IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

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Case number: 06771/2015

In the matter between:

MBATHA BONGANI **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

SUMMARY: Costs disallowed at preliminary stage of proceedings.

Trial action partially resolved by settlement – merits of the action (i.e. negligence or fault) agreed; an undertaking to pay future healthcare costs 'after such costs have been incurred and upon proof thereof'. Draft order deals at great length with costs to be paid on High Court scale to legal representatives and to medical and other 'experts'.

Court refused to award costs at this stage and ordered costs to be "costs in the cause". The reasons were

(1) No examination, reports or opinions of any identified or unidentified 'experts' are before the court and have not been utilised to reach this preliminary agreement on merits. The legal representatives themselves have not utilised nor agreed on these reports and the experts. The court has no idea who may, or may not, ever be utilised as an 'expert'. Such

'expert' has not yet contributed to any result – which result is currently only the issue of fault as to the accident.

(2) The judge presented with an agreement only on the merits has no idea of idea of the injuries sustained or their *sequelae* or the financial consequences thereof and the likely quantum of damages. The focus has been on merits only. Perusal of pleadings is of no assistance. I have in this week been asked for high court costs where only a minimal amount has been agreed and when I checked the particulars of claim found a claim for R 2.5 million (two million five hundred thousand rand). In other words, the pleadings give no indication of the ultimate result. Thirdly, it would be most improper of a judge to have a peek at the reports of the various potential witnesses who may perhaps be called as experts to form a preliminary opinion as to the ballpark of possible quantum of damages. Absent any idea as to the quantum of damages which may be awarded (if any), a court is placed in a very difficult position as to the scale of costs which should be incorporated in such an order made by the court. I decline so to do where I have no idea at all as to the possibility of any quantum ever being determined.

(3) The section 17(4)(a) undertaking only has financial value if and when healthcare treatment is required, the patient himself or herself pays for such treatment and thereafter claims a refund from the RAF. A judge who has heard no evidence on the injuries sustained and the medical and other treatment which may be required in the future can have no view on the quantum of or the financial implications of such undertakings. In numerous matters I was asked to have regard to the so-called 'medico-legal' reports so that I could extract therefrom the opinions of potential but unheard witnesses as to what might be the cost of treatment in the future. The problems are obvious – I have not heard from such witnesses, I do not know whether their opinions should be accepted, most importantly their opinions have obviously not been accepted by both parties and legal representatives since they have been unable to settle quantum based on those reports and opinions.

(4) What is casually called a 'road accident claim' or an 'RAF claim' is a claim for damages. A decision as to the merits is merely a preliminary stage on the way to achieving the intended outcome – monies paid over as damages. When presented with an agreement that merits have been settled but nothing else, I would expect a court to have some concern why it is expected that fees and disbursements should be paid when there is no actual outcome, no identifiable result, and no money in the pocket of the road accident victim. It may of course be that the matter is never pursued for actual damages. Where the parties cannot resolve the question of quantum at this stage when they are in the very court tasked with trying to allocate these disputes to be heard by civil trial judges then one would expect the legal representatives to stand up and say that they have resolved the merits and ask to be allocated to a trial judge for quantum to be determined. After all, they have claimed to be and have been judicially certified as 'trial ready' in accordance with the new judicial case management/certification procedure. No case is placed on the trial roll unless the parties

have claimed at a hearing before a judge that the case is 'trial ready' and the judge has, after investigation, so certified. There should be nothing to prevent any party from asking for allocation for quantum to be determined instead of asking for the determination of quantum to be postponed indefinitely.

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. At issue, on more than one occasion this week, in the hundreds of trial matters where the RAF is the defendant, has been the question of payment of legal and 'expert' costs where no funds whatsoever were to be transferred by way of damages to the plaintiff road accident victims.

