



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

In the matter between:
138/2021

Case No:

MONDE ARTHUR SOKAYA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

REASONS FOR ORDER

BANDS J:

[1] This matter came before me on the civil trial roll on 13 June 2023, having been enrolled on four previous occasions,¹ namely, 3 February 2023; 10 February 2021; 17 February 2023; and 27 February 2023. On the morning of the hearing, I was advised that save for certain issues pertaining to costs, the remainder of the issues had become settled between the parties.

¹ In addition to which the matter had also previously been set down in November 2022, the costs for which are not disputed.

[2] The terms of the parties' settlement, inclusive of the plaintiff's proposed order in respect of costs, was reduced to writing in the form of a proposed draft order. For present purposes, it suffices to repeat the content of the disputed paragraphs only, which read as follows:

"5. *Defendant shall pay Plaintiff's costs of suit on the scale as between party and party, on the High Court Scale, up to and including 13 June 2023, as taxed or agreed, such costs are to include:*

5.1 ...

5.2 ...

5.3 ...

5.4 *The costs of the trial for 3 February 2023, 10 February 2023, 17 February 2023, 27 February 2023 and 13 June 2023.*

5.5 *The costs of Plaintiff's attorney and counsel upon attendances at Court on the dates 10 March 2023 and 24 March 2023.*

5.6 *The costs of Plaintiff's counsel for the trial days trial for 3 February 2023, 10 February 2021, 17 February 2023, 27 February 2023 and 13 June 2023 as well as counsel's preparation costs..."*

[3] In respect of the above, it was common cause that the matter was set down for trial on 3 February 2023 and thereafter on 13 June 2023. Accordingly, the proposed cost order, insofar as it related to those dates, was undisputed. The discord between the parties was rooted in the plaintiff's contention that the matter had been set down for trial on 10 February 2023; 17 February 2023; and 27 February 2023 ("*the disputed dates*"), which the defendant disputes, alleging that the

matter had, on the disputed dates, remained on the trial roll for settlement purposes. The parties were further unable to agree on the costs for attendances by the plaintiff's legal representatives in front of the Deputy Judge President Van Zyl ("*the DJP*") on 10 and 24 March 2023 respectively.

[4] I pause to emphasise that nothing in this judgment is to be misconstrued in any manner as to: (i) limit the powers of the taxing master/mistress in the performance of his/her functions; and/or (ii) interfere in any manner with the exercise of his/her discretion.

[5] On 14 June 2023, having been satisfied that the matter had been set down for trial on the disputed dates, as well as the plaintiff's entitlement to the attendance fees on 10 and 24 March 2023 respectively, I granted an order in the terms proposed by the plaintiff. On 8 August 2023, an amended order was granted at the request of the parties in accordance with Uniform Rule 42(1)(b), correcting a patent error contained in the order of court,² the details of which are irrelevant for present purposes.

[6] What follows are the reasons for the order issued by me, in respect of costs, having been requested by the defendant to provide such reasons.

[7] At the commencement of the proceedings, three bundles of documents were handed up and marked as exhibits "A", "B", and "C" respectively. Apparent from exhibit "B1", read together with the draft order commencing on "B3", is that the

² The capital sum having been recorded as R1,577,660 instead of R1,577,660.15.

I was advised by the parties that the disparity in the said sum, whilst somewhat insignificant, was causing a delay in the processing of payment.

matter was set down for trial on 21 November 2022. What is clear from the content of exhibit “A”, being correspondence between the parties’ respective legal representatives, is that during the period of 10 November 2022 to 21 November 2022, various offers of settlement in respect of the merits, with the application of an apportionment, were made by the defendant. Ultimately at 08h45 on the morning of the trial, 21 November 2022, the merits were conceded 100% in favour of the plaintiff.

[8] A draft order to this effect was prepared by agreement between the parties, with the plaintiff’s claims for quantum, in terms of paragraph 4 of such draft, being separated in terms of Uniform Rule 33(4) and postponed to Monday 28 November 2022. An amendment to the draft order is apparent from the face thereof, by way of a hand annotation, reflecting that the postponement was *for settlement purposes*.

[9] Whilst paragraph 4 is absent from the stamped order of court, the court file was endorsed as follows:

“In Chambers: Order i.t.o. the Draft Order as amended and initialled. (Plaintiff’s claims for quantum be and is hereby separated i.t.o. Rule 33(4) and postponed to 28 November 2022 for settlement purposes.”

[10] That this was the *de facto* position was not placed in dispute by either party in argument.

