IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

REPORTABLE

Case No.: 850/2016

ECD 2150/2016

Replying Affidavit filed on 18 February 2019

Date Delivered: 5 March 2019

In the matter between:

CHANTELLE PITT obo TANEAL PITT Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

GAJJAR AJ:

Introduction

[1] This matter calls for an interpretation of Rule 29(2)(a) and (b) read together with Eastern Cape Practice Rule 3(1)(c) which relate to the set down of a mater.

[2] Pursuant to a *"notice of set down"* dispatched by electronic mail by the Registrar's office on 31 October 2018 to both the plaintiff's and defendant's attorneys, the latter accepted that the matter was in fact set down for trial on that basis. The merits were previously settled and the trial was to proceed in respect of the claim for loss of earnings only, the remaining heads of damages having been previously settled.

[3] On 31 January 2019 the matter was, by agreement, postponed *sine die* and the costs occasioned by the postponement is the only issue which must be determined.

Background

[4] On 31 January 2019 the plaintiff's attorney, Mr Nohaji, and Mr Clark, the defendant's counsel, presented themselves before me in chambers. They informed me that the matter could not proceed as Mr Nohaji only came to learn of the "*set down*" of the matter the previous week when the defendant's attorney contacted his office. Mr Nohaji confirmed that his office received the electronic mail of 31 October 2018 from the Registrar's office enclosing the "*set down*" of this matter for hearing on 31 January 2019. He told me that for reasons unknown to him the matter was not diarised by his office. Consequently he was not in a position to proceed with the matter. Thereafter the parties agreed that the plaintiff would pay the costs occasioned by the postponement.

[5] I was taken aback by the agreement that was reached as the plaintiff had no part in the admitted omission on the part of her attorney's office. Moreover, there was no indication that this agreement was reached on the basis of an instruction which Mr Nohaji had obtained from the plaintiff, it being trite that an attorney must at all times act on the instructions of his/her client. I informed the parties' representatives that I was not bound by the agreement reached between them[1] and gave them a further opportunity to reconsider the agreement reached between them.

[1] In my view the position is analogous to the discretion which a court has to refuse a postponement even when the parties agree to postpone the matter: See: National Police Service Union v Minister of Safety and Security 2000 (4) SA 1110 (CC) at 1112E.

This matter was previously set down for hearing on 26 June 2018, when, by agreement, the matter was postponed at the plaintiff's instance with the plaintiff bearing the costs occasioned by the postponement. It is not clear why the matter was previously postponed.

[6] I was concerned that the agreement reached was going to visit the plaintiff with costs when, as stated, she had no hand in how the matter was being attended to by her attorneys. The parties subsequently agreed as follows:

6.1 The matter be postponed *sine die*;

6.2 The Plaintiff's attorney files an affidavit on or before 7 February 2019, setting out the reasons why he should not pay the wasted costs, if any, of the postponement *de bonis propriis*;

6.3 The Defendant may file an affidavit in response thereto on or before 14 February 2019;

6.4 The Plaintiff's attorney may file a reply, if any, on or before 18 February 2019.

[7] I accordingly issued an order in those terms.

<u>The arguments advanced on behalf of the parties</u>

[8] Pursuant to the aforesaid order, both Mr Nohaji and the defendant's correspondent attorney, Mr Macozoma, deposed to affidavits in accordance with the order of 31 January 2019.

[9] The contents of Mr Nohaji's affidavit may be summarised as follows:

9.1 on 2 November 2017 the Registrar allocated 25 June 2018 as the trial date. Pursuant to receiving the Registrar's notice the plaintiff's attorneys filed and served a notice of set down dated 7 November 2017

setting the matter down for hearing on 25 June 2018, in accordance with the Registrar's notice of set down. The latter notice was served on the defendant's attorneys on 9 November 2017;

9.2 on 25 June 2018, by agreement, the matter was postponed *sine die* with the plaintiff paying the defendant's wasted costs occasioned by the postponement;

9.3 on 25 October 2018 application was made to the Registrar for a new trial date;

9.4 on 31 October 2018 the Registrar's office allocated 31 January 2019 as the trial date. Following this no set down for hearing of the matter on 31 January 2019 was served and filed by his office;

