IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DEVISION)

CASE NO: 05/15950

In the matter between:

SWANEVELDER, K.J. Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGEMENT

SATCHWELL J:

Introduction

1. The Road Accident Fund is a statutory body funded entirely through a levy imposed on the consumption of petrol by road users. Those who work for and administer and those who represent the Fund have a responsibility to road users and, particularly to those who are injured on South African roads, to ensure that public money is well spent and that they discharge their fiduciary responsibilities with expertise and care. If claims administrators and managers employed by the Fund and attorneys and advocates instructed and briefed by the Fund do not have or do not exercise these attributes then they should not be entrusted with any

discretion regarding such public funds and the fate of injured road users.

2. This case provides an illustration of the absence of such care and expertise and accordingly I am directing that a copy thereof be sent to the Minister of Transport, the Chairperson and the Chief Executive Officer of the Road Accident Fund.

3. The RAF was the defendant in this matter which went to trial. In the course thereof it became apparent that neither defendant's attorney nor advocate intended to offer any coherent or substantiated defence to the plaintiff's claim or critical or pertinent challenge to the minimal evidence tendered in support of the plaintiff's claim. The details of these failures appear in the assessment of the evidence.

4. This judgment discusses the trial responsibilities of legal representatives as regards preparation for trial, cross-examination of the opposing sides witnesses, presentation of ones own case and the discharge of the onus on the balance of probabilities notwithstanding minimal challenge to ones version or evidence.

Litigation background [1]

5. On 11 February 2004 the 'insured vehicle' collided with the rear of the vehicle driven by the Plaintiff. A previous judgment of this court found the RAF liable for all damages sustained by the plaintiff as a result of this motor vehicle accident[2]. This court was originally only called upon to determine the quantum of such damages.

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1 The first 2 days of trial took place in court and proceedings were recorded in the usual manner. However, the air conditioning system in the High Court in Johannesburg has been working erratically for many years and completely ceased to work in the course of this trial. In the absence of windows of any source of oxygen, I decided it was necessary to proceed in chambers where I had two windows and had installed my own fans. Accordingly, the last 2 days of trial were held in my chambers and two dictaphones were used to record proceedings, one set of tapes are retained by plaintiffs attorneys and one set of tapes by the defendants attorneys.

2 Msimeki AJ on 31 August 2006.

6. Plaintiff alleges that, as a result of the injuries which she sustained in this motor vehicle accident, she suffered a cervical spine sprain (whiplash), damage to her teeth, gastritis resulting from use of painkillers and that her post-accident condition has led to depression. She instituted a claim for general damages, past and future medical expenses and past and future loss of earnings.

7. The Plaintiff practises as a dentist. The claim for loss of earnings is founded upon the allegations that pain, loss of mobility and resulting depression resulting from the whiplash and dental injury have had a notable impact upon her dentistry practice and ability to continue therewith[3]. Most notably, the greater portion of plaintiff's claim[4] is based upon her alleged inability to now pursue her profession as a dentist in the United Kingdom to which she avers she intended to relocate when her younger daughter completed her own studies and became sufficiently 'independent' to enable the plaintiff to leave South Africa.

8. Four days into the trial the parties presented me with an agreement[5] which recorded that certain sums (not disclosed to the court) were to be paid to the plaintiff in settlement of certain of her claims. The court was, in terms of this agreement, now only required to determine one issue – *"whether the plaintiff would have relocated to the United Kingdom if the accident did not occur and, if so would she have relocated by 1.1.2011; if not by 1.1.2011 by when she would have relocated*"[6]. The agreement between the parties records that certain sums of money (not disclosed to the court) have been agreed to be paid by the RAF dependant upon the determination of these issues by the court.

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3 Three expert witnesses - Ms Michelle Doran (biokineticist), Dr Shevel (psychiatrist), Mr Sher (orthopaedic surgeon) – all testified on behalf of the plaintiff.

