IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

REPORTABLE

Case No.: 480/2020

Date Heard: 2 September 2020

Date Delivered: 17 September 2020

In the matter between:

SIBONGISENI MZAYIYA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

KROON AJ:

INTRODUCTION

1. Pursuant to a complaint laid by one member of the bench against another with the Judicial Service Commission in terms of which the aggrieved Judge contended that her colleague had levelled unfair criticisms about her in a judgment delivered by him[1] Goliath DJP, in dismissing the complaint, commented as follows:

> *"[16] ... It is important for Judges to raise relevant issues and ask hard questions when required. A failure by the presiding Judge to raise these concerns may create the impression that the matter is being swept under the carpet, which could bring judiciary into disrepute. ...*"

2. The current matter is a matter where the Court is required to ask hard

[1] Passenger Rail Agency of South Africa v Siyaya DB (Pty) Ltd & Others : Case No. 23484/18 (Gauteng Division, Pretoria) as delivered on 27 November 2018

questions.

3. In this matter the Plaintiff has brought an application for default judgment in a motor vehicle accident claim.

4. The Plaintiff is an adult male born on 10 October 1992. It is his contention that a motor vehicle with unidentified registration letters and numbers collided with him and that as a result of this accident the Defendant should be liable to him for damages.

5. In the summons the damages have been tabled as follows:

    5.1. Future loss of earnings – R500 000.00.

    5.2. Future medical expenses – R50 000.00.

    5.3. General damages – R1 500 000.00.

6. In both the particulars of claim and the affidavit deposed to in support of the application for default judgment as well as an affidavit accompanying the lodging of the claim with the Defendant, it was alleged that the date of

the motor vehicle accident was 20 March 2019.

7. As will appear from what is set out below the Plaintiff's attorney, Mcebisi Templeton Klaas ("*Mr Klaas*") has, in an affidavit deposed to on 18 August 2020, admitted that the allegation that the accident occurred on 20 March 2019 is false. Mr Klaas contends that the accident in fact occurred on 15 February 2007, that is more than twelve years earlier.

8. The Court has not been furnished with an explanation for the misrepresentation of the date of the accident.

9. This misrepresentation is significant for at least two reasons.

10. Firstly, if the correct date had been contained in the particulars of claim it would then have been open to the Defendant to have raised a special plea of prescription.

11. Secondly, the insertion of the wrong date in the particulars of claim renders the claim for "*future loss of earnings*" in an amount of R500 000.00 and the claim for "*future medical expenses*" in an amount of R50 000.00 fundamentally flawed as both claims are based on a materially inaccurate

date.

12. The Plaintiff's legal representatives have not sought to amend the particulars of claim. Rather they have persisted with the application for default judgment.

13. The misrepresentation regarding the date of the accident aside, there is a further matter which is of grave concern to the Court.

14. Having due regard to the affidavits purportedly deposed to on behalf of the Plaintiff and as submitted to both the Defendant (when the claim was lodged with it) as well as to the Court (in support of the application for default judgment), it appears that someone other than the Plaintiff may have signed the affidavits. It follows that the Court cannot be sure that the Plaintiff even knows about the claim.

15. In order to adjudicate on this application it is necessary to set out a detailed chronology of events coupled with observations where necessary.

AFFIDAVIT DATED 19 NOVEMBER 2019

Introduction

16. Prior to issuing summons, a claim was lodged on behalf of the Plaintiff with the Defendant.

17. In support of that claim, a "*section 19(f)*" affidavit dated 19 November 2019 was delivered to the Defendant on 21 November 2019.

18. In that affidavit, which was an annexure to the founding affidavit deposed to in support of the default judgment application, allegations were made regarding the particulars relevant to the alleged motor vehicle accident.

Who deposed to this affidavit?

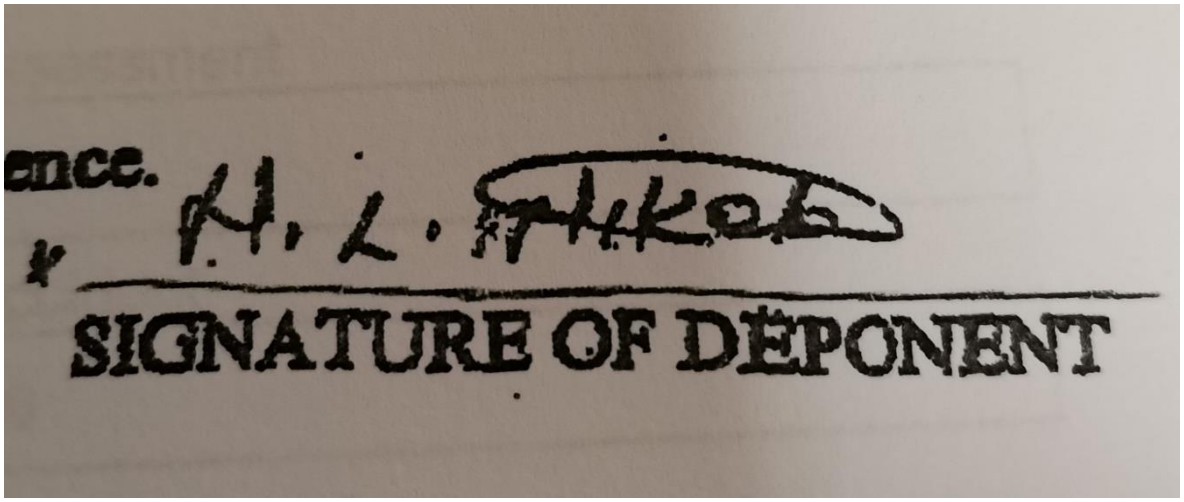
19. Although the affidavit records that the deponent is the Plaintiff, the Court has reservations as to whether this is correct.

20. The signature which is appended to the affidavit mirrors the signature of Nomthandeza Letticie Nikelo, who deposed to an affidavit on 3 December 2019, in terms of which she claimed that she was the mother of the Plaintiff.

