

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 36275/2014

DATE: 15 OCTOBER 2014

In the matter between :

MOTLOUNG MAKHOSI MIRRIAM

(IDENTITY NO: [...])

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT ON THE PLAINTIFF'S EXCEPTION AGAINST THE

DEFENDANTS PLEA

1.

Plaintiff issued summons against the Defendant on the 20th May 2014 for payment of damages arising out of injuries that the Plaintiff sustained in a motor vehicle collision that occurred on the 2nd September 2012.

2.

On the 30th June 2014 the Defendants filed a plea to the Plaintiff's particulars of claim.

3.

On the 3rd July 2014 the Plaintiff excepted to the Defendant's plea.

4.

I refer to the parties herein as "Plaintiff" and "Defendant".

5.

The grounds of the exception are that the Defendant's plea lacks averments sufficient and essential to sustain the defence that the Plaintiff is not entitled to be awarded general damages for non-pecuniary loss. The Defendant namely alleges in the plea that the Plaintiff is only entitled to be awarded general damages for non-pecuniary loss if she sustained a serious injury within the meaning of Section 17 of the Road Accident Fund Act 56 of 1996 ("the Act") as amended. The exception then states in paragraph 2 thereof that the Plaintiff lodged a serious injury assessment form on the prescribed RAF 4 Form wherein Dr Colin Barlin found that the Plaintiff's injuries have resulted in a serious long term impairment or loss of body function which constitutes a serious injury within the meaning of Section 17 of the Act. The exception then in paragraph 3 alleges that the Defendant must within 90 days from the date on which the serious injury report was sent by registered post or delivered by hand to the Defendant accept or reject the serious injury assessment report. In paragraph 4 of the exception it is alleged that the Defendant has failed and/or refused and/or neglected to plead whether or not the Defendant has either timeously or at all handled the claim of the Plaintiff by accepting or rejecting the serious injury assessment. In paragraph 5 of the exception it is then alleged that the Defendant is precluded or estopped from rejecting the serious injury assessment report.

6.

The exception prays that the exception be upheld, that paragraph 6.3 and prayers 2 and 3 of the Defendant's plea be struck out and the Defendant be ordered to pay the Plaintiffs costs of the exception.

7.

In the paginated papers that appear in the court file for purposes of adjudicating the exception there indeed is a RAF 4 Form completed by Dr Barlin that finds on the narrative test that the Plaintiff suffered serious injury that would entitle her to damages for non-pecuniary loss or as it is usually called, general damages. This report was delivered to the Defendant under a Rule 36(4) notice and was received by the Defendant's attorneys on the 3rd June 2014. That medico legal report was also prior to issue of summons delivered to the Defendant. The date of receipt thereof is stamped on the report and indicates the date 22 November 2013. That applies to both the RAF 4 Form and the medico legal report of Dr Barlin.

8.

Thus, on a proper reading of Regulation 3 as quoted in the exception, the Defendant should have disputed the RAF 4 Form and required to Plaintiff to submit herself to a serious injury assessment even before issue of

summons.

9.

However, none of this occurred.

10.

The Plaintiff's particulars of claim in paragraph 10 thereof alleges that the Plaintiff suffered serious, long term impairment or loss of body function and in paragraph 11 alleges that the Plaintiff has suffered general damages for pain, suffering, loss of amenities of life and disablement and disfigurement in the sum of R600 000.00.

11.

Nowhere is it pleaded in the particulars of claim that the Plaintiff submitted an RAF 4 Form to the Defendant and that no objection was made to the contents of the RAF 4 Form.

12.

The Defendant's plea denies the contents of paragraphs 10 and 11 of the particulars of claim and alleges that should it be found that the Plaintiff did sustain bodily injuries then the Defendant pleads that it is not liable to compensate Plaintiff for non-pecuniary damages as the Plaintiff's injuries are not of a serious nature.

13.

The Plaintiff nowhere in her particulars of claim alleged that a RAF 4 Form was delivered to the Defendant and that more than 90 days passed without objection from the Defendant.

14.