[11] Mindful of the above, the plaintiff’s counsel brought to my attention that on the postponed date, being 28 November 2022, the defendant inexplicably sought to

contend that it was no longer prepared to concede liability and that it would seemingly be proceeding on the basis that the issues of liability and quantum both remained in dispute. The reasons for this are unclear. That the defendant laboured under such mistaken belief is apparent from exhibit "B59", being correspondence addressed to the plaintiff's attorney of record by a representative of the defendant, on 10 March 2023, recording an offer of settlement, to which a 20% apportionment was applied. The plaintiff's insistence that the issue of liability had previously been conceded, which concession had been recorded in an order of court, which is apparent from exhibit "B60", fell on deaf ears. Bafflingly, the issue of the apportionment was only resolved on the morning of 13 June 2023, being the date on which the matter served before me. This is apparent from exhibit "B61", being an email addressed to the plaintiff's attorney of record on 13 June 2023, at 08h33, by one Jonas Khutele, a representative of the defendant. The email reads as follows:

"Good day!

We have revised the offer as follows and same will be sent to you when the printout is available:

<i>General Damages</i>	<i>R450 000</i>
<i>Past loss</i>	<i>R143 701</i>
<i>Future loss</i>	<i>R983 958</i>
<i>Total offer</i>	<i>R1 577 660</i>

Further note that we have removed apportionment.

We wait to hear from you.

Kind regards" [own emphasis].

[12] Notwithstanding the aforesaid, and without addressing the above misnomer, it was argued on behalf of the defendant that the issue of liability had become settled on 21 November 2022 and that from that date onward, the only issue in dispute between the partes remained that of quantum. Whilst this may be so in fact, implicit in the aforesaid correspondence is that the defendant was, at all material times, from 28 November 2022 up until 13 June 2023, of the misguided view that the issue of liability remained a live issue for determination by the court.

[13] With no progress being made on 28 November 2022, the matter was referred back to the DJP and an order was granted, on 1 December 2022, in terms of which the defendant was ordered to pay the plaintiff's costs from 22 November 2022 to 1 December 2022, as taxed or agreed, together with other ancillary relief. More particularly, paragraph 4 of the order reads as follows:

"4. Defendant shall make a decision on whether or not it accepts that Plaintiff sustained a serious injury arising from the motor vehicle accident which occurred on 2 April 2018 at the intersection of Khawulela Street and Ramra Street, NU-B, Motherwell, Gqeberha on or before 13 January 2023."

[14] The matter was thereafter set down for trial on 3 February 2023, on which date the matter was postponed at the request of the defendant to 10 February 2023, the reason for such request being self-evident from the content of paragraph 2 of the order. The order of court reads as follows:

*"1. The matter be and is hereby postponed to the 10th of February 2023.
2. The Defendant is to address paragraph 4 of the order dated 1 December 2022 on or before 10 February 2023.
3. The cost of the postponement is to be costs in the cause."*

[15] On 10 February 2023, more than two months subsequent to the DJP's order, directing the defendant to take a decision in respect of the "seriousness" of the plaintiff's injuries, the matter came before Collett AJ. Once again, the matter was postponed at the request of the defendant, the aforesaid issue still being unresolved. Accordingly, an order was granted in the following terms:

- “1. *The matter be and is hereby postponed at the request of the Defendant to the 17th of February 2023.*
2. *The Defendant is to address paragraph 4 of the order dated 1 December 2022 on or before 17th February 2023.*
3. *The costs of the postponement are costs in the cause.*”

[16] Collett AJ, in endorsing the draft order of court on 10 February 2023 made a note thereon that the file was to be return to the DJP. The matter was thereafter allocated to Zilwa J for 17 February 2023. On 17 February 2023, at the request of the defendant, an order was granted in the same terms as that on 10 February 2022, but for the inclusion of extended time frames, as follows:

- “1. *The matter be and is hereby postponed at the request of the Defendant to the 27th of February 2023.*
2. *The Defendant is ordered to address paragraph 4 of the order dated 1 December 2022 on or before 23 February 2023.*
3. *The costs of the postponement are to be costs in the cause.*”

[17] It was argued by the plaintiff's counsel that Zilwa J, when granting the aforesaid order, expressed his concern that the matter was again being postponed. That this was in fact so, was not placed in dispute on behalf of the defendant.