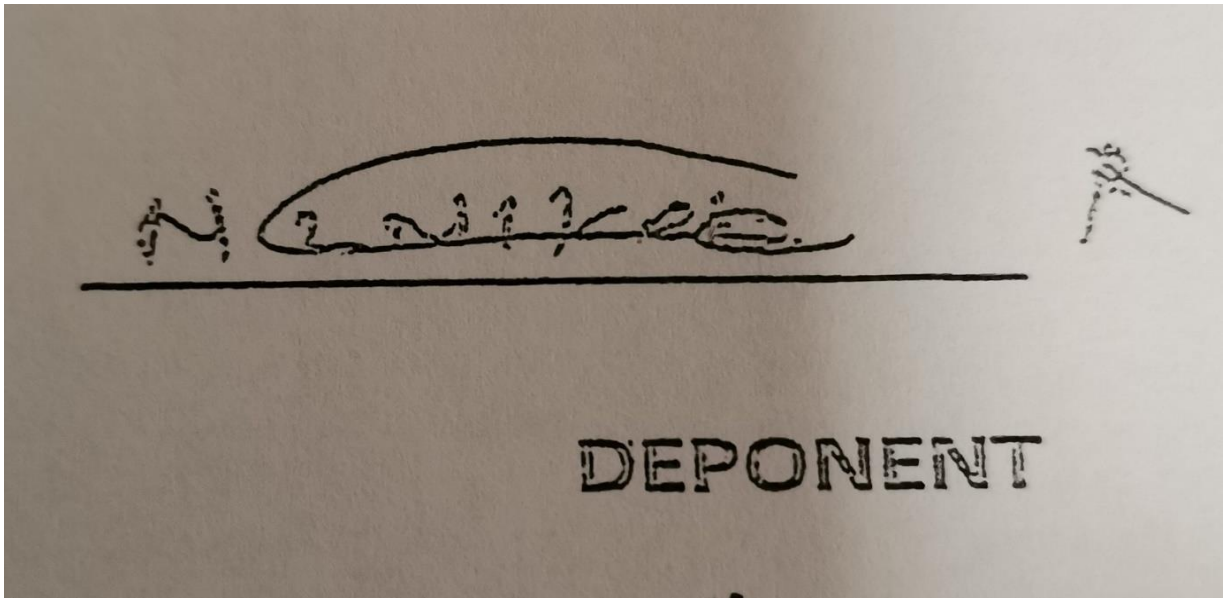
21. The affidavit deposed to by Ms Nikelo was furnished to the South African Police Services when the alleged accident was reported (apparently in December of 2019 more than a decade after the accident) and was annexed to the application for default judgment.

22. The signature of Ms Nikelo also appears to be appended to the affidavit deposed to in support of the application for default judgment (see below) and which also purports to be an affidavit by the Plaintiff.

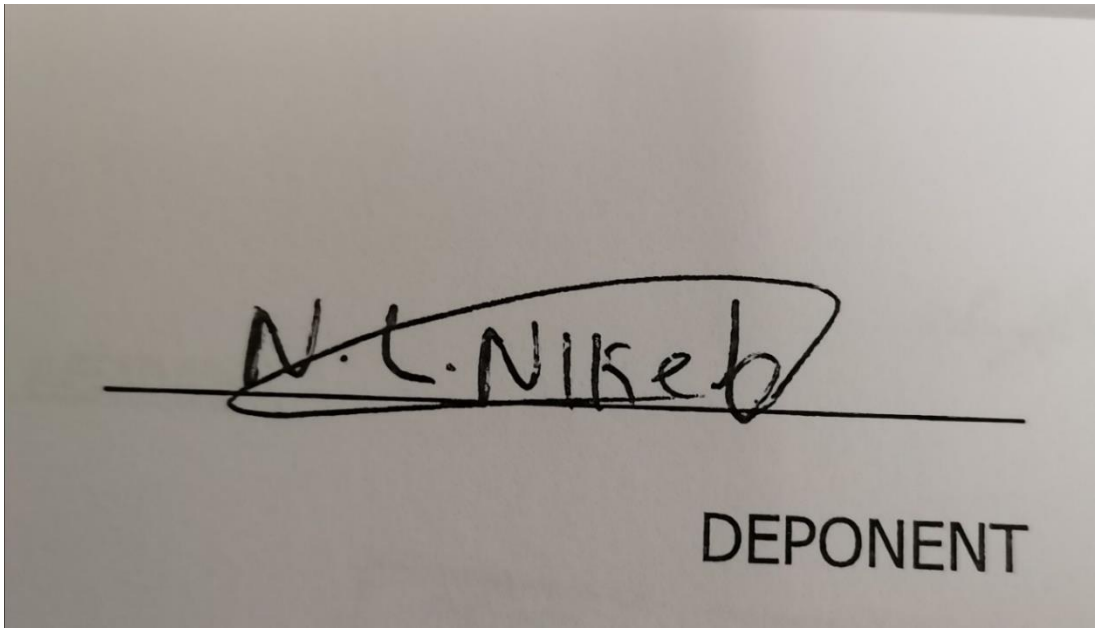
23. The resemblance between the signature appended to the affidavit of Ms Nikelo (as submitted to the South African Police Services) and the signatures appended to both affidavits purportedly deposed to by the Plaintiff is apparent from the circumstance that the initials "*N*" and "*L*" and the surname "*Nikelo*" appear on all three affidavits. Photographs of the respective signatures are reproduced below.



Signature appended to the affidavit deposed to by Ms Nikelo on 3 December 2012 as furnished to the South African Police Services when the alleged accident was reported.



Signature appended to the affidavit purportedly deposed to by the Plaintiff dated 19 November 2019 in support of the lodging of the claim with the Defendant.



Signature appended to the affidavit in support of the application for default judgment dated 30 July 2020 as purportedly deposed to by the Plaintiff.

24. Given the differences in style as appears *ex facie* the signatures, the Court cannot rule out the circumstance that the respective signatures may have been penned by three different persons. For present purposes what is important is that the signatures reflect the name of Ms Nomthandeza Letticie Nikelo and not that of the Plaintiff.

25. The circumstance that the accident was reported in the first half of December 2019 to the South African Police Services by Ms Nikelo and not the Plaintiff (who would have been 27 years old at the time the accident was reported) and the fact that the Plaintiff did not depose to an affidavit when the matter was reported to the South African Police Services does

nothing to dispel the impression that he may not be the signatory to the affidavits relied on when the claim was lodged with the Defendant and when the application for default judgment was made. As mentioned in the introduction, it brings into question as to whether he even knows about the claim.

26. The Court is however not in a position, due to insufficient information, to make a finding as to who signed the "*section 19(f)*" affidavit and the affidavit deposed to in support of the application for default judgment. This question must be the subject of further investigation.
27. For the sake of completeness, it is recorded that nothing herein must be interpreted as the Court accepting that Ms Nomthandeza Letticie Nikelo is indeed the mother of the Plaintiff.

Misrepresentation in the affidavit

28. In the affidavit deposed to on 19 November 2019 in support of the claim lodged with the Defendant, the following is alleged:

> "*3. On or about the 20th day of March 2019, at or near NU 1 Mdantsane, I was involved in a motor vehicle accident and at the time of the accident and at the time of the said*

> *accident* [sic] *I was a pedestrian where motor vehicle with registration numbers and letters unknown to me there and then driven by unknown insured driver collided with me.*"
>
> (own underlining)

29. As mentioned above, the allegation that the accident occurred on 20 March 2019 has been admitted by Mr Klaas to be a false allegation.