4 The initial claim for loss of income was amended to R 800 000 and then the Plaintiff's heads of argument refer to a further amendment in the light of certain actuarial calculatioins to increase the claim under this head to R 5 354 615.

5 Annexure "E"

6 Clause 1 of the Annexure E

Evidence on relocation to the United Kingdom

9. The plaintiff is married but separated from her husband who now lives in New Zealand. She is the mother of two daughters, both living in South Africa, the elder of whom has qualified as a medical practitioner and younger of whom will qualify as a veterinary surgeon in 2010. She qualified as a dentist at the University of the Witwatersrand in 1980 and commenced her own practice in 1985 which still continues.

10. Plaintiff's evidence was that, prior to the motor vehicle accident, she had intended to relocate to the United Kingdom where she would find employment as a dentist. Pursuant to this desire she registered, for the first time, with the General Dental Council of the United Kingdom in 1998 [7].

11. However, the plaintiff did not emigrate when she first contemplated this move. She testified she did not wish to disturb her daughters academic opportunities. The plaintiff therefore decided to postpone such relocation until such time as her younger daughter appeared to be sufficiently independent. Since this daughter has embarked on a veterinary degree course, it seemed to the plaintiff that such 'independence' would be attained when she qualified in 2010 which would allow the plaintiff to move to the United Kingdom in 2011. She did state that it was possible that she may have left South Africa earlier than 2011, perhaps 2008 or 2009, as it seemed that her daughter was becoming increasingly independent.

12. The plaintiff testified that she travelled to the United Kingdom during 2003 and then attended two interviews with prospective employers.

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7 Exhibit D7 and 8, page 32 is a registration certificate for the year 1998. Page 33 of the same bundle is a certificate for the year 2005 but this was not led in evidence.

Plaintiff claimed that she had kept in touch with dentistry agencies. An undated circular from a dental practice not addressed to the plaintiff and two undated advertisement from unknown sources were referred to in the course of plaintiff's testimony.[8]

13. Plaintiff was born in 1952. She would therefore be fifty nine years old in 2011 when she claims she planned to relocate to the United Kingdom. The plaintiff testified that there is no required age for the retirement of dentists and claimed that she would continue practising for many years. Although the plaintiff claimed that she had kept in touch with individual practitioners and agencies in the United Kingdom, the only reference made to such an individual was to a Dr Mizrahi whom she stated had emigrated to the United Kingdom, was now in his eighties and still in private practice.

14. The plaintiff called an industrial psychologist, Mr K. P. Distiller, to testify on the prospects of plaintiff finding and maintaining employment in the United Kingdom from 2011 onwards and her likely earnings. He had accessed the British Dental Association and Department of Health websites and the British Dental Association journal as to salary scales and remuneration. He had spoken to two unnamed persons, one a dentist and one a general practitioner, who had informed him of a "huge demand" for dentists and given him estimates of what dentists were currently earning.

15. Mr Distiller was asked to address the issue of the plaintiffs age and likely prospects of employment as a dentist in 2011 when she would be fifty nine years old. He stated that retirement age in South Africa for dentists was a matter of "personal choice". He commented that a person such as the plaintiff who is a good and "passionate" dentist would "continue as long as possible" and that her life expectancy in South Africa was seventy seven years old. He estimated that she would "start tapering down her

8 Pages 44 to 47 of Plaintiffs bundle D.

practice" from the age of sixty five or seventy or "filtering down" from sixty five until seventy six years old. Mr Distiller testified that approach to retirement in the United Kingdom would be "the same" but, with the female life expectancy in the United Kingdom of eighty four years old , he would expect her to "taper down" to the year before "the year she was no longer with us".

16. That concluded the case for the Plaintiff on the issue which this court must now decide.[9] The Defendant led no evidence.

