REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/6354

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

5/9/2012
DATE

SIGNATURE

In the matter between:

ROAD ACCIDENT FUND Applicant

and

MASONDO, PHUMZILE Respondent

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] This application raises the issue whether the respondent's claim against applicant based on a taxed bill of costs has prescribed, and

concomitantly, whether the subsequent writ of execution issued by the respondent was valid. Regrettably, the papers evince several dilatory and unexplained conduct on the part of both parties in dealing with the matter.

[2] In the notice of motion, the applicant seeks an order staying and setting aside a warrant of execution issued at the behest of the respondent on 16 October 2009; declaring that the applicant is not liable for the sheriff's costs connected with the execution of the said warrant of execution; that the respondent's claim for costs, arising from a settlement agreement entered into between the parties on 12 November 2004, became prescribed on or about 27 August 2009; and finally, the applicant seeks a costs order against the respondent in regard to the instant application. The respondent is opposing the application on the grounds as set out later in this judgment.

BACKGROUND FACTS

[3] The facts giving rise to the present application may briefly be summarised as follows: The respondent instituted action against the applicant in this Court for compensation in terms of section 17 of the Road Accident Fund Act 56 of 1996 ("*the RAF Act*") as a result of certain bodily injuries she sustained in a motor vehicle accident on 17 November 2002. The respondent was represented by attorneys Raphael Kurganoff of Johannesburg. The matter was set down for trial on 8 November 2004. However, on this date, the plaintiff accepted an offer of settlement in terms of Rule 34(1) and (5) of the Uniform Rules of Court. The settlement agreement

provided that the applicant shall pay 100% of the respondent's proven or agreed damages in due course. In addition, the settlement provided that:

> "*In the event of the offer of settlement on the merits being accepted, the defendant* (applicant) *hereby tenders to pay the plaintiff's* (respondent's) *taxed costs as between party and party on the High Court scale provided that the quantum is determined or agreed within the jurisdiction of the High Court ...*" (my insertions)

In essence, the issue of the respondent's quantum of damages was postponed *sine die*, and the applicant was to pay the costs relating to liability.

[4] On 5 March 2005 the respondent's costs relating to the merits was taxed in the amount of R21 119,88. This amount was duly paid by the applicant to the respondent's attorneys on 26 July 2011. The latter date becomes relevant later herein.

[5] The issue of the respondent's quantum of damages was settled on 26 January 2006 pursuant to an offer under Rule 34 of the Uniform Rules made and accepted by the respondent. In accepting the settlement offer, the respondent's attorneys. Raphael Kurganoff, addressed a letter to the applicant's attorneys, *inter alia*, as follows:

> "*We refer to the offer of R120,000.00 plus an undertaking in settlement of the capital, which our client has agreed to accept. Herewith a copy of our notice of acceptance. Our party and party bill of costs on a High Court scale will follow in due course. Kindly instruct your client to make payment into the following account ...*"

[6] Thereafter, some seven months later, and on 3 August 2006, the respondent's attorneys served on the applicant's attorneys a notice of taxation relating to the respondent's costs of quantum and set down for 28 August 2006. On the latter date, the bill of costs was taxed in the amount of R71 936,18. It is not entirely clear from the papers what caused the delay, but on 16 October 2009 the respondent's attorneys issued a warrant of execution based on the taxed bill of costs of R71 936,18. Thereafter, and on 9 January 2012, the sheriff executed the warrant by attaching the applicant's movable property. This led to the present application.

[7] The respondent seeks an order that the settlement agreement reached between the parties on 4 November 2004 be made an order of court, and that the applicant pays the sum of R71 936,18 as taxed, as well as the costs of this application.