30. This in turn raises the uncomfortable question as to how it came to be that, more than decade after the alleged motor vehicle accident, an affidavit was produced in which the date of the alleged accident was misrepresented.

31. In particular the question may be asked as to whether the date of the accident was misrepresented to circumvent the legal hurdle of prescription.

32. As appears from her affidavit submitted to the South African Police Services, Ms Nikelo was aware of the correct date of the accident and in this affidavit she stated as follows:

> "*On <u>Thursday 2007-02-15</u> at about 16:00 I received a call from my late husband Derick Mzayiya who told me that I must come quickly*

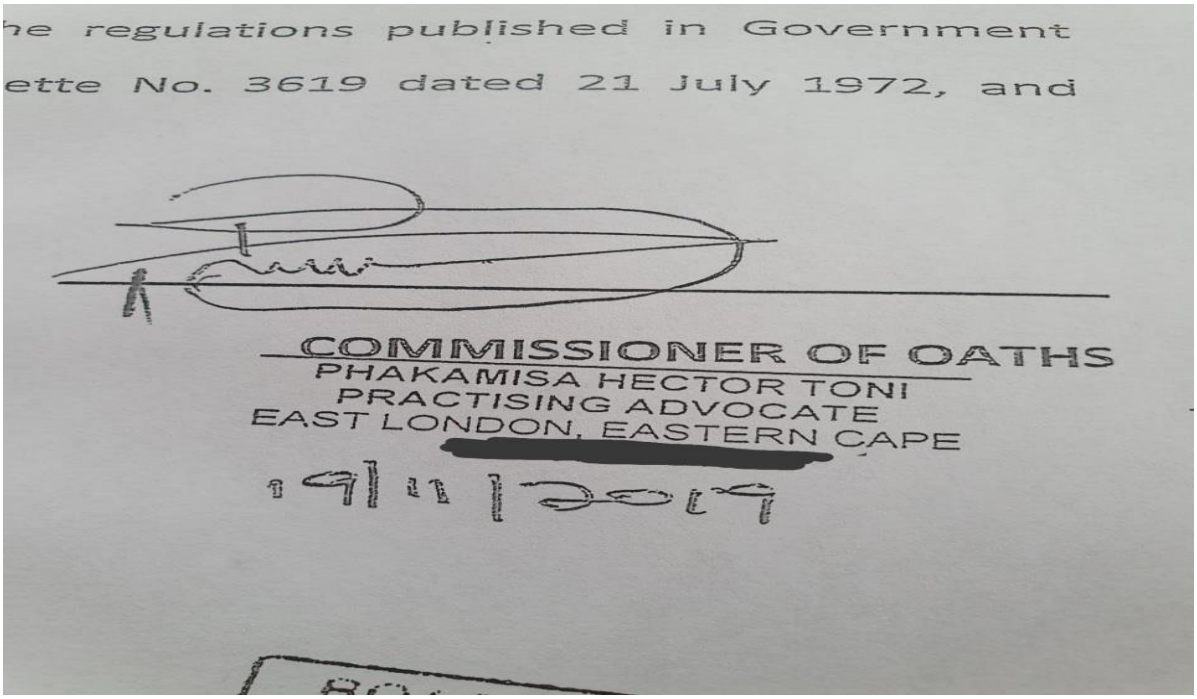
because my son Sibongiseni Mzayiya had been bumped by the vehicle while coming back from Sisadukeshe Stadium close to Masizakhe Orphanage coming back from athletics. He told me he will wait for me at highway."

(own underlining)

Role of Counsel in the commissioning of the affidavit

33. According to the commissioner of oaths stamp, the oath in respect of the "*section 19(f)*" affidavit was administered by Phakamisa Hector Toni who, according to the stamp, is a practising advocate in East London.

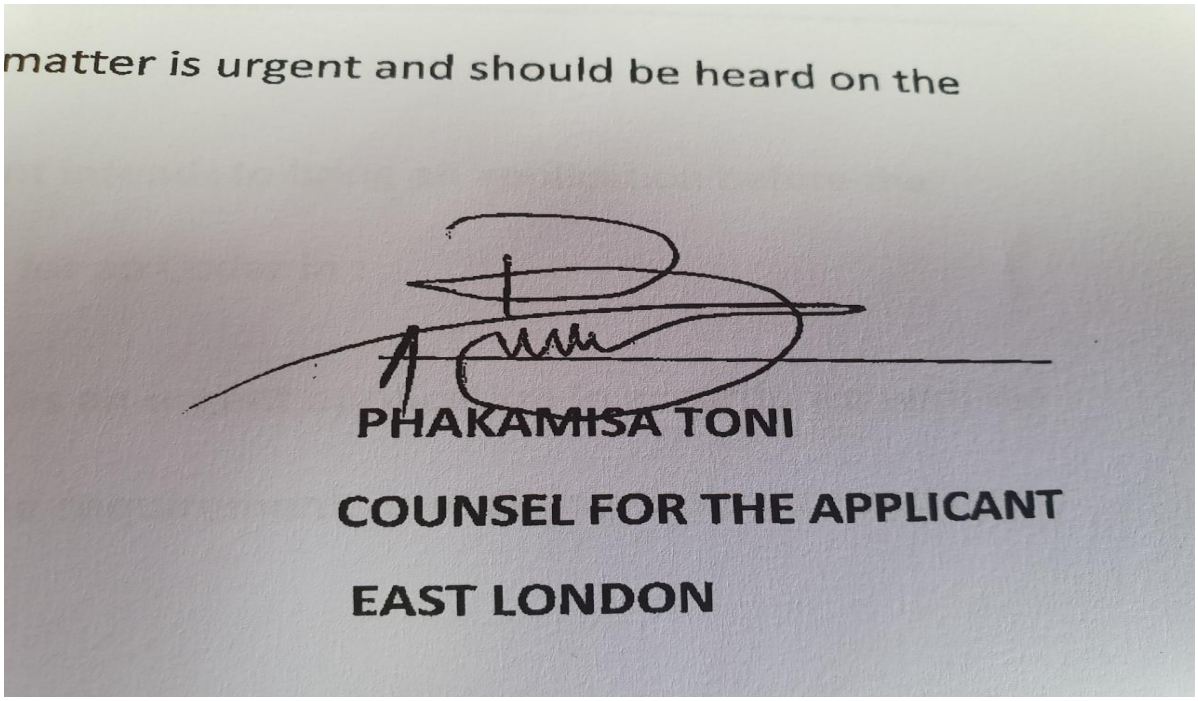
34. A photograph of the commissioner of oaths stamp is reproduced below with the cellphone number redacted.