Defendants response to plaintiffs case

17. During the course of the trial counsel for the defendant failed to cross-examine the plaintiff and her witnesses on a number of highly relevant issues.[10] At the close of each witness's evidence this lack of critique and challenge was glaringly apparent. Accordingly, I placed on record each time that there were certain important questions which had not been put to the witness in cross examination and that there were certain vital issues which had not been explored or challenged by the defendant. I placed on record that it was not the function of this court to represent either party and I would not do so on behalf of the defendant but would indicate in argument the issues which I considered ought to have been explored, criticized or challenged on behalf of the defendant.[11]

18. As regards the issue which this court must now decide – whether or not

9 The medical evidence ie that of Dr Shevel, Mr Sher and Ms Doran is not relevant to the issue of relocation nor is that portion of the plaintiff's evidence which deals with her physical and emotional condition subsequent to relocation.

10 The failure to challenge the evidence led on behalf of the plaintiff by herself, Mr Sher, Dr Shevel, Ms Doran related to her entire case – allegations of physical injuries and the resulting pain, physical incapacity and depression and impact on her employment; her dental practice and earnings therefrom; the averment that she had intended to emigrate to the United Kingdom. However, I shall only deal with the failures insofar as they relate to the issues which I must now decide.

11 In Yuill v Yuill 1945 1 All ER 183 at 189 " The judge who himself conducts the examination … descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation." See also Hamman v Moolman 1968(4) SA 34) AD

and when if ever the plaintiff would have relocated to the United Kingdom had the accident not occurred – the following are an indication of the aspects which were not dealt with in cross-examination:

a. The plaintiff's dental practice which was the basis of her claim for loss of income and relied upon to support her relocation to the United Kingdom: the nature of her practice, number of patients, location and size of surgery, type of equipment and expenditure thereon, investment in practice, attendance at professional seminars, explanation of financial statements adduced in evidence with particular reference to capital value of equipment and business expenses.

b. Registration with the General Dental Council of the United Kingdom: whether the plaintiff had registered for any years other than 1998, why had she not discovered additional registration certificates or introduced them in evidence [12], how many dentists practising in South Africa were so registered on an annual basis and the reasons for registration of healthcare professionals other than emigration, the import of such registration for employment or professional purposes.

c. Reasons for emigration: the reasons for emigration prior to 1998, in 1998, in 2003 and thereafter, what plaintiff meant by 'economic reasons', plaintiff's knowledge of the United Kingdom including periods of residence or employment (locum or otherwise), her appreciation of UK lifestyle and employment demands, family ties in South Africa including two daughters and their families, her decision to remain in South Africa when her husband emigrated to New Zealand;

d. Relevance of childrens education to emigration: date of childrens' birth, schools attended, age of children when husband left for New Zealand, age of children and school attendance when first contemplated emigrating in 1998, knowledge of education system in the United Kingdom and enquiries made on behalf of children when emigration first considered, why educational opportunities for

12 It is noted that there a registration certificate for the year ending December 2005 but this was not introduced in evidence.

(younger) daughter precluded relocation to the UK at any time, why had emigration not taken place when younger daughter at primary school or high school or before tertiary education, when did her daughter commence her veterinary studies, when did the plaintiff decide not emigrate until her younger daughter had completed her studies.

e. Employment interviews in 2003 : the names of the firms or bodies with whom the plaintiff interviewed and in which towns, for which position, at what remuneration, the date when the position was to be filled, was the position permanent or temporary, was the interview sourced through professional journals, employment agencies or otherwise, whether the plaintiff was actually offered a position and the details thereof, was there any documentation pertaining to such interviews, why the plaintiff was attending interviews for positions she already knew she could not take up since she only intended to emigrate in seven years time, what the plaintiff believed she could learn in 2003 which would be relevant to employment in 2011.

f. Keeping in touch with professional agencies : which were these agencies, how did the plaintiff keep in touch with them, what did she learn from such contact, what documentation emanated from such contact.

g. Dentistry opportunities in the United Kingdom: was any information sought from the General Dental Council of the United Kingdom or relevant professional journals or the various National Health Trusts as to employment opportunities for dentists in the public or private sector, the retirement age in the public sector, prospects of first time employment at the age of fifty nine, the age profile of practising dentists in South Africa or the United Kingdom after sixty.

h. Plaintiffs financial position : would the plaintiff be possessed of sufficient funds to enable her to purchase accommodation in the United Kingdom or would she retain her home in South Africa, how would she finance retirement in the United Kingdom or would she return to

South Africa.