The essence of the Plaintiff's exception is set forth in paragraph 8 of the Plaintiff's Heads of Argument and reads as follows:

"8. It is respectfully submitted that:

8.1 Compliance with the provisions of Regulation 3 quoted above by the Defendant is peremptory; and -

8.2 The failure by the Defendant to allege and submit such compliance estopped from raising

the defence that the Plaintiff is precluded and estopped from being awarded general damages by the above Honourable Court. ”

15.

At the hearing of this matter on 6 October 2014 Mr Van As appeared for the Plaintiff and Mr Tisane for the Defendant.

16.

The Defendant failed to file Heads of Argument timeously and did so on the 6th October 2014. There was an attempt to file the Heads with the senior judge, Preller J, on the 2nd October 2014. Despite the absence of a practice note and Heads of Argument that were timeously filed by the Defendant, I heard the matter.

17.

When the matter was called Mr Van As withdrew the exception but disclaimed liability for costs. He did so on grounds of the existence of a letter dated the 19th September 2014 that was apparently telefaxed to the Plaintiff's attorneys of record by the Defendant's attorneys on the 23rd September 2014. Until the 6th October 2014 the Plaintiff's were apparently unaware of the existence of the letter dated the 19th September 2014. By agreement between the parties the letter was handed up to me together with the telefax dispatch confirmation indicating the date of the 23rd September 2014.

18.

The importance of the letter of the 19th September 2014 is that the Defendant, in that letter, rejects the Plaintiff's serious injury assessment reports and requires the Plaintiff to be examined by the Defendant's medical practitioner. The letter in addition disputes the exception and requires the Plaintiff to withdraw it with immediate effect in the absence whereof the Defendant will oppose the exception and seek a punitive costs order.

19.

Nowhere in the particulars of claim did the Plaintiff allege that a RAF 4 Form was delivered to the Defendant. The Defendant's denial of the contents of paragraphs 10 and 11 of the particulars of claim was perfectly in order and undoubtedly the exception never had any merit.

In the light thereof that the exception was withdrawn, it is not necessary for me to rule on the exception as such. The exception as filed is, however, relevant for purposes of deciding the question of the costs.

21.

Mr Van As argued that costs of the exception ought to be reserved or be held to be costs in the cause. His argument was that if the letter dated the 19th September 2014 were timeously or at least before the exception was taken on the 3rd July 2014, delivered to the Plaintiff, the Plaintiff would never have excepted.

22.

Mr Tisani's argument was that the exception was bad from the outset, should never have been taken and caused the Defendant to incur the costs of having to brief counsel to appear and to oppose the exception and costs ought to follow the result and accordingly the Plaintiff must pay the costs of the exception.

23.

Mr Tisani frankly conceded the lateness of the Defendant's Heads of Argument and failure to timeously file same.

24.

I indicated to the parties that a trial court would not be in a better position to deal with the costs of the exception and that I accordingly decline to reserve the costs.

25.

The final argument of Mr Van As regarding costs was that costs ought to be costs in the cause or that I should order that each party pays its own costs.

26.

The Plaintiff's exception was undoubtedly without any merit. On this basis it might be said that the Plaintiff ought to be ordered to pay the costs of the exception.

27.

On the other hand the Defendant itself is to blame for the fact that a timeous objection to the RAF 4 Form and report of Dr Barlin was not taken. In addition the Defendant required an indulgence from me, in the

absence whereof the matter would have been postponed *sine die* and the Defendant ordered to pay the costs in view of its failure to file a practice note and Heads of Argument timeously in terms of the Practice Manual applicable in this Division.

28.

I carefully considered the question of costs. Both parties were to a certain extent in the wrong. The Plaintiff was overeager in taking an exception. The Defendant simply failed to comply with its obligations both as regards objection to the RAF 4 Form and with regard to filing Heads of Argument and a practice note. In the circumstances I am of the opinion that the fair and just costs order is that each party ought to pay its own costs arising from the exception filed by the Plaintiff.

29.

Accordingly I make the following order:

The Plaintiff and the Defendant are each liable for her/its own costs arising from the exception dated 2 July 2014.

SIGNED AT PRETORIA ON THIS 15TH DAY OF OCTOBER 2014.

AJ LOUW: ACTING JUDGE