



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 9974/2008

In the matter between:

NESHANIE CHURRAN

Plaintiff

and

REKA DEVI SINGH NO

Defendant

ORDER

- (a) There will be judgment for the plaintiff in the amount of R1 million.
- (b) The plaintiff is ordered to pay the costs occasioned by the amendment of her particulars of claim pursuant to the notice dated 15 August 2018, the objection thereto and the consequential amendments to the defendant's plea.
- (c) The plaintiff is ordered to pay the costs occasioned by the adjournment of the trial on 3 September 2018, including the qualifying fees of Dr Fraser, Rene Stewart and Sonia Hill.
- (d) The plaintiff is ordered to pay the costs of the opposed hearing on 20 May 2019.
- (e) Save as aforesaid, the defendant is ordered to pay the costs of the action, including those previously reserved, all such costs to include those consequent on the employment of two counsel.

(f) The costs referred to in (e) above will include the qualifying fees of the following expert witnesses: CB Wright, Thilor Naidoo, Ureka Sinanin, Prof Schlebusch, Dr RN Gongal, Gerard Jacobson, Jackpersad and Partners, Pradeep Bahadur, Kavisha Naidoo and Nirvenie Elder.

JUDGMENT

Delivered on: 24 May 2019

Ploos van Amstel J

[1] The plaintiff in this matter claimed damages from an attorney who had allowed her claim against the owner of a dog to become prescribed. The matter has now been settled on the basis that the defendant's deceased estate will pay to the plaintiff a sum of R1 million plus costs. What remains in issue, and was argued before me, was what order should be made in respect of the costs that were reserved on 3 September 2018, when the matter was on the trial roll, but was postponed. There are also some minor issues as to what should be included in the costs orders.

[2] The summons was issued on 22 July 2008. It was pleaded in the particulars of claim that the plaintiff had instructed the defendant to claim damages from one Chetty, whose dog had bitten her. The case against the defendant was that he had negligently allowed the claim to become prescribed, in consequence of which the plaintiff suffered damages in an amount of R1 033 368.

[3] The matter was set down for trial on 14 March 2011, but was removed from the roll as one day was not enough. The matter was then set down for trial on 12 to 14 March 2014, and was again removed from the roll by agreement. It was then set down for trial for 2 to 13 March 2015. The defendant passed away before the trial date arrived and the matter was again removed from the roll. The executrix of his deceased estate was substituted in his stead.

[4] By then the particulars of claim had been amended pursuant to a notice dated 15 December 2014, and additional claims were introduced relating to future medical expenses, the cost of an automatic motor vehicle, the cost of a domestic aide and future loss of income. The quantum of the claim was increased to an amount of R5 958 124.

[5] The trial was then set down for 10 days for the period 3 to 14 September 2018. The notice of set down was served on 1 September 2017.

[6] On 15 August 2018 the plaintiff delivered a notice of intention to amend her particulars of claim. The effect of the proposed amendment was that the averment that the plaintiff was bitten by a dog was to be deleted and replaced by an averment that two dogs chased and jumped on the plaintiff, causing her to fall and injure her hip and head. Further grounds of negligence on the part of the attorney were added, and averments that the plaintiff would require at least three hip replacements, specially made shoes and additional medication. The quantum of the claim was increased by more than R3 million.

[7] The notice of 15 August gave the defendant a period of 10 days within which to object to the proposed amendments. A notice of objection was delivered on 28 August 2018. It stated that the primary ground for the objection was the prejudice to the defendant occasioned by the lateness of the application for the amendment, which did not afford the defendant sufficient time to properly investigate and consider its full impact and if deemed necessary make consequential amendments to its plea and secure additional evidence in relation thereto. It also stated that the proposed amendment would introduce a new cause of action which had prescribed, introduced additional grounds of negligence on the part of an attorney who was no longer alive, sought to introduce new injuries, and increased the quantum of the plaintiff's claim by more than R3 million. On 29 August 2018 (two clear court days before the trial) the plaintiff delivered a substantive application for the amendments foreshadowed in the notice of 15 August.

[8] On 3 September 2018 the matter came before the deputy judge president for trial. The order which he made, apparently by agreement, was that the matter was adjourned to 20 to 31 May 2019; the defendant was directed to furnish the plaintiff with copies of her discovered documents; it was recorded that the defendant withdrew her objection to the plaintiff's proposed amendments in the light of an agreement between the parties that the trial would be postponed and that the wasted costs be reserved; the plaintiff was directed to file her amended pages on or before 5 September; the defendant was directed to deliver any consequential amendments to her plea by 26 September; the plaintiff was directed to file any replication by 3 October; and the wasted costs occasioned by the adjournment were reserved for determination by the trial court.