19. There are potentially dire consequences in civil trials for the failure to cross-examine a witness on a certain issue or to put one's version to that witness. In President of the Republic of South Africa v South African Rugby Federation Union 2000(1) SA 1 CC ('SARFU') was stated that:

> "The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct…" (at para 61)[13]

20. By failing to cross examine in any meaningful way on a number of important aspects of the plaintiff's claim, defendants legal representatives left a number of issues unexplored, a number of weaknesses unexposed, a number of alternatives unexplored. By so doing they laid the defendant open to the very real possibility that the court would accept this unchallenged evidence in the absence of any serious critique thereof. The court was deprived of the opportunity to receive a more complete spectrum of evidence upon which to base its factual and credibility findings.

21. The defendant not only failed to cross-examine the plaintiff and her witnesses on relevant and important aspects pertaining to her claim. The defendant also failed to put alternative facts or circumstances which might challenge such claim. For instance, in argument it was suggested, for the first time, that the plaintiff had only gone to England in 2003 for a

13 See also R v M 1946 AD 1023; R v Lee 1949 (1) SA 442 (A);R v Qcgatse 1957 (2) SA 191 (E); Small v Smith 1954 (3) SA 434 (SWA); S v Gobozi 1975 (3) SA 88 (E); S v Jackwe 1957 (2) SA 191 (E)

holiday. It was also suggested in argument that if she ever went to live in England it would be not be to work as a dentist but to stay/live with the family which a discovered family tree indicated had lived in England in the 1800s. These were completely new propositions with which no witness had any opportunity to deal. Accordingly, neither the plaintiff nor her expert was given notice that the defendant sought to impeach the evidence just given.

22. As was stated in SARFU supra,

> "The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed." (paragraph 63)

23. The ability to cross examine is a function of careful preparation. This requires decisions on overall strategy, planning of line of attack, research through documents and witnesses to obtain information to enable both challenge and putting of questions, design of questions and responses and follow up questions. In the present case there was absolutely no indication that the defendants legal representatives had performed any of these elemental tasks. They had not, once discovery had taken place and in advance of the trial, obtained or utilised any information as to the South African or United Kingdom dentistry profession to enable them to pertinently deal with BDA registration, employment opportunities in the public or private sectors, retirement ages and ages of practising dentists, earning potential.

24. Time and again judges in this Division have been informed that the RAF, in many cases which come to trial, has elected not to brief counsel

timeously and that counsel have only been briefed on the day before trial[14]. In fact, judges in this Division have also been informed that the RAF imposes a limit on the time allowed to its counsel (perhaps its attorneys) for consultations with witnesses and preparation. It appears that this is yet another such case. The RAF administration may think that they are saving legal fees in delaying timeous briefing of their legal representatives but they are sadly mistaken if they think that they are saving road user's money. Proper preparation requires the opportunity not only to read through the pleadings. It necessitates collaborative work between attorney and advocate, understanding of both facts and law, development of a strategy, research on the internet and in relevant literature, consultation with advisors and potential witnesses, appreciation of weaknesses and strengths in ones opponents case and planning on how to exploit the one and diminish the other. Both skill and time are required for such preparation. This cannot be done overnight. No attorney or advocate should accept instructions or a brief where this is standard practice and a condition of work of the RAF. The RAF should not initiate such a practice in litigation where the matter is not settled at a pre-trial meeting or shortly thereafter, the claim is substantial, there are issues requiring research and preparation which has not been done either prior to settlement or trial. Otherwise the RAF is sending its gladiators into the arena without sword or shield.