THE PARTIES' CONTENTIONS

[8] The applicant contends that the warrant of execution issued on 16 October 2009 is illegal, improper and invalid since it was issued solely on the basis of the *allocatur*, without any underlying court judgment as required by the provisions of Rule 41(1) and (2) read with Rule 45(1) and (2) of the Uniform Rules. In addition, the applicant contends that the respondent's complete cause of action arose on 28 August 2006 when the bill of costs was taxed and allocated. Consequently, according to the applicant, the respondent's claim became prescribed on or about 27 August 2009 in terms

of section 12(1) of the Prescription Act 68 of 1969. On the other hand, respondent contends that the payment of the costs of the merits by the applicant on 26 July 2011 interrupted prescription which commenced *de novo* from such date. Further, that the rights of the parties are not finally determined until the costs ordered by the Court have been taxed, and consequently, prescription could never have commenced prior to 26 August 2006 when the quantum bill of costs was taxed. In essence, the respondent argues that the payment of the taxed costs of the merits of the claim, is an acknowledgement of the debt as a whole. The debt is not divisible. In the end, the respondent seeks confirmation of the warrant of execution.

THE APPLICANT'S CONTENTION OF PRESCRIPTION

[9] I deal first with the applicant's contention that the respondent's claim in the sum of R71 936.18, being the costs in respect of quantum, taxed on 28 August 2006, has prescribed. The quantum of damages was settled on 26 January 2006 when the applicant undertook to pay the respondent's costs on taxation. Once the respondent accepted applicant's offer of settlement, including taxed costs unconditionally, a contract came into existence. The litigation between the parties was brought to an end. In *Erasmus v Santam Insurance Ltd and Another* 1992 (1) SA 893 (W) at 898B-C, Flemming DJP said:

> *"On the basic principles of conclusion of a contract, the plaintiff could indeed only accept what is offered. Nothing else was available to be accepted."*

See also *Hassett v Santam Insurance Co Ltd* 2000 (1) SA 403 (C). Subsequent to the conclusion of the agreement, all that the respondent had to do was the taxation of costs which is an integral part of the proceedings before a Court. See *Bill of Costs (Pty) Ltd v The Registrar, Cape, NO* 1979 (3) SA 923 (A). On this basis, the applicant's resistance to the claim of costs is unfounded and falls to be dismissed.

[10] However, if I am incorrect in the above determination, I believe that the applicant's submission based on prescription, can also not succeed for yet another reason. This is that, the respondent's claim for taxed costs in regard to the quantum should be regarded as one whole part of the claim on the merits which was also settled when the applicant conceded the merits in full in favour of the respondent. The respondent's claim based on quantum is not divisible from the claim on the merits. In *Estate Allie v Cape Town Municipality* 1980 (1) SA 265 (C), at 267 the Court said:

> *"The contention that the whole award, including costs, should be treated as a composite whole is more consistent than the contrary contention with what has been said in the decision of Hire-Purchase Discount Co (Pty) Ltd v Magua 1973 (1) SA 609 (A) at 613-4:*
>
> > *'Every civil judgment given by a court of law generally includes an order as to costs might constitute a separate cause of action (I have pointed out that it is unnecessary to decide this issue), such order is nevertheless closely associated and ancillary to it ..."*

In the present matter, there could never have been commencement of prescription before August 2006. It is conceded, however, that the settlement agreements in terms of which the applicant undertook to pay the respondent's

taxed costs were never made orders of court. The contention of the applicant that the respondent's claim based on costs must therefore fail.

[11] Again, if I am incorrect in my determination of the above, I believe that there is a further reason why the applicant's contention based on prescription should not succeed. This is that, the respondent's bill of costs in respect of the merits of her claim was taxed on 5 March 2005. The applicant did not pay the costs immediately until 26 July 2011. It is, however, unclear on the papers whether this was preceded by a letter of demand or not. The delay in paying remains unexplained.

[12] It was contended on behalf of the respondent that the payment made by the applicant as aforesaid in fact interrupted prescription. It is settled law that the respondent's claim based on the costs, became a complete cause of action once the bill was taxed on 28 August 2006, and prescription in respect thereof began to run from that date. See *Santam Ltd v Ethwar* [1999] 1 All SA 252 (A), also reported in 1999 (2) SA 244 (SCA). However, the payment of the costs relating to the merits by the applicant on 26 July 2011 places a different slant on the facts of the instant matter.