9.5 on 25 January 2019 he received an email from the defendant's instructing attorneys wherein it was recorded that the matter is set down for trial on 31 January 2019 and further requesting that the plaintiff confirms that she is indeed ready to proceed to trial. The defendant's rights in respect of any costs implications as a result of the plaintiff not being ready to proceed and not timeously informing the defendant thereof were reserved;

9.6 on 25 January 2019 the plaintiff's attorney wrote to the defendant's instructing attorneys wherein it was recorded that he was not aware that this matter was set down for trial on 31 January 2019 and requested the defendant's instructing attorneys to '*furnish us with a copy of the notice of set down*';

9.7 on 30 January 2019 the defendant's instructing attorneys received confirmation from the Registrar's office that the Registrar had dispatched her notice of set down on 31 October 2018 and it was further stated by the defendant's instructing attorneys that '*our counsel*

will be at court tomorrow to argue the wasted costs in this matter as the defendant was ready to proceed to trial';

9.8 reliance is placed on Rule 29(2)(a) and (b) which reads as follows:

"(a) upon allocation of a date of trial or dates for the trial, the Registrar must inform all parties of the allocated dates.

(b) The party which applied for the trial date must, within ten (10) days of notification from the Registrar, deliver a notice informing all other parties of the date or dates on which the matter is set down for trial."

9.9 Reliance is also placed on Eastern Cape Practice Rule 31(1)(c) which provides that '*whenever in any cases not carried on by default, the pleadings have been closed, the plaintiff or, if he fails to do so within 30 days, the defendant may set down the case on the roll for trial by entering the particulars in the register, kept by the Registrar, and by forthwith giving notice in writing to the opposite party and the Registrar, in the form set out in the First Schedule hereto that he has done so.*'

9.10 It is submitted that a Notice of Set Down from the plaintiff, failing which the defendant, should be delivered to the opposite party and the Registrar before a matter can be said to have been correctly set down. According to this argument, the Registrar cannot set the matter down.

[10] The contents of Mr Macozoma's affidavit may be summarised as follows:

10.1 Prior to making the order of 31 January 2019 the parties had reached agreement in terms whereof the plaintiff agreed to pay the wasted costs occasioned by the postponement. In light of the agreement so reached the plaintiff's attorney is precluded from now raising an argument that

neither he nor the plaintiff should pay the wasted costs occasioned by the postponement. With reference to Rule 29(2)(b) the defendant accepts that the plaintiff failed in her pre-emptory obligation to serve a notice of set down on the defendant. This set down simply serves to inform the defendant that the trial has (already) been set down for hearing on a particular day;

10.2 with reference to Eastern Cape Practice Rule 3(1)(c) the plaintiff failed to give the defendant notice that she had set the case down for trial. What clearly emerges from this rule is that it is the entering of the particulars in the register kept by the Registrar that sets the case down for trial and not the subsequent notice served on the defendant;

10.3 from a reading of Rule 29(2)(b) and Eastern Cape Practice Rule 3(1)(c) the plaintiff's notice of set down is simply further notice to the defendant of the trial date. Should a matter be removed from the roll for lack of service of a notice of set down on the defendant, such is done for the benefit of the defendant (and not the plaintiff) in order to ensure that the defendant has notice of the trial date. The plaintiff cannot rely on her own failure to comply with the rules;

10.4 the assistant Registrar, Ms Kirsten, confirmed this to be the practice in this court when she was called to chambers. She clearly intimated that it was the entry of the case in the register of the Registrar that sets the matter down for trial and that a further notice of set down from the plaintiff (after and in addition to the notice of set down sent by the Registrar to the parties) is simply a courtesy. She stated further that the case would remain on the Registrar's roll unless removed by way of a notice of removal;

10.5 the plaintiff's attorney blames his failures (in failing to diarise the date allocated by the Registrar and serve the notice of set down on the defendant) on a clerical oversight at his office.

Discussion

[11] Mr Nohaji's reference to Eastern Cape Practice Rule 3(1)(c) is, in my view, of no assistance in resolving the determination of the issue of costs. The purpose of Eastern Cape Practice Rule 3(1)(c) is to afford the plaintiff firstly an opportunity to apply for a trial date by submitting the form set out in the First Schedule to the Eastern Cape Rule 3(1)(c), and should the plaintiff fail to do so then within thirty days of the close of pleadings, the defendant may apply for a set down of the matter.