25. In the present case I do not know the sums of road users money to which the RAF has committed itself to paying the plaintiff. I do however know the quantum of the claim – R 800 000 for loss of income in the initial particulars of claim to be increased (according the Plaintiffs heads of argument) to R 5.3 million to conform with the oral evidence and certain actuarial calculations – and must therefore assume that the RAFs legal

14 The last occasion I had to refer a judgment to the Minister of Transport, the Chairperson of the RAF Board and the CEO of the RAF, I was advised by counsel for the RAF that he had only been briefed the afternoon prior to trial – this information emerged in the course of his application for a postponement.

representatives negotiated and then recommended to the RAF administration payment of sums of money to the plaintiff when these very legal representatives and administrators had failed through preparation and trial work to ascertain the full factual scenario relevant to the issues in dispute.

26. I note that the defendant led no evidence to present an alternative set of facts or to challenge the evidence offered on behalf of the plaintiff or the credibility of those testifying.

27. In narrowing the issues for determination by the court, the parties have limited the function of the court to two questions only: whether the plaintiff would have, but for the motor vehicle accident, relocated to the United Kingdom? If the answer is in the affirmative, when she would have relocated. It is a matter of some concern that this limitation of the dispute was done by the RAF's legal representatives when they were without full and complete information on the plaintiff's physical and emotional condition, the impact on her employment prospects and her current employment and remuneration – these all being areas where defendants counsel had failed to cross-examine with any degree of enthusiasm or efficacy – and had nevertheless entered into a settlement on these issues.

28. The parties, more particularly the RAF, have left the court with no discretion to determine, for instance, that the plaintiff may have relocated to the United Kingdom but that such relocation may not have endured for a number of reasons: her age at the time of relocation, ability to find secure or sufficiently remunerative employment; working or living conditions; retirement opportunities and finances; family location and ties. Of course, the ability of the court to have full regard to all relevant circumstances pertaining to successful and enduring relocation prospects has been severely hampered by the failure of the RAFs legal

representatives to properly cross-examine the plaintiff or her witnesses or adduce their own evidence with regard to this important (and very costly) issue.

Assessment of the evidence on relocation to the United Kingdom

29. The only issues this court is now required to determine are: whether the plaintiff would have, but for the motor vehicle accident, relocated to the United Kingdom and, if she would have so relocated would she have done so by 1st January 2011 or on another date.

30. In summary plaintiffs case rested on the following 'facts': she averred that she had wished to emigrate to the United Kingdom, in 1998 she registered with the General Dental Council of the United Kingdom, in 2003 she attended two job interviews in England, she kept in touch with professional agencies, she was awaiting the 'independence' of her youngest daughter in about 2010 or perhaps earlier.

31. I have already adverted to the absence of any significant challenge to the evidence of the plaintiff or her witness. I must therefore note that the above evidence was not seriously disputed. That is, however, not the end of the matter. A trial court does not accept uncontested evidence without further ado. I must still have regard to the burden of proof and assess whether or not the plaintiff has proved her claim on a balance of probabilities.[15] The plaintiff bears what Wigmore has referred to as the risk of 'non-persuasion' in that the plaintiff, irrespective of challenge or otherwise to her evidence, bears the risk of failing in her claim where

15 In Pillay v Krishna 1946 AD 946 Davis AJA, as he then was, described the meaning of 'onus' as: "…the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be…" See also at p 952 – 953. See also South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 548 for discussion of the distinction between the 'onus', in the true sense of the word, and the evidentiary burden.

the evidence on that point does not satisfy the court.[16]

32. The plaintiff asks the court to accept her bland averment that she intended to emigrate and offers, as corroboration of this averment, registration with the Dental Council in 1998 and job interviews in 2003. In my view the plaintiff was regrettably silent on the details of her activities, omitted to produce documentation which could have been available, did not offer the court evidence which would render the potential dream a rather more likely plan for implementation.