35. I mention this because Mr Toni was the Counsel who appeared on behalf of the Plaintiff in the application for default judgment on both the occasions when it came before the Court (see below).

36. Lest there be any doubt that it is the same Mr Toni whose name is recorded in the commissioner of oaths stamp, the Court further records that Mr Toni appeared in the matter which was called before this matter[2] and in that matter Mr Toni was the author of a certificate of urgency and, for the sake of completeness, a photograph of his name and signature as it appears on the certificate of urgency is reproduced below.

[2] Mcebisi Klaas v Sikhumbule Hlangu (Case No. 835/2020)


matter is urgent and should be heard on the

PHAKAMISA TONI

COUNSEL FOR THE APPLICANT

EAST LONDON

37. This raises the question as to whether it was proper for Mr Toni, as a practising advocate, to act as commissioner of oaths in a litigious matter and, perhaps more importantly, whether it was proper for him to subsequently appear in a matter where he had commissioned one of the affidavits relied upon in support of the application, he being at all material times under an ethical duty to maintain his independence in relation to his client and the litigation in which his appearing.

38. This aside, more searching questions need to be asked as to how:

38.1. it came to be that Mr Toni administered an oath in respect of an affidavit wherein the person to whom the oath would have been

administered, assuming that the signature was that of Ms Nikelo and not the Plaintiff, would have been a 55 year old woman (if the identity number recorded in her affidavit furnished to the South African Police Service is correct) and not the Plaintiff, a 27 year old man, who was identified as the deponent in the affidavit; and

38.2. whether it was merely an extraordinary coincidence or whether there is something more to it than meets the eye that it would happen that it would be the same Mr Toni who would ultimately move the application for default judgment relying on the affidavit which he had commissioned and which contained the material misrepresentation.

THE SUMMONS

39. On 20 May 2020 summons was issued on behalf of the Plaintiff wherein he claimed R2 050 000.00 in damages from the Defendant.

40. At paragraph 3 of the Particulars of Claim it is alleged that:

"*On or about the 20th March 2019, at or near NU1 Mdantsane, Highway near Taxi Rank, East London, the Plaintiff was involved*

in a motor vehicle accident and at the time of the said accident he was a pedestrian where motor vehicle with registration letters and numbers unknown to the plaintiff collided with him."

(own underlining)

41. The summons thus repeated the misrepresentation as contained in the affidavit of 19 November 2019 that the accident had occurred on 20 March 2019.

42. The particulars of claim were signed by the Plaintiff's attorney, Mr Klaas.

43. Having recorded that the accident occurred on 20 March 2019, the Plaintiff alleges as follows in his particulars of claim at paragraph 10:

"*The claim in respect of future medical expenses is an estimate based on the need for Plaintiff to undergo surgical treatment and medical treatment in respect of fractured right tibia and fibula anxiety, emotional stress and shock and depression <u>over a period of ten years from the date of the accident</u>*."

(own underlining)

44. It is thus also misrepresented in the Particulars of Claim that the Plaintiff would incur medical expenses up and until 2030 on the basis that this would be ten years from the date of the accident whereas the correct position is that a period of ten years had already lapsed since the accident had taken place.

45. It follows that, leaving aside the question of prescription (which is an issue which the Court is not permitted, *mero motu*, to raise in the ordinary course of litigation), the claim is in any event a bogus one because it is based on the fundamentally unsound premise that the accident occurred on 20 March 2019 and that future medical expenses and loss of earnings should be calculated from that erroneous date onwards.

APPLICATION FOR DEFAULT JUDGMENT

46. The claim was not defended and on 5 August 2020 the Plaintiff launched an application for default judgment, the matter being set down on 18 August 2020.

47. The prayers which were sought in the notice of motion were the following:

> "*1. Defendant be and is hereby declared liable for damages*

suffered by the Plaintiff as a result of a motor vehicle accident which occurred on the 20th of March 2019 at or near NU 1 Mdantsane, Highway, Taxi Rank;

2. *That the Defendant be and is hereby ordered to pay R1 500 000.00 million as an for general damages;*

3. *That the issue relating to loss of earning or loss of earning capacity be and is hereby postponed* sine die*;*

4. *That the Defendant be and is hereby ordered to pay costs of this application;*

5. *Granting further and / or alternative relief;*"

(own underlining)

48. As appears from paragraph 1 of the notice of motion, the Court was asked to declare that the accident had occurred on 20 March 2019 when, according to Mr Klaas, it had occurred on 15 February 2007.

49. In short, the Court was requested by the Plaintiff and his legal

representatives to give legitimacy by way of a declaratory order to a false allegation regarding the date of the motor vehicle accident.

50. The affidavit deposed to in support of the default application was purportedly deposed to by the Plaintiff. For reasons already set out above, this is open to doubt.

51. In the affidavit it is recorded as follows:

> "*5. On or about the 20th of March 2019, at or near NU 1 Mdantsane, Highway near Taxi Rank, I was involved in a motor vehicle accident and at the time of the said accident I was a pedestrian where an unknown motor vehicle collided with me whilst I was walking long the road*."

(own underlining)

52. This is then the second time where a misrepresentation as to the date of the alleged motor vehicle accident has been made under oath. When one has regard to the Particulars of Claim, it is the third such misrepresentation.

53. It follows that hard questions need to be asked as to how this state of

affairs came about and in particular as to how it came about that the legal representatives of the Plaintiff:

53.1. drafted particulars of claim which contained a material misrepresentation as to the date of the motor vehicle accident;

53.2. drafted two affidavits which contained a material misrepresentation as to the date of the accident; and

53.3. drafted two affidavits in the name of the Plaintiff but whereupon, at least on the face of it, they were signed by someone other than the Plaintiff.

54. As mentioned above, there has been no explanation for this misrepresentation notwithstanding the circumstance that the Plaintiff's attorney, Mr Klaas, has deposed to an affidavit dealing with the misrepresentation.

55. When it comes to the misrepresentations, three observations can be made:

55.1. Firstly, it would have been obvious from the documentation attached to the application for default judgment including the

affidavits submitted to the South African Police Services and the medico-legal reports that the accident had occurred on 15 February 2007[3] and not on 20 March 2019;

55.2. Secondly there is, on the face of it, no room to argue that a typographical error or a misspelling is the cause of the misrepresentation in that the day, the month and the year of the alleged accident contained in the particulars of claim and the affidavits are all different to the day, the month and year of the actual date of the accident; and

55.3. Thirdly, and insofar as Ms Nikelo is concerned, having deposed to an affidavit on 3 December 2019 recording that the accident had occurred on 15 February 2007, if she was both the signatory to the "*section 19(f)*" affidavit and the affidavit in support of the application for default judgment (as appears *prima facie* to be the case), an explanation is required of her as to why the affidavits which she signed (less than a month apart) contained different dates as to the alleged motor vehicle accident.

