NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 1395/2008

DATE:12/12/2011

In the matter between:

NKASHA ZENOBIA TSAKANI — Plaintiff

and

ROAD ACCIDENT FUND — Defendant

CASE NO: 44114/07

SANDERSON MUMSY ROSE

Obo HLULANI MAGALELA WILSON BALOYI — First Plaintiff

SANDERSON ROSE MUMSY N.O

Obo N L B — Second Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MAKGOKA, J:

[1] In these matters the only issue in dispute is costs. The cause of action arose from the same incident and the defendant is the same, hence a combined judgment. The plaintiffs in both matters have withdrawn their claims against the defendant. They had claimed from the defendant in terms of the provisions of the Road Accident Fund Act 56 of 1996. The plaintiff in case number 1395/08 (Nkasha) sued in her personal capacity as well as her representative capacity as mother and natural guardian of three minor children. The plaintiff in case number 44114/07 (Sanderson) sued in her capacity as mother and natural guardian of a minor child.

[2] The claims arose from the death of Mr. Mavhaza Wilson Baloyi ("the deceased) who died as a result of a motor vehicle collision on 31 August 2004. The plaintiffs alleged in her particulars of claim that they were married to the deceased during his lifetime and that they had minor children with the deceased.

[3] The plaintiffs withdrew their claims as the actuarial calculation showed that they were not entitled to any payment from the defendant (Nkasha both in her representative and personal capacities, and Sanderson in her representative capacity). The actuarial report, dated 26 July 2011 was obtained at the request of the defendant following an agreement by the parties in a

pre-trial conference on 6 June 2011 to obtain an actuarial calculation from one actuary.

[4] The plaintiff's claims were formally withdrawn shortly after the actuarial report was made available to them and on the eve of the trial date, on the basis that the actuarial calculation had extinguished their respective at claims.

[5] It appears that the plaintiff's claims were extinguished by their inheritances in terms of the final liquidation and distribution account, which, when taken into account in actuarial calculations resulted in them not being entitled to any amount of damages.

[6] The defendant contends that the plaintiffs should be ordered to pay the costs of the action. This, Mr. *Tisani* for the defendant argued, is premised on two bases: first that the plaintiffs' as the dominas litis, failed to obtain the actuarial calculation well in time, which would have indicated that they did not have a claim. The information necessary to assess the quantum of their loss, was at ail times available to the them and the plaintiffs did nothing about that until the defendant took the initiative to do so. The plaintiff were also in the process of finalizing the Liquidation and Distribution account. Had they taken diligent steps when the claim was instituted, they would have immediately been aware that they did not have a claim against the defendant. Second, in respect of Nkasha, it was eventually established that the minor children were in fact not her biological children, but of Sanderson and a Mrs Ellen Peters, respectively.

[7] Ms Erasmus and Ms Schreuder appeared for the plaintiffs, and opposed the costs relief sought by the defendant. Ms Erasmus contended that each party should pay its own costs as all the parties were at all relevant stages up until 27 July 2011, believed that Nkasha had a claim. Therefore it came as a surprise to everyone that the actuarial calculation demonstrated that she did not have a claim. On receipt of the actuarial report, the plaintiff reconsidered her

position and not pursued her claim further. Ms Erasmus also pointed out that Nkasha's previous attorneys of record withdrew in June 2011 and the present attorney had only been only on record since then. The defendant itself, so was the argument, did not do much to move the matter forward in terms of obtaining the actuarial calculations. The defendant only requested the necessary documentation in this regard, only in mid July. The previous attorneys, submitted Ms Erasmus, did not properly advise the plaintiff.

[8] With regard to the children, Ms Erasmus handed up an affidavit deposed to by the plaintiff wherein she explains that it was due to a misunderstanding between herself and her previous attorneys that a claim was instituted in her representative capacity on behalf of the children. Ms Erasmus submitted therefore that there was no intention on behalf of the plaintiff to mislead the court in that respect.

[9] Ms. Schreuder, for Sanderson made common ground with Ms. Erasmus and argued that the defendant should pay the costs of Sanderson, at least on a magistrate court scale. (It is not clear on what basis counsel contended for this).

[10] The issue of costs is generally a matter pre-eminently within the discretion of a court, taking into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs, as to be fair and just between the parties. The general rule is that costs follow the event. The court can, for good reason, deprive a successful party of costs.

[11] In the present case, it is clear that the plaintiffs are the unsuccessful parties in the sense

of having withdrawn their action against the defendant on the basis of an actuarial report having shown that she did not have a claim against the defendant. I agree with Mr. Tisani, for the defendant, that the plaintiffs' lack of diligence led to the withdrawal of the action at the proverbial eleventh hour. I appreciate that in the case of Nkasha the previous attorneys might have been lax in the prosecution of her case. I also accept her explanation with regard to the minor children (that there was a misunderstanding resulting in her claim been formulated also in her representative capacity). However, none of these points to any fault or reprehensible conduct on the part of the defendant to justify me to deprive it of costs. Ms Erasmus argument that the defendant itself did nothing about actuarial calculation suffers one major flaw: the plaintiff is the dominus litis. It is not upon the defendant to gather evidence for the plaintiff's case. Under normal circumstances the defendant would obtain counter expert opinion to that obtained by the plaintiff.

[12] I therefore find no basis to deprive the defendant of costs. If Nkasha's attorneys are indeed responsible for the state of affairs resulting in the costs order I am about to make, the plaintiff can have recourse against the attorneys.

[13] In the result I make the following orders:

1. In case number 1395/2008, the plaintiff is ordered to pay the defendant's costs.

2. In case number 44114/2007, the draft order marked "X" is made an order of court.

TM MAKGOKA

JUDGE OF THE HIGH COURT

DATE HEARD : 28 JULY 2011

JUDGMENT DELIVERED : 12 DECEMBER 2011

FOR THE PLAINTIFF IN

CASE NO: 44114/07 : ADV L SCHREUDER

INSTRUCTED BY : VAN NIEKERK ATTORNEYS,

PRETORIA

FOR THE PLAINTIFF IN

CASE NO: 1395/08 : ADV N ERASMUS

INSTRUCTED BY : LUBISI ATTORNEYS, TZANEEN AND

HOFFMAN LESHILO ATTORNEYS, PRETORIA

FOR THE DEFENDANT : ADV SM TISANI

INSTRUCTED BY : GELDENHUYS LESSING MALATJI

INC, PRETORIA