33. The only motivation given by the plaintiff for this emigration as a single woman without her family at the age of 59 were "economic reasons". These were never explored. However, common sense tells one that there are many reasons for emigration from South Africa which range from maintaining family connections to career opportunities to fear of crime. Whichever was of application to the plaintiff in 1998, 2003 or at any other time was not shared with the court. Certainly such motivation would have enormous bearing on formation of and adherence to such a desire, determination of a firm plan to actually emigrate, timing of departure from two daughters and family and friends and disposal of dental practice and home, timing of arrival in a new country to take up a new life and employment entirely alone.

34. The plaintiff tenders her certificate of registration with the General Dental Council of the United Kingdom for the first time in 1998. No certificates were handed in as evidence to indicate that the plaintiff had registered in any subsequent years including 2003 which is the year when she was in England[17]. There was no evidence as to the import and

16 See Neethling v Du Preez and Others; Neethling v Weekly Mail and Others 1994 (1) SA 708 (A) at p 744, Gates v Gates 1939 AD 150 at 154 – 5; Schwikkard, Van der Merwe 'Principles of Evidence' 2 Ed at p 537 and Obotseng v Lebone 1994 (4) SA 88 (BG) where the court stated: "…the incidence of the burden of proof is a measure which decides which party will fail on a given issue if, after hearing the evidence, the Court is unable to decide which party to believe - what has been called by Wigmore 'the risk of non-persuasion'. at p 94

17 I note that there is a registration certificate for 2005 which was discovered but not introduced or

purpose of such registration and no explanation why the plaintiff would register in 1998 when she did not intend to emigrate to the United Kingdom in that year or indeed for another thirteen years.

35. The plaintiff testified that she has two daughters, both living in South Africa, and that she decided she wished to emigrate in 1998 but that she could not do so until her younger daughter was 'independent'. It appears that her elder daughter has now completed medical school and that her younger daughter is still studying veterinary science which course she will complete in 2010. However, she did not explain why she did not act upon this desire to emigrate when her daughters were still schoolchildren and could have emigrated with her instead of leaving this relocation to a time when she would emigrate alone as she approached retirement years. The plaintiff did say that she did not was to disrupt her younger daughters educational opportunities and further that she "wanted to make sure that they knew what they wanted to do and where they were going". The dates of birth of the daughters were not given but the plaintiff did mention that her younger daughter is now twenty two years old. No evidence was led as to the schools attended or the standards for which her daughters were registered at the time the plaintiff first decided to relocate nor was there any evidence on the availability or lack of academic opportunities to her children in the United Kingdom. It is difficult to comprehend why a single parent (with her husband in New Zealand) would elect to leave her home country alone as a single woman at the age of 59 leaving two daughters and an entire life behind when, in 1998, she could have taken her children with her to set up a new life and career at the age of forty six.

36. Insofar as the visit to England in 2003 was concerned, the plaintiff merely stated that she had gone for two job interviews but did not give the names or situation of the dental practices involved nor did she give details of the nature of the dental practices, the positions for which she

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referred to in evidence.

was interviewed, conditions of employment and remuneration, the outcome of such interviews. She said generally that 'they' were "keen to take me" but gives no indication who 'they' were. The only documentation tendered in evidence were two cuttings advertising dental positions - these were undated and, since there is no indication that the plaintiff was in any way connected therewith, they have no evidential value. On the strength of two undated advertisements, no court would be entitled to draw inferences as to availability of employment for the plaintiff when she desired to relocate to the United Kingdom. The general circular to which the plaintiff made reference was not addressed to the plaintiff but appears to have practitioners in Europe as part of its readership, was undated and its provenance was never properly placed on record. It too, does not enable the court to reach any conclusion as to whether this indicates demand for dentists, vacancies in any particular year, the suitability of the plaintiff for such positions.