[13] The last-mentioned payment brings into consideration the provisions of section 14(1) of the Prescription Act 68 of 1969 ("*the Prescription Act*"). In *Erasmus v Grunow en 'n Ander* 1978 (4) SA 233 (OPD), the head note reads as follows:

> *"According to the provisions of ss 10(1), 12(1) and 14(1) of the Prescription Act 68 of 1969 it is a debt which is extinguished by prescription; prescription begins to run as soon as the debt is due, and an interruption of prescription accordingly takes place if liability in respect of that debt is admitted. These provisions make it clear that the Legislature saw a debt as a unitary concept for the purposes of prescription. It is not divisible in the sense that prescription can run against part of a debt and not run against another part. It follows, therefore, that at any given moment there cannot be more than one period of prescription in respect of a single debt, and that a particle interruption of prescription is therefore impossible. Stated differently, a debt cannot prescribe piecemeal. An admission of partial liability cannot result in a partial interruption of prescription.*
>
> *The wording of s 14(1) of the Prescription Act 68 of 1969 leads to the conclusion that an admission of partial liability interrupts the running of prescription."*

[14] Section 14(1) of the Prescription Act provides as follows:

> *"The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor."*

In *Extinctive Prescription* (1996), M M Loubser, at pp 139-140, the learned author states:

> *"An acknowledgement in respect of any part of a debt interrupts the running of prescription in respect of the whole debt, unless the debtor expressly excludes this conclusion in making the acknowledgement. Where a debtor had acknowledged liability for, and had paid interest on an arbitrator's award, this conduct also amounted to a tacit acknowledgement of liability in respect of the arbitrator's award for costs, because the liability for costs formed an integral part of the award."*

Reference is made to *Erasmus v Grunow en 'n Ander* (*supra*). See also *Estate Allie v Cape Town Municipality (supra)* at 267H and at 269, as well as LAWSA, Vol 21 para 129.

[15] In applying the above legal principles to the facts of the present matter, it is plain that the payment of the taxed costs on the merits of the respondent's claim in the amount of R21 119,88 by the applicant on 26 July 2011, interrupted whatever contentions of prescription present. The reason for the delay in paying from the date of the taxation of such costs on 5 March 2005 to 26 July 2011, (more than six years), is not apparent from the papers. It, however, remains significant that in spite of the applicant's contention that the respondent's claim in respect of the taxed costs relating to her quantum of damages prescribed on 27 August 2009, the applicant nevertheless made the payment on 26 July 2011 only. This is inconsistent and inexplicable. Properly construed, prescription began to run *de novo* from the date of such payment. The applicant is clearly abusing the court process by denying the respondent's costs to which she is legitimately entitled and which costs the applicant had agreed to pay. In my view, this conduct on the part of the applicant, and dragging the matter from 2002 when the cause of action initially arose, is deserving of a punitive costs order in the circumstances of this matter. On the other hand, the respondent's attorneys of record are also not without fault. It boggles the mind why they taxed the costs on the merits as far back as 5 March 2005 and received payment thereof only on 26 July 2011. It is equally worrisome that the bill of costs in respect of the respondent's quantum of damages was taxed on 28 August 2006 and the attorneys procrastinated until 16 October 2009 to issue a warrant of execution. All these matters remain unexplained, at least on the papers. The only person possibly affected by the inordinate delay in finalising the matter is indeed the respondent. For all the above reasons, the applicant's contention based on

prescription is misconceived and must fail. In the light of this finding, it is unnecessary to decide the issue whether an agreement to pay costs in terms of Rule 34 of the Uniform Rules of Court can prescribe while there is still an opportunity to approach a judge to have the settlement made an order of Court.

THE VALIDITY OF THE WARRANT OF EXECUTION

[16] Finally, I now turn to the question of the validity of the warrant of execution issued by the respondent's attorneys on 16 October 2009 based on the bill of costs taxed on 28 August 2006. In my view, this aspect of the matter is capable of easy resolution in favour of the applicant as discussed immediately below.

