

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 14849/13

Date: 19 September 2014

In the matter between-

MASHININI, NOMFUNDU J

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

BAM J

1. On 8 March 2013 the plaintiff instituted action against the defendant claiming damages, loss of maintenance, in her personal capacity and her capacity as mother and guardian of minor children as dependants of her husband who died as a result of a motor vehicle collision on 9 September 2008.
2. The merits were settled in favour of the plaintiff. The quantification of the plaintiffs loss of support amounted to R946 112,00. It is common cause that the Compensation Commissioner, in terms of the Compensation Occupational Injuries and Diseases Act, No.130 of 1993, (The "*Act*") made an award to the plaintiff in the amount of R845 960,00. Of this amount R56 000 had already been paid. The balance is to be paid by way of monthly amounts of R4686.48. The remaining amount, the difference between the amount awarded by the commissioner and the amount the defendant is liable for, must obviously be paid by the defendant.
3. The issue that the amount awarded to the plaintiff by the Commissioner should be deducted from the amount the defendant would be liable to pay to the plaintiff was raised by the defendant a few days before the trial.
4. On 9 September 2014 the matter came before me on trial. I was then informed by counsel appearing for the plaintiff, Adv. Shakoana, that the only issue this court has to adjudicate upon is an application by the applicant that the payment of the balance of R789 960 still to be paid by the Compensation Commissioner be

stopped and the defendant ordered to pay that amount, including the balance between the two amounts referred to above, to the plaintiff.

5. Adv. Frosch, appearing for the defendant confirmed that it was indeed the only issue. Ms Frosch submitted that the Act provides specifically that the amount to be paid by the Compensation Commissioner should be deducted from any amount for which the defendant may be liable.

6. There was no substantive application in this respect before Court. Mr Shakoane, however, indicated that he would call the plaintiff to substantiate the application. Due to the fact that counsel were *ad idem* that the issue turned upon the interpretation of section 36 of the Act, thus a point of law, Mr Shakoane was requested to state on what grounds the application is founded. Mr Shakoane referred to instructions by his instructing attorney and submitted that he will be able to refer to relevant authorities in that regard but that he did not have it at hand.

7. Mr Shakoane then moved for a postponement to enable him to draft heads of argument. Ms Frosch objected, again pointing out the provisions of the Act and indicated that if the matter is postponed the defendant will on the return date ask for *de bonis propriis* costs order against the plaintiffs attorneys of record and/or counsel.

8. The matter was postponed to 11 September 2014. Mr Shakoane's heads of argument was Emailed to my chambers on 10 September.

The defendant's heads of argument were delivered by hand.

9. On 11 September 2014 Mr Shakoane applied to call the plaintiff to substantiate the application referred to above. Ms Frosch objected and submitted again that the issue before court turned upon a question of law. Mr Shakoane conceded the point but submitted that he should be allowed to call the plaintiff to substantiate and motivate the application. Despite the fact that the issue actually turned upon the interpretation of section 36 of the Act, in view of the fact that the defendant would not be prejudiced, I allowed Mr Shakoane to adduce the plaintiffs evidence.

10. The plaintiff, Mrs Mashinini, stated that the monthly amount paid to her by the Commissioner was inadequate. She said that she was unable to maintain herself and the children on that amount. She has already approached the Commissioner's Office on three occasions to get the monthly amount increased, but was not successful. She said the Commissioner actually reduced the amount of the monthly payments when two of her children became of age. She was advised by the Commissioner's office to borrow money from banks. That she did but now she has to repay the banks. Upon a question posed by me she said the Commissioner actually reduced the total amount to be paid to her. She did however not have any documentary proof thereof.

11.The plaintiffs situation was mentioned in a letter from the plaintiffs attorneys, dated 8 September 2014, addressed to the defendant's attorneys. It was further mentioned in the said letter that the monthly payments started at R3000 and that it was recently increased to the present R4686.48.

12.In view of the fact that the parties at the inception of the matter were ad idem about the amount awarded by the Commissioner I enquired from Mr Shakoane whether the Commissioner has actually reduced the total amount to be paid to the plaintiff. Mr Shakoane responded that he had no proof thereof.

13.Section 36 of the Act clearly provides that the court considering to award damages in matters of this nature shall have regard to the amount to which the employee is entitled in terms of the Act.

It was argued by Ms Frosch that any amount awarded by the Commissioner has to be deducted from the amount the defendant is liable to pay. Mr Shakoane, on the other hand submitted that only the amount already paid out to the plaintiff, R56 000, has to be deducted and that this court should make an order stopping any future payments by the Commissioner and to order the defendant to pay the balance.

14.Section 36 was considered and discussed in *RAF v Maphiri* 2004(2) SA 258 (SCA). On p265 par [12] the following is stated:

"The section requires a court to deduct ('have regard to') the 'compensation' to which the employee 'is entitled' under the A - not part of the compensation or certain heads of the compensation only - in determining the employees entitlement vis-a-vis the third party.

This is made abundantly clear by ss (A), which defines by way of extention the meaning of 'compensation' for purposes of the section. That compensation must be deducted from the award of 'damages' (skadevergoeding has always been the Afrikaans rendition) and not from certain heads of damages."

15. Mr Shakoane's argument was that only the amount actually paid out by the Commissioner, R56 000, should be deducted from the total amount due to the plaintiff and that the defendant should therefore be ordered to pay the balance. Mr Shakoane pointed out that it was stated in *Maphiri* that the amount *actually* paid by the Commissioner is the amount that should be deducted.

16. However, when the relevant paragraphs in the *Maphiri* judgment is read in context, there can be no doubt that the whole amount awarded by the Commissioner must be deducted from the amount the defendant is liable for.

17.The problem experienced by the plaintiff, namely that the monthly payments made by the Commissioner

are inadequate, is clearly an issue between the plaintiff and the Commissioner. It has nothing to do with the defendant. The plaintiffs application therefore stands to be dismissed.

18. Ms Frosch contended that the plaintiffs attorney and /or counsel appearing for the plaintiff should be ordered to pay the defendant's costs in regards to the application in question *de bonis popriis*.

19. Although the application lodged by the plaintiff was without substance, I am of the opinion that it cannot be said that the plaintiffs attorneys were in any way *malo fide* and that their conduct should merit such a cost order.

20. It also has to be taken into account that the issue of the Commissioners award was raised by the defendant but a few days before the trial. On the other hand it must be assumed that the plaintiffs attorneys were aware of the award made by the Commissioner. Both parties are in my view equally responsible for the costs of the 10th and 11th September.

21. Paragraphs 2, 3, 4, 4.1 and 7 of the draft order is amended as follows: Paragraph 2 substituted by:

2. The Defendant is ordered to pay to the plaintiff the amount of R100152,00 (R946 112 less the Compensation Commissioner's award of R845 960,00), which amount shall be payable on or before 1 October 2014 to the credit of the trust account of the plaintiff's attorneys of record.

Paragraph 3. Whole paragraph deleted.

Paragraphs 4 and 4.1 substituted by:

4. The defendant is ordered to pay the plaintiff's costs up to and including 9 September 2014. The costs to include the costs of senior junior counsel.

4.1 Each party is to pay its own costs for 10 and 11 September 2014.

7. The amount of R890 112,00 is replaced by R100 152.00.

22. The draft order as amended, marked "X", is made an order of court.

AJ BAM

JUDGE OF THE HIGH COURT