37. The plaintiff's explanation that she had been for job interviews in 2003 because she wanted to see what opportunities would be available when she actually was about to emigrate in 2011(or earlier) is somewhat difficult to understand. As at 2003 she did not see herself leaving South Africa until her younger daughter had completed her studies in 2010. She offers no indication at all of what she learnt in this exploratory trip. Quite obviously these exact jobs would not have been kept open to her for seven years so she never had any intention of taking up these position (if they had been offered to her). She did not testify that she had learnt whether she would prefer to work in the public sector or private practice, whether she preferred to work in a metropolitan area or a village, whether she discovered that the equipment and practices utilised in dental practices in the England were familiar to her and she felt comfortable with her ability to cope in a new working environment. The purpose of these visits remains an enigma. There was no real explanation why the plaintiff believed that interviews for jobs in 2003 which she did not then intend to

accept if they were offered to her would be of any assistance to her when implementing her decision to emigrate in 2011.

38. The plaintiff testified that she had spoken to dental agencies subsequent to 2003. There was no evidence as to the identity or situation of such agencies, the fields in which they specialised, what she had asked of them pertinent to her desire to depart for the United Kingdom in 2003, or what she had learnt from these agencies or their response to her interest.

39. Plaintiff iterated her desire to work as a dentist in the United Kingdom. No evidence was given by the plaintiff as to her knowledge of opportunities for employment and remuneration in either the public or private practice of dentistry in 1998, 2003 or at any other time. She tendered in evidence an undated circular regarding a dental practice in Peterborough to indicate what she hoped or believed could be earned as a dentist in the United Kingdom. She also handed in cutouts of two unsourced advertisements The court was told nothing of vacancies advertised in professional journals or elsewhere or recruitment offers advertised by dental agencies. There were no details at all of employment and remuneration opportunities for female dentists aged fifty nine (having regard to the fact that retirement age in the public sector is different for women and men).

40. The plaintiff was born in 1952. When questioned about retirement age she disclaimed any intention to retire and referred to Dr Misrahi who had emigrated to England and was still practising in his eighties. No evidence was led as to the statutory retirement age of dentists employed in the public sector (either in South Africa or in the United Kingdom). It is highly unlikely that the National Health Service in the United Kingdom would wish to employ a dentist so very close to retirement age. Apart from the reference to Dr Misrahi no evidence was led on the feasibility of continuing to work on private patients as a dentist (either in South

Africa or the United Kingdom) upon reaching the seventieth or eightieth decade. The plaintiff led no evidence herself as to enquiries made by her into the feasibility of her finding employment -as a locum, an employee or setting up her own practice – in the United Kingdom at the age of fifty nine or thereabouts. Such evidence would have assisted the court in understanding whether she had seriously investigated whether it was realistic to attempt to implement this desire to emigrate. If such information had been available to her in 1998 or 2003 (or at any relevant time) she could have indicated to the court some basis upon which she had decided that she could delay implementation of her decision to emigrate in 1998 for a period of perhaps thirteen years.

41. The industrial psychologist, Mr K Distiller, testified that he had checked salary scales on the website of the UK Department of Health and in the British Dental journal. However, he did not testify that he had obtained from either of these (or any other) organisations any information as to employment prospects for dentists in either the public or private sectors particularly for dentists aged fifty nine. Mr Distiller stated that he had made contact with two unknown persons in the United Kingdom of the demand for dentists. Clearly this is hearsay evidence and carries no weight when one considers that other and better evidence (ie from the British Dental Association or the National Health Service) would be available. In any event, this hearsay evidence as to 'demand' was made without reference to the age of the dentists so in demand. What is noted is that the public sector would impose a retirement age on employees and that persons who are able to afford private sector healthcare are less likely to choose to subject themselves to the care of a dentist in her seventies or eighties – I accept that there is no evidence in this regard and that this is really an opinion based on common sense but the absence of evidence is must be laid at the door of the plaintiff.