[3] Although one medico-legal report records that the accident occurred not on 15 February 2007 but on 28 February 2007.

DRAFT ORDER

56. The application came before Stretch J on 18 August 2020.

57. Prior to the hearing of the application a draft order was filed at court on this same day, namely 18 August 2020.

58. The draft order provided as follows:

> "*1. The Defendant is liable for the Plaintiff's damages, arising from a motor vehicle accident which took place at or near NU1Mdantsane* [sic] *Highway on the 15th of February 2007.*
>
> *2. The Defendat* [sic] *shall pay the Plaintiff the sum of R720 000.000* [sic] *{SEVEN HUNDRED AND TWENTY THOUSAND RAND} in respect of general damages on or before the 18th day of February 2021, whereafter and in the event of default, interest at the applicable legal rate shall accrue until the date of final payment.*
>
> *3. The aforesaid amount shall be paid into Plaintiff's Attorneys Trust Account whose details appear hereunder:*

Account Holder	*:*	*M.T. Klaas Incorporated*
Bank	*:*	*First National Bank*
Account Number	*:*	*623[….]*
Branch Code	*:*	*2110021*

4. The Defendant shall pay Plaintiff's reasonable taxed or agreed party and party costs together with interest thereon at the legal rate of 10.25% from the date of allocator to the date of final payment, subject to the following conditions [sic] read such costs to include*:*

4.1. the costs of the Plaintiff's Counsel;

4.2. The costs of medico-legal reports, addendum reports as well as a [sic] such reports furnished to the Defendant or its attorney

5. The issue of loss of earnings is postponed sine die."

(own underlining)

59. The striking aspect of the draft order is that, for the first time, it recorded

that the accident happened on 15 February 2007.

60. Thus the author of the draft order was aware that the date contained in the summons as well as in the affidavit deposed to in support of the default judgment application was patently incorrect.

61. The draft order was not accompanied by a supplementary affidavit explaining (a) how the misrepresentation came to be made, (b) when the error was detected and why an effort, albeit an entirely inadequate effort, was only made on the day of the hearing to correct the date and (c) why the error was not brought to the attention of the Defendant. There was also no application to amend the particulars of claim.

62. The draft order was not served on the Defendant. There can be no doubt that the Defendant was unaware that the legal representatives of the Plaintiff were of the mind to request the Court to declare that the accident had occurred on 15 February 2007 and not on the date reflected in the particulars of claim.

63. In the view of the Court the attempt to obtain relief in this manner, by way of a draft order containing a recitation of facts materially different to what was contained in the Particulars of Claim and affidavit deposed to in

support of the default application at the eleventh hour and without the knowledge of the Defendant, at best constituted sharp practice. In this context, reference should be made to paragraph 108 below where the content of the draft order is addressed more fully.

THE PROCEEDINGS BEFORE STRETCH J ON 18 AUGUST 2020

64. When the matter was called on 18 August 2020, Mr Toni appeared on behalf of the Plaintiff (the Applicant in the application for default judgment) and moved for an order in terms of the draft order which had been filed on the same day.

65. As appears from the exchange set out below, Mr Toni sought to obtain an order by consent in terms of the draft order and in this context it is recorded that an exchange of emails was placed in the Court file which apparently provided the basis for the contention by Mr Toni that the order was by consent. The Court deals more fully with the exchange of e-mails separately below.

66. Having listened to a recording of the proceedings which were before Stretch J on 18 August 2020, the following may be noted:

66.1. Mr Toni commenced his address by informing the Court that this was a matter where "*... we are taking an order by agreement*".

66.2. Mr Toni then enquired as to whether the Court was in possession of the draft order which had been forwarded to the Court and repeated that the Plaintiff requested that an order be granted in terms of the draft order.

66.3. The Court in response questioned whether the Plaintiff's attorney, Mr Klaas, and the Defendant were "*...dealing with the same person*" and on the back of this question the Court asked Mr Toni as to when the accident had occurred.

66.4. In response Mr Toni stated without hesitation:

"*It was on the 20th of March 2019*".

66.5. The Court pointed out that the neurosurgeon's report recorded that the Plaintiff was in a motor vehicle accident on 28 February 2007 when he was fourteen years old.

66.6. Mr Toni then, extraordinarily so, enquired as to whether the Court could amend the report of the neurosurgeon. The Court, taken aback, stated that it could not.

66.7. The Court then repeated its concern about the date which was recorded in the medical report.

66.8. Mr Toni, undeterred, then referred the Court to paragraph 3 of the particulars of claim in an attempt, it would seem, to persuade the Court that what was stated in the particulars of claim should prevail.

66.9. In response the Court stated that the relief granted should surely be based on the medical evidence contained in the neurosurgeon's report and ventured that:

> "*The neurosurgeon either saw someone else or somebody's not speaking the truth here*".

66.10. The Court expressed concern as to whether the Defendant had been apprised of the correct facts and stated that it was not prepared to

grant the order remarking:

"*There is something very, very wrong here*".

66.11. The Court then indicated that it required an affidavit from both Mr Toni's instructing attorney and the Defendant to satisfy the Court that the parties were "*dealing with the same accident*".

66.12. The matter was then stood down and it was impressed upon Mr Toni to convey the Court's concerns to his instructing attorney who would presumably then convey the Court's concerns to the Defendant.

66.13. In closing the Court noted that it did not wish, in any way, to be unduly obstructive but that it had, in the past, been confronted with claims against the Defendant which were not *bona fide.*

67. After the matter was stood down, Stretch J was approached in Chambers by the legal representatives of the Plaintiff armed with an affidavit by Mr Klaas. There was no affidavit from the Defendant furnished.

68. The affidavit which was deposed to by Mr Klaas and which was termed an

"*explanatory affidavit*" is quoted *verbatim* below:

"*I, the undersigned,*

MCEBISI TEMPLETON KLAAS

Do hereby make oath and state as follows:-

1. *I am a major male and an attorney, practising as a Director, under the name and style M.T. KLAAS Incorporated in East London.*

2. *I am the Plaintiff's attorney of record in the above-mentioned matter, by virtue of being the duly appointed attorney.*
3. *The facts contained herein are, unless otherwise appear from the context, are within my personal knowledge and are to the best of my knowledge and belief true and correct.*

4. *This is supplementary affidavit in support of an application for default judgment against the Defendant.*

5. *I wish to confirm that the date of accident as per the attached accident report is 15th of February 2007 at about 14h00 at or near NU1 Mdantsane, Highway near taxi Rank, East London.*

6. *I have therefore noted on the Plaintiff's particulars of claim that the date of accident has been incorrectly recorded as the 20th of March 2019 and I have further noted that on the medico-legal report by Dr. Mazwi, the date of accident is recorded as the 28th of February 2007.*

7. *I therefore confirm that the date of accident is the 15th of February 2007 and the dates on the particulars of claim and Dr. Mazwi are incorrect.*

8. *In the premises I humbly request the relief as sought in the notice of motion."*

(own underlining)

69. The affidavit deposed to by Mr Klaas did not take the matter any further as

it served only to inform the Court what it already knew, namely that the allegations made both in the summons as well as in the affidavit deposed to in support of the application for default judgment about the date of the alleged motor vehicle accident were misleading.