[9] Pursuant to the amendments to the particulars of claim the defendant amended her plea and contended that a new cause of action had been introduced, which was prescribed, and that in any event the plaintiff would not have been able to recover from the owner of the dog the damages which she sought from the defendant. This elicited a replication from the plaintiff.

[10] I was informed from the Bar that when it became known that the deceased estate of the attorney is insolvent and that the limit of his professional indemnity insurance was R1 million, the matter became settled.

[11] It is not in issue that the plaintiff is entitled to the costs of the action, including those consequent upon the employment of two counsel. The parties are not ad idem about the detail of the costs order, and in particular the costs reserved when the matter was adjourned on 3 September 2018. Today's hearing concerned mainly the question of the reserved costs, and the parties are also not in agreement as to who should pay the costs of today's hearing.

[12] Counsel for the plaintiff urged me to find that a lack of cooperation on the part of the defendant's attorneys with regard to pre-trial procedures contributed to the need for the adjournment on 3 September 2018 and that the plaintiff's application to amend was not the sole cause. He was however constrained to concede that if there had been no application to amend the trial would have proceeded.

[13] It should be noted that on 3 September the defendant withdrew her objection to the proposed amendments on condition that the matter would be adjourned so as to give her time to consider her position and effect consequential amendments to her plea.

[14] Counsel for the defendant informed me from the Bar that if the plaintiff had not pursued the amendment the matter would have proceeded on 3 September. This may have been a predicament for the plaintiff as the particulars of claim stated that she had been bitten by a dog, which turned out not to be the case.

[15] It seems plain to me that the real reason for the adjournment on 3 September was the application by the plaintiff to amend her particulars of claim. Counsel for the plaintiff criticised the basis on which the defendant objected to the proposed amendments and suggested that it was frivolous. Whatever the merits were of the consequential amendments to the plea, I would not label them as frivolous. In any event, if the defendant had not objected to the proposed amendments within the 10 day period allowed in the notice, and the plaintiff effected the amendments, I have little doubt that the defendant would have succeeded in an application for an

adjournment at the plaintiff's expense so as to allow her to consider her position in the light of the new factual allegations and the increase of the quantum by more than R3 million.

[16] The plaintiff will therefore be ordered to pay the costs occasioned by the adjournment of the matter on 3 September 2018. She should also pay the costs occasioned by the application for the amendments. Today's hearing only concerned the costs issue, as the matter became settled some time ago.

[17] The draft costs orders proposed by the parties with regard to the witnesses look more like extracts from bills of costs than costs orders. These matters seem to me to be for determination by the taxing master, and if either party is unhappy with the taxation the remedy is a review. The only order I am willing to make in relation to the expert witnesses relates to their qualifying fees.

[18] The order that I make is as follows:

- (a) There will be judgment for the plaintiff in the amount of R1 million.
- (b) The plaintiff is ordered to pay the costs occasioned by the amendment of her particulars of claim pursuant to the notice dated 15 August 2018, the objection thereto and the consequential amendments to the defendant's plea.
- (c) The plaintiff is ordered to pay the costs occasioned by the adjournment of the trial on 3 September 2018, including the qualifying fees of Dr Fraser, Rene Stewart and Sonia Hill.
- (d) The plaintiff is ordered to pay the costs of the opposed hearing on 20 May 2019.
- (e) Save as aforesaid, the defendant is ordered to pay the costs of the action, including those previously reserved, all such costs to include those consequent on the employment of two counsel.
- (f) The costs referred to in (e) above will include the qualifying fees of the following expert witnesses: CB Wright, Thilor Naidoo, Ureka Sinanin, Prof Schlebusch, Dr RN Gongal, Gerard Jacobson, Jackpersad and Partners, Pradeep Bahadur, Kavisha Naidoo and Nirvenie Elder.

Appearances:

For the Plaintiff	:	Y Moodley (together with RK Ramdass)
Instructed by	:	Siva Chetty and Company
	:	Pietermaritzburg
For the Defendant	:	R Pillemer
Instructed by	:	Bowman Gilfillan
		C/o A K Essack, Morgan Naidoo & Co
	:	Pietermaritzburg
Date Judgment Reserved	:	20 May 2019
Date of Judgment	:	24 May 2019