;

64.5.2. the costs consequent upon the experts testimony of Ms J van Zyl on 6 May 2015 and MR IJ Minnaar on 7 May 2015 on an attorney and client scale;

64.5.3. the remainder of the costs of 6 May 2015;

64.5.4. the remainder of the costs of 7 May 2015 on the attorney and client scale.

64.6 the costs of the calling of, attending, drafting, perusing and signing of the pre-trial meeting and pre-trial minute for both parties are disallowed.

A handwritten signature in black ink, appearing to read 'B. Neukircher', written over a horizontal line.

B NEUKIRCHER (AJ)

13 May 2015