70. The affidavit contained no explanation as to why both the summons as well as the affidavit deposed to in support of the application for default judgment were misleading. Rather it inexplicably contained a prayer in its conclusion that the relief sought in the "*notice of motion*" be granted.

71. The approach contained in the affidavit is troubling in two respects.

72. Firstly, as mentioned above, the affidavit offered not so much as a semblance of an explanation for the material misrepresentation which had been repeated in the Court process. If Mr Klaas was of the mind to depose to an affidavit dealing with the misrepresentation, then what was required was a full and comprehensive explanation as to who was responsible for the misrepresentation and how it came about so as to place the Court in a position to assess the motives and conduct of the Plaintiff, his legal representatives and any other person who was responsible for the misrepresentation. An explanation would also be required as to when the misrepresentation was detected, how it was detected, why it only came to

the fore on the day that the order was sought and why it was not brought to the attention of the Defendant.

73. Secondly, when the error was detected its significance should have been immediately conceded and appropriate steps should have been taken to address the unsatisfactory state of affairs which would have included informing the Defendant of the misrepresentation and informing it that negotiations which preceded the application for default judgment were based on a misrepresentation by the Plaintiff. If the Plaintiff was of the mind to proceed, then the Plaintiff would have been obliged to have taken the necessary steps to effect an amendment to the particulars of claim to bring them in line with the facts.

74. Mr Klaas, in his affidavit, however persisted with a prayer for the relief claimed as though the misrepresentation and non-disclosure to the Defendant could simply be overlooked.

75. After the production of the explanatory affidavit, Stretch J made the following order:

> "*Having heard Mr Toni for the Plaintiff and having read the documents filed of record*

IT IS ORDERED THAT:

1. *The application is postponed to 1 September 2020.*

2. *The draft order and the explanatory affidavit filed by the plaintiff's attorney on 18 August 2020 must be served on the defendant for its perusal and consideration before 12:00 on 21 August 2020.*

3. *Today's costs are reserved*."

2 SEPTEMBER 2020

76. This matter was one of four applications for default judgment against the Defendant which came before the Court on 2 September 2020 by way of virtual Motion Court proceedings.

77. Mr Toni again appeared on behalf of the Plaintiff in this matter.

78. Mr Toni did not inform the Court of the concerns raised by Stretch J about the validity of the claim.

79. In substance Mr Toni submitted that:

79.1. there had been compliance with the order by Stretch J in that the affidavit and draft order had been transmitted to the Defendant[4];

79.2. this was a matter where there was "*consent*" from the Defendant; and

79.3. an order should accordingly be granted in terms of draft which he had prepared dated 2 September 2020 which, for all intents, mirrored the draft which was presented to Stretch J on 18 August 2020.

80. The Court reserved judgment.

[4]The Court notes that there was, in the file, e-mail correspondence addressed to the Defendant purporting to enclose unidentified documentation and requesting a response from the Defendant. There was no proof of what, if any, documents were transmitted to the Defendant and there was no record of any response from the Defendant in the file. Although it is not necessary to decide for the purposes of this application, the Court is of the view that such conduct did not constitute proper service of the order of Stretch J.

THE ETHICS APPLICABLE TO LEGAL PRACTITIONERS

81. Given the issues raised and the questions posed above it is appropriate, by way of reminder, to make some observations as to the ethical standards required of legal practitioners.

82. It is often stated that the legal profession is an honourable one and that legal practitioners are required to conduct themselves with the utmost honesty and integrity. The imperative that the conduct of legal practitioners must be beyond reproach must not be allowed to become a platitude to which lip service is paid.

83. A legal practitioner has a pre-eminent duty to the Court not to embark on a litigation plan that will mislead the Court and this includes misleading the Court on evidentiary and legal points. He is not permitted to knowingly offer or rely on false evidence or to misstate evidence. He may not induce a witness to give dishonest evidence or to depose to an affidavit containing a version different to what he knows to be the facts. He is not permitted to draft a statement of case, an affidavit or any other document which contains any statement of fact which is at variance with or unsupported by his instructions. To supress evidence or worse still to suborn perjury, is to sabotage the administration of justice and it strikes at the heart of the legal

practitioner's duty to the Court.

84. In an article published in December 2017 in The Advocate titled "*The Ethics of the Hopeless Case*"[5] Judge Owen Rogers[6] expressed views on the scenario where a client instructs a legal practitioner to advance a case without providing a factual basis therefor.

85. It is apposite, for purposes of this matter, to quote from portions of his article:

> "*(i) Pleadings and affidavits must be scrupulously honest. Nothing should be asserted or denied without reasonable factual foundation. Counsel who acts contrary to this standard is guilty of misleading the court and may make herself party to perjury. She also fails to honour her paramount duty to the court and the administration of justice.*
>
> *(ii) It is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts …*

[5] At pg46
[6] Acting Judge of Appeal

(iii) A necessary correlative is that counsel must properly research the law and insist on adequate factual instructions. They must not fill gaps with guesswork or plead denials because their instructions are incomplete.

(iv) ...

(v) There is an ethical obligation to ensure that only genuine and arguable issues are ventilated and that this is achieved without delay.

..."

(own underlining).

86. The Court aligns itself with the conclusions reached by Judge Rogers.

87. The misleading of the Court can take place by way of both commission and omission. As to the latter, to every legal practitioner comes those implacable moments when he is called upon to make a disclosure in respect of a difficulty in or challenge to the granting of an order which the Presiding Judge, not having the attributes of papal infallibility, has either overlooked or is unaware and which may result in the client losing his case. The legal practitioner must step up and must not shirk his duty. Who

knows, it may turn out that the facts or that awkward passage in the evidence which the legal practitioner is dutybound to draw to the attention of the Court are less damaging than initially perceived or that the precedent which caused him so much anxiety and consternation and to which he was obliged to refer the Court is, in the final analysis, distinguishable. But that it for the Court, not the legal practitioner, to decide. If because of the disclosure the order is refused, well then the legal practitioner would have honourably fulfilled his role in the proper administration of justice.