[12] In my view, the words "*set down*" in East Cape Practice Rule 3(1)(c) do not bear the meaning which parties' representatives ascribe to it. Rule 3(1)(c) is no more than a written application addressed to the Registrar seeking an allocation of a trial date in the form of a notice. The notice is reproduced below.

First Schedule
FORM OF NOTICE UNDER RULE 3

Case No.....

IN THE SUPREME COURT OF SOUTH AFRICA
(Eastern Cape Division)

In the matter
of:……
……
……
……. Plaintiff/Applicant.

versus

……
……. Defendant/Respondent

NOTICE OF SET-DOWN IN TERMS OF RULE 3(1) OF THE RULES OF THIS COURT

Kindly take notice that the above-mentioned matter has been set down for hearing.

The following counsel will be briefed to appear:

……
……

…….
for Plaintiff/Applicant

and

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……

…….

for Defendant/Respondent

Dated at ..... this ..... day of .....19……

……
Attorney for Plaintiff/Applicant

Address .....
.....

To: The Registrar of the above Honourable Court; and to:
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Attorney for Defendant/Respondent
Address
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[13] The heading of the notice under Rule 3(1)(c) is anomalous since it creates the impression that a matter is set down. This is unfortunate. No provision is made for a date for "*set down*" in that notice. In my view, the Rule 3(1)(c) notice must be properly read and understood as an application for a trial date.

[14] To compound matters further, the Registrar in response to the party's Form 3 Notice dispatches a document headed "*notice of set down"*, pursuant to Rule 29(2)(a). This notice, however, serves no more than to advise the requesting party which date is available. This interpretation is supported by having regard to what Rule 29(2)(b) requires of a party who has applied for a trial date. The requesting party is required within ten days of receipt of the notice in terms of Rule 29(2)(a) from the Registrar to make an election, that is either to "accept" the Registrar's proposed trial date by means of a formal notice of set down or not. If it is not so accepted, the Registrar will be at liberty to make such date available to another requesting party. At least three practical considerations for this procedural mechanism for effectively

managing the set down process come to mind. The first is that it allows the Registrar to manage his/her trial roll and the second is to allow the requesting party a period of ten days to decide whether the matter can proceed on the proposed date(s), having regard to, *inter alia*, the availability of witnesses. Thirdly, the ten day period allows the parties to engage with each other regarding the suitability of the proposed trial date.

[15] It is significant to note that in terms of Rule 29(2)(b) it is only the requesting party that can file a notice of set down. Whilst the defendant has submitted that the plaintiff cannot seek to benefit from the omission on the part of her attorney by failing to set the matter down in terms of Rule 29(2)(b), it, in my view, would have entitled the defendant to have correctly assumed that in the absence of such notice that the matter was not set down for hearing on 31 January 2019. Tellingly, on 25 January 2019 the plaintiff's attorney in reply to the defendant's instructing attorneys electronic mail of the same date stated that *"[w]e are not aware that this matter is set down for trial on Thursday the 31st January 2019, kindly urgently furnish us with a copy of the notice of set down*". The notice referred to can only be the notice in terms of Rule 29(2)(b). In reply, the defendant's instructing attorney relied on the Registrar's Rule 29(2)(a) notice of set down.

[16] It is incorrect to assume that the "*notice of set down*" dispatched by the Registrar in terms of Rule 29(2)(a) constitutes a setting down of the matter for trial on a specified date. In my view, the compilation of the list of trial cases by the Registrar must be based on the receipt of a formal notice of set down in terms of Rule 29(2)(b) from the requesting party.

[17] In the result, it seems to me that to properly and effectively set a matter down for trial encompasses taking three distinct steps, namely:

171 The completion of the form in terms of notice under Rule 3(1)(c) of the Eastern Cape Rules;

17.2 the Registrar's response to that notice in terms of Rule 29(2)(a), and

17.3 the notice of set down in terms of Rule 29(2)(b) by the requesting party.