2. I am indebted to Advocate C. Tshidada who was the only counsel who took the time and the trouble to argue the matter – without preparation but with vigour and sense. I handed down a very *extempore* ruling with reasons in the middle of roll call of some 80 matters so that all legal representatives would understand my reasoning. I indicated at the time that I would have the judgment transcribed and would correct same so that it might become coherent and of assistance.[1]

3. I also encouraged Advocate Tshidada to bring an application for leave to appeal notwithstanding that my ruling is obviously both provisional and limited to the issue of costs. This is an important issue and certainly operates to the great disadvantage of the legal representatives of the plaintiff road accident victims whilst the defendant RAF legal representatives continue to be paid for all their services irrespective of their success or failure and whether or not only a preliminary stage of the litigation is reached. It may well be that other judges, thinking slowly and carefully and without the pressure of managing some 350 matters set down for the trial roll in one week, may come to a different opinion.

THE PROBLEM

4. In this particular matter the draft order presented to me reads as follows:

[1] The original extempore judgment is messy and somewhat unclear. It is attached to this judgment to ensure that what I now tender is not a complete reworking of my reasoning but a 'correction' to ensure that what I said is of greater assistance. Rule 42 allows for clarification of a judgment.

"By agreement between the parties and having considered the matter, it is ordered that:

1. The issue of liability is separated from the issue of quantum in terms of Rule 33(4) of the Uniform Rules of the court.
2. The Defendant shall be liable for 80% of the Plaintiff's proven and agreed damages suffered by the minor child as a result of a motor collision in question.
3. The defendant shall furnish to the plaintiff on behalf of the minor an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to the plaintiff, arising out of the injuries sustained in a motor vehicle collision in question and the *sequelae* thereof, after such costs have been incurred and upon proof thereof, limited 80%.
4. The issue of quantum is postponed *sine die*.
5. The Defendant shall be liable for costs of the action to date hereof on high court scale.
6. The defendant is to make payment of the taxed costs within fourteen days of taxation, such costs to include the costs of counsel and costs of medico legal experts who assessed and filed medico legal reports on behalf of the plaintiff.
7. The defendant is to make payment of the taxed costs within (14) days of taxation.
8. Contingency fee agreement is not in compliance with the Contingency Fee Agreement Act, in the circumstances it is declared null and void.
9. The plaintiff's attorney shall be entitled to recover from the plaintiff such fees as are taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to exceed 25% of the amount awarded or recovered by plaintiff."

5. In approximately 50% of the matters where I was asked to make draft orders an order of court, the tenor of the draft order is to the same effect although some do spell out the number of and names of experts whilst others do not. That number seems to range from about 5 to 13 experts.[2] The draft order in this particular case does not reveal the identity or occupations or the number of 'medico-legal experts' who are to be paid.

[2] The number of matters where there are such draft orders is approximately 30% of the total number of cases on the roll.

6. What I have found striking is the absence of any result of any significance whatsoever for the plaintiff road accident victim. It is of no assistance to them that they have succeeded on the merits and that the 'insured driver' in the form of the RAF is agreed to be negligent. There is, after all, no sign that the RAF will perhaps one day be liable to pay some monies over to the plaintiff if and when any damages are proven.

7. The section 17(4)(a) undertaking only has value to a plaintiff road accident victim who is in the happy position of being able to fund his or her own medical or hospital or other expenses associated with injury and thereafter prove such expenditure to the RAF and claim a refund. Of course, absent any payment of monetary damages to the plaintiff road accident victim, many (if not most) of such victims are unable to make payment in advance and therefore cannot claim a refund from the RAF with the result that the undertaking is not of any great practical effect.

8. Accordingly, when calling the trial roll i.e. managing the court in which trial disputes are allocated to judges, making orders of court where trials have become settled, postponing or removing matters, I have queried the focus on payment of fees to legal practitioners and to 'experts' in the absence of any payment to the plaintiff road accident victim.

COSTS RESERVED OR COSTS IN THE CAUSE

9. My reasoning in this particular matter and in others of identical import is as follows.

10. I am being asked to make an order that the merits of the road accident are settled and the issue of quantum (if any) is postponed to another day. I am asked to award costs on the High Court scale to advocates and attorneys and the healthcare practitioners or actuaries who may perhaps be used as expert witnesses when it comes to the issue of quantum.

Merits of negligence or fault in a motor accident do not require medical experts.

11. At this stage of the proceedings, all the court has been asked to do is to make an order that the parties have agreed the issue of merits – which party was entirely or partially responsible for the road accident.