88. In an often quoted English case, Rondel v Worsley, Lord Denning eloquently observed that:

> "[The legal practitioner] *has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth…He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court.*

The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline ... Such being his duty to the court, the barrister must be able to do it fearlessly. He has time and time again to choose between his duty to his client and his duty to the court ....[7]"

89. Chief Justice Mason, in the High Court of Australia, dealing with the question of whether a Barrister had immunity from being sued pointed out that the ethical duties resting on legal practitioners extend beyond that of not misleading the court and include an obligation to conduct the litigation in which they are involved in such a manner that will ensure its expeditious and proper ventilation:

"*11 The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. ...*

[7] [1966] 3 All ER 657 (Eng. C.A.) at 665. See also the comments of Leach J in Toto v Special investigating Unit and Others 2001 (1) SA 673 (E) at 683

12. It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.[8]

[8] Giannarelli v. Wraith, (1988) 165 CLR 543, 556-7. In a decision given in the Labour Court Van Niekerk J in Mashishi v Mdladla and Others (2018) 39 ILJ 1607 (LC), with reference to the article by Judge Rogers, stressed the ethical obligation on Counsel to ensure that only genuine and arguable cases are ventilated and that legal practitioners

90. There is much to be said for the sentiments expressed by Lord Denning and Chief Justice Mason.

91. Thus legal practitioners need to appreciate that the duty to the Court touches upon almost every aspect of practice and is not confined to what takes place in the Court room. Even the mundane exercise of the administration of an oath must be conducted in such a manner so as to enable the Court to safely and confidently rely on the contents of the statement which was the subject of the administration of the oath.

92. Lastly, as was stated by Ponnan JA in General Council of the Bar of South Africa v Geach & Others[9]:

> "[Legal practitioners] *are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard won freedoms is without parallel. As officers of our courts lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them ...*".

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have an obligation to ensure the efficient and expeditious adjudication of the matters which they pursue before the Court (see paragraphs [14] to [16]).

[9] 2013 (2) SA 52 (SCA) at paragraph 87.

93. In summary then, legal practitioners must refuse to follow instructions from their clients if to do so would put the administration of justice and the public's faith in the profession in jeopardy. Cases can and should be fought fearlessly but they must be fought within the bounds of honour and propriety.

94. If a legal practitioner makes himself guilty of misconduct then an obligation rests on the professional organisation which has jurisdiction over the practitioner, the Legal Practice Council, to bring the errant practitioner to book, it being the watchdog of the profession. For that reason a legal practitioner also owes a concomitant duty to the Legal Practice Council to fully participate in any enquiry instituted by the Legal Practice Council, the obligation being an expression of the Legal Practitioner's overarching duty of loyalty to the Legal Practice Council.[10]

THE AGREEMENT ALLEGEDLY REACHED BETWEEN THE PLAINTIFF AND THE DEFENDANT

Introduction

[10] Cf. Hewetson v Law Society of the Free State 2020 (5) SA 86 (SCA) at page 106G-I

95. Given the conclusion which I reach, it is not necessary to dwell on the contention by the Plaintiff that the draft order should be granted by consent given that any consent which may have been obtained (the Court is not persuaded that such consent exists), would have been consent secured on the basis of a material misrepresentation.

96. It is however appropriate to make some comments about the alleged consent obtained and the manner in which the Plaintiff's legal representatives sought to secure an order.

E-mail Exchange

97. In support of the contention that the order could be taken by consent, reliance was apparently placed on an exchange of unsigned emails which were filed at Court.

98. In summary, the correspondence in the file reveals:

98.1. The Defendant made an offer in full and final settlement of the matter utilising the standard "*OFFER AND ACCEPTANCE OF SETTLEMENT*" form containing the standard terms therein and requiring the signature of the Plaintiff and/or his representative on

or about 13 August 2020.

98.2. In a letter dated 13 August 2020 Mr Klaas, on behalf of the Plaintiff, recorded that this offer was not accepted by the Plaintiff.

98.3. On 17 August 2020 a person identified as Amanda Booi, apparently a Claims Handler employed by the Defendant, transmitted an email to Chumani Klaas recording as follows:

"*Good day,*

Kindly find here with our revised offer. GD= R 900 000.00 LESS 20% APPORTIONMENT = R 720 000.00."

98.4. There was no record on file of any response to this communication from Ms Booi.

99. There was no agreement signed between the parties and, in the Court's view, leaving aside the material misrepresentation which would have tainted any purported agreement, there is no indication that any offer was accepted and accordingly the e-mail exchange does not rise to the level of an agreement.

100. A Court should be hesitant to grant an order of the magnitude sought where public funds are at stake purely on the basis of an informal e-mail exchange.

101. Mogoeng J (as he then was) in Hotel Slots (Pty) Ltd and another v Premier of North West [1999] JOL 5120 (B) held as follows:

> "*It is befitting and imperative that a state contract be in writing and that the delegation of authority to state employees, public servants or any other person for that matter, be in writing. Corruption has reached alarming proportions in this country. Any charlatan can claim to be acting on behalf of the state with disastrous consequences. It would be a sad day if the courts would be willing to recognise oral authorisations and oral contracts allegedly entered into on behalf of the state and therefore in the public interest*."[11]

102. This is salutary advice. It is the view of the Court that, although these comments were directed at oral transactions, a Court should express a similar reluctance to recognise informal unsigned written communications

[11] At page 16

as being proof of binding contracts where hundreds of thousands of Rands of public funds are at stake and particularly where, as in this case, the Organ of State has a Standard Settlement Agreement template.

103. The Defendant is a social security scheme which is obliged to afford appropriate relief to victims of motor vehicle accidents who suffer bodily injury as a result of someone else's negligence[12]. It is accordingly imperative that its affairs are properly administered particularly when it comes to the expenditure of large amounts of public funds.

104. It is common knowledge that the Defendant has introduced a new litigation model where litigation is conducted inhouse by claim handlers and where a decision has been taken not to engage external legal representation. It would be naive to think that the withdrawal of the mandates of its attorneys has not had a substantial effect on its capacity to conduct litigation and to defend claims made against it.

105. It has also been observed that it is common knowledge that there is fraud and corruption on both the side of staff within the Defendant as well as on the side of attorneys who engage with the Defendant and that indeed the fraud and corruption extends to the medical profession, the ambulance

[12] Law Society of South African & Others v Minister of Transport and Another 2011 (1) SA 400 (CC) at paras 17 and 57.

emergency sector and the South African Police force[13]. The e-mail correspondence on file as generated by the Defendant incidentally contains a contact number to report fraud.

106. The view has been expressed, albeit in a different context, that it may be necessary for the Court to take a more inquisitorial role in matters involving the Defendant as the Court *"... cannot sit back supine whilst the RAF is finding its feet.."*[14].