[18] In the instant matter on 30 October 2018 the plaintiff's attorneys duly filed a notice in terms of Eastern Cape Rule 3(1)(c). Pursuant to that notice the Registrar by notice dated 31 October 2018 "*set the matter down*" for hearing on 31 January 2019 in terms of Rule 29(2)(a). It is common cause that the Registrar's notice was transmitted to both the plaintiff's and defendant's attorneys by electronic mail.

[19] What is, however, absent is the third stage of the set down process, namely the attorney's notice of set down as contemplated by Rule 29(2)(b).

[20] As alluded to, the matter was previously set down for trial for hearing on 25 June 2018. It is instructive to note that after receiving the Registrar's notice pursuant to Rule 29(2)(a), the plaintiff's attorneys in fact set the matter down for hearing for that date being 25 June 2018, that notice being served on the defendant's correspondent attorneys on 9 November 2019 pursuant to Rule 29(2)(b). Thus, the plaintiff's attorney previously complied with Rule 29(2)(b).

[21] In my view, for a trial matter to be properly and effectively set down encompasses taking all three steps set out in paragraphs 17.1 to 17.3 above.

[22] Non-compliance with Rule 29(2)(b) in the present case means thus that the matter was not properly set down for hearing on 31 January 2019. That being my conclusion, it would not be proper to mulct either party with costs.

[23] The defendant's reliance on the agreement reached with the plaintiff's attorney that his client pays the costs occasioned by the postponement is accordingly unavailing.

[24] A word, however, needs to be said about the manner in which the plaintiff's attorney has conducted the matter.

[25] The plaintiff sues in her representative capacity as mother and natural guardian in respect of her son who sustained injuries in a motor vehicle accident

which occurred on 5 July 2015. As stated, loss of earnings is the only head of damage which remains outstanding.

[26] Notwithstanding the fact that this matter was previously enrolled for trial on 25 June 2018, there appears to have been very little, if anything, that was done on behalf of the plaintiff other than having filed an application for a trial date with the Registrar on 30 October 2018. Since then it appears that no active steps have been taken on the plaintiff's behalf to further advance the action to reach finality.

[27] The plaintiff's attorney has regrettably displayed a level of apathy and dilatoriness unbecoming of an officer of the court. The inept conduct on the part of the plaintiff's attorney in attending to the plaintiff's claim, which is in essence the minor's claim, is cause for concern.

[28] Attorneys are expected to discharge their duties towards their client(s) diligently.[2]

[29] In this regard the court in *Thulo v Road Accident Fund*[3] said*:*

> *"[45] It is said that an attorney's word is his or her bond and unless litigation can be conducted with an officer of the court being able to place absolute trust in the undertaking of another officer of the court the conduct of litigation will rapidly break down and become less efficient. Given that litigation is the means chosen by the legislature to resolve claims for bodily injuries arising from motor vehicle accidents and given the huge sums of public funds involved in this industry a breakdown in the means whereby these claims are to be processed, where attorneys' words must be their bonds, cannot be tolerated by the profession or by the courts whose trial rolls are at present made up of approximately 80% of such matters.*

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[2] See Mazibuko v Singer 1979(3) SA 258 (W) at 261C; Mlenzana v Goodrick and Franklin Inc 2012 (2) SA 433 (FB) at para [97]
[3] 2011 (5) SA 446 (GSJ) at para [45] and [46]

[46] If the attorneys entrusted with the conduct of those trials do not acquit themselves with scrupulous professionalism they exacerbate the condition of what is already a massive problem in the courts of this division."

[30] I express the sincere hope that the plaintiff's attorney will discharge his duties and responsibilities towards his client with greater diligence than he has thus far displayed. The plaintiff deserves better.

[31] In the result, I make the following order in respect of the costs occasioned by the postponement of the matter on 31 January 2019 and the subsequent attendances by the respective attorneys:

31.1 There shall be no order as to costs;

31.2 Neither attorney is to recover any fees from their respective clients in respect of their appearance, the postponement and the affidavits filed pursuant to the order of 31 January 2019.

G J GAJJAR
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Kotze instructed by Cinga Nohaji Inc, East London

For Defendant: Adv Clark instructed by Bate Chubb & Dickson, East London