12. The court is not asked to make any finding and there is no agreement between the parties that any injuries have been sustained, that such injuries are of a nature that they have any *sequelae*, that past or future medical or other expenses have or will be incurred, that future therapy of any sort is required, that the earning capacity of the road accident victim is impaired in any way or that the plaintiff should receive general damages as a form of *solatium*.

13. Accordingly, the examinations and reports and opinions of the orthopaedic surgeons, neurosurgeons, neurologists, ophthalmologists, audiologists, psychologists, occupational therapists, actuaries and so on are not before the court at this stage. In coming to a decision to endorse the settlement reached between the parties, the court is not asked to and has no regard to the opinions of these potential 'expert' witnesses. Nor have the legal representatives themselves reached any views of the opinions of the potential 'expert' witnesses since they have reached no agreement in regard thereto – they have only agreed on the fault involved in road accident.

14. No court should therefore order that the fees of 'experts' be paid at this stage. No court has any idea of who may be called as a witness and who may not. No court has any idea of the purpose for which a witness may be called and if he or she will be found to be an 'expert'. No court knows what reliance may be placed on the opinion of this potential witness if such opinion is actually tendered.

15. In any event, no such 'expert' witness has contributed to the only result achieved thus far – agreement as to the cause or fault involved in the road accident. The only 'expert' witnesses who may have contributed to such agreement on the merits is an engineer, a mechanic, an accident reconstruction expert or any other person whose expertise has been used to determine the merits i.e. the circumstances of the road accident and the fault (if any) associated therewith. There has been no indication in this, or any other matter, that the services of such an expert have been used and his or her fees should be covered in the draft order.

The scale of fees

16. Mr Tshidada asked for a further opportunity to address the court after I had made my ruling. I listened to him. He pointed out that, if the matter had been heard as a trial and the court had itself decided on the merits, then the successful party would be entitled to ask for costs. Accordingly, it was unfair to penalise legal practitioners merely because they had settled this issue and asked that it be made an order of court when, after a trial on the merits only, they would have been awarded their fees.

17. His argument has merit. However, I did not and do not find it persuasive.

18. It is correct that, at the end of a trial, a judge would make an order as to the merits and, assuming that there has been a separation of issues and quantum[3] is to be heard at a later date, would usually be asked to make an order as to costs. However, the difficulty both for a trial judge where there is a separation and also for the judge

[3] In terms of Rule 33(4) of the Uniform Rules.

managing the trial roll call is that the judge has no idea as to whether or not costs should be awarded on the magistrate or regional or high court scale.

19. This is not a minor issue. Firstly, in such circumstances the trial or roll call judge has no idea of the injuries sustained or their *sequelae* or the financial consequences thereof and the likely quantum of damages. The focus has been on merits only. Secondly, perusal of pleadings is of no assistance. I have in this week been asked for high court costs where only a minimal amount has been agreed and when I checked the particulars of claim found a claim for R 2.5 million. In other words, the pleadings give no indication of the ultimate result. Thirdly, it would be most improper of a judge to have a peek at the reports of the various potential witnesses who may perhaps be called as experts to form a preliminary opinion as to the ballpark of possible quantum of damages.

20. Absent any idea as to the quantum of damages which may be awarded (if any), a court is placed in a very difficult position as to the scale of costs which should be incorporated in such an order made by the court. I decline so to do where I have no idea at all as to the possibility of any quantum ever being determined.

The section 17(4) (a) undertaking

21. All draft orders reflecting agreement reached between the parties which include a clause in respect of an undertaking conclude with the words "after such costs have been incurred and upon proof thereof".[4] These words are correctly taken directly from Act 56 of 1996.

22. The result is that an undertaking, as provided for by Statute, only has financial value if and when healthcare treatment is required, the patient himself or herself pays for such treatment and thereafter claims a refund from the RAF. I have already pointed out the difficulties in obtaining any refund from the RAF where the patient is without means and cannot make advance payment and is in receipt of no damages to fund such advance payment.

23. A judge who has heard no evidence on the injuries sustained and the medical and other treatment which may be required in the future can have no view on the quantum of or the financial implications of such undertakings.