107. Thus when a Court adjudicates on litigation involving the Defendant and in particular when it is called upon to exercise its discretion whether to grant an application for default judgment against the Defendant in a large sum, it must bear in mind the current state of the Defendant. It may be that, depending on the facts of the case, the Court is required to insist on additional measures and safeguards before such an order is granted. In the case of a default order this may include insisting that oral evidence is led and, in the case of an alleged agreement, that an official from the Defendant with the requisite authority confirm the alleged agreement or order by consent, preferably by way of affidavit or, better still, by being present at Court. As a minimum I would have thought that there should be

[13] FourieFismer Inc and Others v Road Accident Fund [2020] 3 All SA 460 (GP) at paragraph [81]
[14] FourieFismer (*supra*) at para [85]

a signed agreement and that, without wishing to belabour the point, an exchange of informal emails is not sufficient given the large sums of public funds involved.

108. That all being said, there are two further hard questions which need to be asked of the legal representatives of the Plaintiff in the light of the contention by Counsel that the order was being sought by consent:

108.1. Firstly, if the order was being taken by consent why then was it the stance of Counsel that the draft order did not need to be served on the Defendant because it was labelled an application for default judgment?

108.2. Secondly why did the draft order, in addition to containing the amount of R720 000.00 referred to in the alleged offer by the Defendant (as referenced above), contained further relief relating, *inter alia*, to expenses of expert and other reports and Counsel's fees when there was no mention of any of these items in the e-mail exchange and why did the draft order record that the question of the future loss of earnings allegedly suffered by the Plaintiff should stand over when there was no mention of this exception in the e-mail exchange?

RELIEF TO BE GRANTED AND FURTHER CONDUCT OF THE MATTER

109. It would clearly not be appropriate to grant the Plaintiff (Applicant in the default judgment) any relief as the Particulars of Claim upon which the application for default judgment/judgment by consent is sought refer to a non-existent accident.

110. Given the manner in which the Plaintiff's legal representatives have approached the Court, the matter should not be entertained. It should be struck from the roll.

111. In the light of the serious concerns raised by the Court it would not be sufficient to refuse to entertain the matter without more. Having due regard to the issues which have arisen, this matter calls for further investigation for two reasons.

112. Firstly, the facts before the Court ask the question as to whether the Plaintiff's claim may be a fraudulent one and whether other offences may have been committed in prosecuting the claim such as perjury and/or the obstruction of justice.

113. Whilst the body of this judgment speaks for itself, it is worth emphasizing that:

113.1. The date on which the accident appears to have occurred, 15 February 2007, may have been repeatedly misrepresented as 20 March 2019 to the Defendant and the Court with a view to securing a settlement from the Defendant under false pretences and/or circumventing the legal hurdle of prescription in the current litigation; and

113.2. Someone other than the Plaintiff appears to have deposed to the affidavit dated 19 November 2019 as submitted to the Defendant in support of the claim as well as the affidavit dated 30 July 2020 as relied upon by the Plaintiff in support of the application for default judgment and there is thus doubt as to whether the Plaintiff even has any knowledge of the claim.

114. Secondly, and similarly, the facts before the court ask the question as to whether the legal representatives who were responsible for:

114.1. the lodging of the claim with the Defendant on or about 21 November 2019;

114.2. the prosecution of the claim in this Court by way of the summons issued on 3 March 2020; and

114.3. the bringing of the default judgment application on 5 August 2020,

may have been guilty of unprofessional conduct and may have been party to the fraud, if one did take place, as well as to the perjury/obstruction of justice if such did occur.

115. Added to the above, an attempt was made by the legal representatives of the Plaintiff to secure the granting of a draft order on 18 August 2020 on a basis materially different to that foreshadowed in both the summons and the notice of motion in the default judgment application without the knowledge of the Defendant and in circumstances which raise questions about their *bona fides*.

116. It is accordingly necessary to refer the matter to the appropriate bodies for further investigation, namely the Department of Public Prosecutions and the Legal Practice Council.

THE ORDER

117. I accordingly issue the following order:

117.1. The application for default judgment/application for an order by consent is struck from the roll;

117.2. Should the Plaintiff wish to proceed with the claim he is required, within 21 days, to bring a substantive application for leave to amend his particulars of claim to reflect the correct date of the accident and is therein to give a full explanation as to:

117.2.1. how the misrepresentation as to the date of the motor vehicle accident as contained in the summons of 20 May 2020 and the two affidavits purportedly deposed to by the Plaintiff on 19 November 2019 and 30 July 2020 came to be made;

117.2.2. the identity of the person or persons responsible for the misrepresentation as to the alleged date of the motor vehicle accident in the affidavit deposed to on 19

November 2019, the summons issued on 20 May 2020 and the affidavit deposed to on 30 July 2019;

117.2.3. the date when the misrepresentation was detected and by whom it was detected;

117.2.4. the reason why the misrepresentation was not brought to the attention of the Defendant;

117.2.5. the reason why Counsel for the Plaintiff represented to the Court on 18 August 2020 that the motor vehicle accident had occurred on 19 March 2020 and the reason why it was submitted by Counsel on behalf of the Plaintiff on 18 August 2020 that the order was by agreement when the Defendant had not been made aware that the summons and affidavit deposed to in support of the application for default judgment were misleading as to the date of the alleged motor vehicle accident; and

117.2.6. the reason why the signatures on the two affidavits purportedly deposed to by the Plaintiff, on 19

November 2019 and 30 July 2020, resemble the signature of Ms Nomthandeza Letticie Nikelo as contained in her affidavit deposed to on 3 December 2019 as submitted to the South African Police Services.

117.3. The application for the amendment is to be accompanied by an affidavit by the Plaintiff setting out in detail the circumstances relating to the alleged motor vehicle accident and a chronology of all his interactions with the Plaintiff's legal representatives, namely Mr Klaas and Mr Toni.

117.4. This judgment must be attached to any application for amendment as referred to above and must be entered into the record of any future proceedings in this matter.

117.5. Should the claim proceed, it will be in the discretion of the Judge hearing the matter to determine whether oral evidence is necessary in respect of either liability or quantum or both.

117.6. The Registrar is directed to transmit a copy of this judgment to:

117.6.1. the Chairperson of the Legal Practice Council and the

Director of the Eastern Cape Legal Practice Council for further investigation having due regard to the issues raised in this judgment;

117.6.2. the Eastern Cape Director of Public Prosecutions for further investigation having due regard to the issues raised in this judgment; and

117.6.3. the Defendant, for the attention of the Claims Handler in the matter, Amanda Booi, and the Senior Manager, Lance Johnston.

117.7. The Registrar is to obtain acknowledgements of receipt from the above persons and to place them in the Court file.

P N KROON

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff/Applicant: Adv Toni instructed by M. T. Klaas Incorporated