[18] There is no record in the court file as to what transpired on 27 February 2023, nor does there appear to be an order of court issued on the said date. Neither of the legal representatives were able to shed any light on this aspect save for the submission on behalf of the plaintiff's counsel that on each and every postponed date, not only did he hold a trial brief, but the plaintiff was ready to proceed with the trial.³

[19] The attorney appearing on behalf of the defendant, during the course of argument referred me to two decisions of the Eastern Cape High Court, *Williams NO v Taxing Mistress of the High Court, Port Elizabeth; in re: Williams NO v Road Accident Fund and Others* 3 All SA 658 (ECP) ("*Williams*") and *Trollip v Taxing Mistress of the High Court and Others* 2018 (6) SA 292 (ECG) ("*Trollip*"), both of which repeat the accepted position that:

*"...the acceptance of a brief on the running roll requires the advocate to give consideration to the possibility that the matter may not commence on the allocated date and that it may run for longer than anticipated. The acceptance of a brief on trial in these circumstances necessarily means that the trial fee may be earned not on the day allocated for the trial but on a subsequent day. If the matter settles either on the allocated date or thereafter, the entitlement to a trial fee will depend upon whether the advocate has, as the authorities put it, lost the opportunity to earn the fee. Where the day has been "reserved" it necessarily follows that no other appearance work has been or can be conducted on that date. In the event that other appearance work is performed the advocate is not entitled to charge the trial fee on the basis merely that the day has been reserved."*⁴

³ Presumably the plaintiff either would have elected to abandon general damages or seek a separation of issues at the commencement of the trial.

⁴ *Williams* (supra) at paragraph [25].

[20] Neither decision is of assistance to the defendant on the facts of the present matter. The legal principles as to when counsel is entitled to raise a trial fee is not in dispute between the parties. What is in dispute is the factual position as to whether or not the matter was set down for trial purposes, on the disputed dates. On the facts of this matter, it is not disputed that in the event of a finding that the matter was set down for trial and was not merely standing down for the purposes of settlement, the plaintiff would be entitled to the order sought.

[21] If I accept that the defendant was under the mistaken belief that the trial was to continue on the issues of both liability and merits, which I must accept for the reasons stated, coupled with the following further facts: (i) there are no notes on the file to indicate that the matter was merely standing down and/or that it was to remain on the trial roll for settlement purposes only; (ii) the orders of court on the disputed dates specifically postponed the matter to future dates, with the orders granted on 10 and 17 February 2023 recording that the postponements were at the request of the defendant; (iii) the file was not retained by each and every judge seized with the matter, for the purposes of settlement, but instead transferred to alternative judges, seized with civil trials in the relevant week/s; (iv) no cogent reason was advanced on behalf of the defendant as to why the matter was not set down for trial on the disputed dates; there was no reason upon which to find that the matter was set down for any other reason than for the purposes of trial on the disputed dates.

[22] I now turn to the attendances by the plaintiff's legal representatives on 10 and 24 March 2023. Apparent from exhibit "B53" is that whatever transpired on 27 February 2023, the matter remained on the trial roll. A draft order was prepared by

the parties in which it was recorded that the defendant accepted that the plaintiff had suffered serious injuries in terms of Regulation 3(3)(b) of the Regulations. Notwithstanding the draft order, the matter stood down, at the request of the defendant, until 24 March 2023 when the matter was ultimately removed from the trial roll and the following order was issued:

- “1. *The matter is removed from the trial roll and the registrar may enrol the matter for hearing on 13 June 2023.*
2. *The costs of the trial are to be costs in the cause.*
3. *Defendant having accepted that Plaintiff has suffered serious injuries in terms of Regulation 3(3)(b) of the Regulations, Plaintiff shall be entitled to claim such general damages as he may prove or as agreed upon.”*

[23] Such attendances were not disputed on behalf of the defendant during argument, which attendances I accept. Moreover, no reasons, whatsoever, were advanced on behalf of the defendant as to why the plaintiff was not entitled to such costs, in the absence of which, there exists no reason as to why they ought not to have been granted.

[24] Having already granted the order on 14 June 2023, I need make no further order.

I BANDS

JUDGE OF THE HIGH COURT

Coram: Bands J
Date heard: 13 June 2023
Order granted: 14 June 2023
Amended order: 8 August 2023
Written reasons: 1 November 2023

Appearances:

For the plaintiff: Adv Frost
Instructed by: Labuschagne van der Walt Inc.
6 Cuyler Street, Central, Gqeberha

For defendant: Ms Jantjes
Instructed by: State Attorney
29 Western Road, Central, Gqeberha