[17] It is common cause that the settlement agreements reached by the parties in respect of both the merits and quantum of damages of the respondent's claim, as well as the concomitant undertaking by the applicant, were never made orders of Court. The warrant of execution issued by the respondent's attorneys was based on the taxed bill of costs and resultant *allocatur* only. In *Road Accident Fund v Nnosa and Another* 2005 (4) SA 575 (T), the first respondent instituted an action against the applicant for damages suffered as a result of the death of her husband in a motor vehicle collision during December 1991. However, the action was settled on 19 September 2001. It was a term of the settlement that the applicant would pay the first respondent's agreed or taxed party and party costs. The settlement was not

made an order of Court. The capital amount in terms of the settlement was paid. There was no agreement between the parties on the quantum of costs. The first respondent's attorney caused his bill of costs to be taxed in July 2004 and thereafter proceeded to issue a writ of execution. The second respondent was instructed to execute the writ. In response, the applicant objected to the execution. In spite of the request to him to withdraw the writ of execution, the first respondent's attorney refused to do so. The applicant's main contention was that the writ of execution was invalid and irregular and qualified to be set aside by virtue of the fact that it was not supported by any judgment of the Court. The first respondent, on the other hand, contended that the writ was based on an *allocatur* of the Taxing Master. After reviewing numerous case law and other authorities, Van der Merwe (as he then was) at 580C-E said:

> *"It is clear why special provision was made in Rule 41(1) and 41(2) for situations where proceedings are withdrawn or judgments abandoned. Rule 41(1) provides that judgment may be applied for if a written settlement has not been carried out. There is no provision in Rule 41 that an undertaking in a settlement to pay costs shall have the effect of an order of Court. It is clear that in order to execute on an undertaking in a settlement to pay costs, a judgment will have to be obtained and the costs will have to be taxed. A taxed bill of costs alone is not enough to levy execution on an undertaking to pay costs. An allocatur does not amount to a judgment for the purposes of execution. Prior to execution the first respondent should have obtained a judgment as well as the taxing master's allocatur. The application must therefore succeed."*

See also Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5ed pp 1026-1027; as well *Ashersons v Panache World (Pty) Ltd* 1992 (4) SA 611 (C) at 617B-C, in regard to the force of an *allocatur* for the purposes of provisional sentence. In

applying the above legal principles to the instant matter, it is plain, for reasons stated earlier in this judgment, that the warrant of execution issued by the respondent's attorneys on 16 October 2009 was illegal, improper, and invalid. It was issued solely on the strength of the *allocatur* dated 28 August 2006, without any underlying court order. The warrant of execution falls to be set aside. It will be unjust in the circumstances to saddle the applicant with the costs and fees incurred in regard to the issuing and execution of the warrant. *En passant*, there has been no explanation at all for the delay between the taxing of the bill of costs on 28 August 2006 to the date of the issuing of the warrant.

COSTS

[18] I deal with the issue of the costs. The respondent has achieved substantial success in regard to her claim. She is entitled to her costs, save for the costs associated with the issuing of the warrant of execution as contained in the body of this judgment.

ORDER

[19] In the result I make the following order:

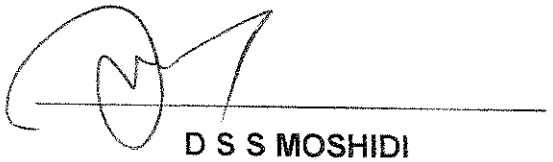
1. The applicant shall pay to the respondent 100% of her proven or agreed damages in the amount of R120 000,00 (One Hundred and Twenty Thousand Rand).

2. The applicant shall pay the respondent's taxed costs of the action relating to quantum of damages on the High Court scale.

3. The applicant shall provide the respondent with an undertaking in terms of section 17(4)(a) of the RAF Act within 14 (fourteen) days from the date of this order.

4. The warrant of execution issued against the applicant on 16 October 2009 is hereby set aside.

5. The applicant shall pay the costs of this application on the attorney and client scale. Such costs shall exclude the costs connected with the issuing of the warrant of execution referred to in order no. 4 above.



D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	9 MAY 2012
DATE OF JUDGMENT	5 SEPTEMBER 2012

SUMMARY

Claim for damages in terms of section 17 of the Road Accident Fund Act No. 56 of 1996 as a result of bodily injuries sustained in a motor vehicle collision – plaintiff accepting settlement offer from Fund in terms of Rule 34 of Uniform Rules of Court – plaintiff's attorneys taxing bill of costs and later issuing writ of execution. Fund challenging validity of writ of execution and raising as defence prescription in terms of section 14(1) of the Prescription Act No. 69 of 1969.