42. Mr Distiller did not indicate whether he had made any enquiries of the

British Dental Association, the National Health Service or any other body of the range of ages of dentists in private practice or public health sector employment and how many dentists were still in employment in their seventieth or eightieth decades. Mr Distiller testified that retirement age for dentists in private practice was a matter of "personal choice" but that, in the United Kingdom, the plaintiff could continue working until 83 although her practice would "taper down" from the age of 65 or 70. He gave no indication that he had made any enquiries into or had any knowledge of the number of dentists actually practising in the United Kingdom in the sixth, seventh or eighth decade or the prospects of a dentist maintaining a remunerative private dental practice at these ages. The witness further gave no indication that he had any knowledge of the statutory retirement age for employees in the public sector or the National Health Service in the United Kingdom.

43. Relevant to any decision to emigrate to another country as one reaches mature years would be financial planning for retirement. Mr Distiller gave no indication whether he had conducted any enquiries as to the ability of the plaintiff to survive in the United Kingdom on an income which would have started "tapering down" within five or six years (if it started to taper at the age of 65) of her arrival in that country. This consideration must be of importance to assessing plaintiff's own decision as to the feasibility of emigration in 2011 or thereabouts.

Conclusion

44. It is for the plaintiff to convince the court, on a balance of probabilities, that she had more than a mere passing fancy to relocate to the United Kingdom. She must show the court that her intention had some foundation in reality and that she was working towards a goal with some feasible expectations of implementation. I do not expect that the plaintiff, or anyone else, would have their life planned years or decades in

advance. I do not expect that the plaintiff would have tied up accommodation, employment and an entire new life in a country some six or seven years before relocating there (2004 being the date of the accident and 2011 being the date originally proposed for relocation). However, this court is required to make a decision as to whether or not the plaintiff would have so relocated and I must therefore have regard to those facts tendered in support of what is presented to me as a firm plan which merely required finalisation of the younger daughters education before it was actually implemented.

45. I find that the plaintiff may have thought of emigrating and this may have occasioned her registration in 1998 with the General Dental Council of the United Kingdom. She did not emigrate. Five years later she claims that she underwent two unsubstantiated job interviews in England. She still did not emigrate. She asks the court to accept that, at the age of fifty nine, in 2011 when her younger daughter completes her tertiary qualifications she would then have relocated to the United Kingdom and found employment as a dentist.

46. I must assume that the plaintiff would, prior to reaching any firm decision to emigrate to the United Kingdom, conduct full enquiries as to employment prospects in the United Kingdom for a woman aged fifty nine who has no personal or educational or professional history in that country. I must proceed on the assumption that the plaintiff would not pursue a mere 'romance'[18] and that she would have been guided by the practicalities and realities of life. I must proceed on the assumption that the plaintiff is an intelligent woman who would make not make irrational nor unconsidered decisions as regards emigration. I must assume that the plaintiff would, prior to acting upon any desire to emigrate, weigh up her reasons for emigrating against the disruption to her life in South Africa, separation from her two daughters, arrival in a foreign country as a single

18 SARFU supra at para 64.

woman and without close family, commencing a new life and employment at the age of fifty nine, her financial arrangements for living on reduced income or retiring and utilising savings in South African rand whilst incurring living expenses in UK sterling.

47. For the reasons and comments set out in my assessment of the evidence led on behalf of the plaintiff I am forced to the conclusion that, once the plaintiff had not emigrated by 2003, the plaintiff would not have relocated to the United Kingdom on 1st January 2011 or at any date prior thereto or afterwards.

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Satchwell J

DATED AT JOHANNESBURG 19th SEPTEMBER 2007

Hearing:30 August to 3rd September 2007

Plaintiffs Attorneys: Raphael Kurganoff Inc
Plaintiffs Counsel: Adv du Plessis
Defendants Attorneys: Mohlala Attorneys
Defendants Counsel: Adv Mokale