24. In numerous matters I was asked to have regard to the so-called 'medico-legal' reports so that I could extract therefrom the opinions of potential but unheard witnesses as to what might be the cost of treatment in the future. The problems are obvious – I

[4] Section 17(4)(a)(i)

have not heard from such witnesses, I do not know whether their opinions should be accepted, most importantly their opinions have obviously not been accepted by both parties and legal representatives since they have been unable to settle quantum based on those reports and opinions.

25. In several cases I was referred to medical reports in an attempt to argue that the quantum of the value of the undertaking would bring the total capital above magistrate court costs. One expressed the opinion that there is a 2% possibility that epilepsy might result and I was then asked to take into account the cost of medication required to control epilepsy. I took the view that a 2% possibility did not meet the test of a "balance of probability". Another expressed the opinion that the patient will require physiotherapy costing R 8 000 per month which would suggest that two sessions of physiotherapy a week will be provided by a physiotherapist charging R 1000 per session when the rates allowed by the Health Professions Council do appear encompass such. I did not find such opinions as to costing compelling but of course I had not heard from the potential witness themselves. But, as I have pointed out, both parties did not simultaneously find the opinions compelling since they could not agree on quantum based on those reports.

26. In the present case, I cannot find that a section 17(4)(a) undertaking by the RAF that it will pay up to 80% of the healthcare costs "after such costs have been incurred and upon proof thereof" is any indication to the court that the plaintiff has or will receive any benefit in respect of such undertaking and that such undertaking justifies success for the road accident victim.

No proven damages

27. What is casually called a 'road accident claim' or an 'RAF claim' is a claim for damages. A decision as to the merits is merely a preliminary stage on the way to achieving the intended outcome – monies paid over as damages.

28. When presented with an agreement that merits have been settled but nothing else, I would expect a court to have some concern why it is expected that fees and disbursements should be paid when there is no actual outcome, no identifiable result, and no money in the pocket of the road accident victim.

29. It may of course be that the matter is never pursued for actual damages.

30. Where the parties cannot resolve the question of quantum at this stage when they are in the very court tasked with trying to allocate these disputes to be heard by civil trial judges then one would expect the legal representatives to stand up and say that

they have resolved the merits and ask to be allocated to a trial judge for quantum to be determined.

31. After all, they have claimed to be and have been judicially certified as "trial ready" in accordance with the new judicial case management/certification procedure. No case is placed on the trial roll unless the parties have claimed at a hearing before a judge that the case is "trial ready" and the judge has, after investigation, so certified. There should be nothing to prevent any party from asking for allocation for quantum to be determined instead of asking for the determination of quantum to be postponed indefinitely.

32. There are some cases where the parties advise the court that they have settled the merits, have agreed general damages, have agreed loss of earning capacity but are unable to agree contingencies and they are allocated a judge for that limited issue to be determined. Many times the disputes are not so narrowly limited in respect of quantum and the allocated judge is asked to determine wider issues or every issue pertaining to quantum.

33. In this week in the trial court (22nd to 26th August 2016) we were able to allocate all those matters requiring to be allocated to a judge from both the previous court week and this week. This was thanks to some incredibly hard working judges some of whom heard three or four or five matters per day. In other words, there is no reason why those who have settled merits but are unable to agree quantum cannot ask to be allocated to a trial judge to hear their dispute on quantum for which they have claimed to be "trial ready".

CONCLUSION

34. It was for these reasons, regrettably not set out with clarity or coherence that I made the numerous rulings on costs which I did this week. In some cases the order was "costs in the cause" and in others it was "costs reserved". The parties elected the form of the ruling.

35. In the present matter I amended the draft order presented to me. Paragraphs 5,6,7,8 and 9 were deleted and a new paragraph substituted dealing with costs.

36. Accordingly, an order was made:

    a. The draft order as amended is made an order of court.

b. The draft order as amended by deletion of paragraphs 5,6,7,8 and 9 and substitution of a new paragraph 5 which reads “the costs of the action to date are costs in the cause”.

DATED AT JOHANNESBURG 26TH AUGUST 2016

SATCHWELL J

Dates of hearing: 23rd August 2016.
Date of judgment: 26th August 2016.