IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***3rd June 2020*** Signature: _____

CASE NO: 2019/31546
CASE NO: 2019/22794
CASE NO: 2019/31545
CASE NO: 2019/37216
CASE NO: 2019/29804

DATE: 3RD JUNE 2020

In the matter between:

LEGOALE, KAGISO SONNYBOY	Plaintiff (In 1st Case)
MATHEBULA, DAVID SONNYBOY	Plaintiff (In 2nd Case)
MOJADIBE, MASIPA EVAN	Plaintiff (In 3rd Case)
SHOKO, TREVOR	Plaintiff (In 4th Case)
MOPHUTING, MMATHEPELO GLORIA	Plaintiff (In 5th Case)

and

ROAD ACCIDENT FUND	Defendant

Coram: Adams J
Heard: 01 June 2020
Delivered: 03 June 2020

Summary: Civil procedure – applications to compel the RAF to agree to the use of 'joint experts' – uniform rule of court 36(9A) and *Directive 2 of 2019* of the Gauteng Local Division – no legal basis for the relief sought – applications dismissed with no costs orders

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ORDER

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(1) The interlocutory applications of the above plaintiffs against the RAF under the above case numbers are all dismissed.

(2) There shall be no costs orders in any of the interlocutory applications.

JUDGMENT

Adams J:

[1]. In the specialised *Trials Interlocutory Court* of this division on Monday, the 1st of June 2020, I had before me five applications against the Road Accident Fund ('the RAF') by the plaintiffs in five different cases. The relief sought by these plaintiffs in all five applications are identical and are based on the simirlar factual matrices and legal arguments. In all the applications the plaintiffs applied for an order that the medico-legal experts appointed by them, which experts are then listed, shall be deemed to be appointed as single joint experts.

[2]. So, for example, in the first application (Legoale v RAF) Mr Legoale applied for an order in the following terms:

'1. That the experts appointed by the plaintiff, being Dr Geoffrey Read, Michelle Hough, Lowinda Jaquire and Prof Laurence Anthony Chait, be deemed to be appointed as single joint experts.'

[3]. The applications are all based on the provisions of the Uniform Rule of Court 36(9A)(a), which was recently introduced into the Uniform Rules of Court

by an amendment to the Rules and which came into operation during July 2019. The new rule 36(9A) reads as follows:

'(9A) The parties shall—

(a) endeavour, as far as possible, to appoint a single joint expert on any one or more or all issues in the case; and …

[4]. This rule should be read with *Directive 2 of 2019* by the Honourable Judge President Mlambo, which came into operation with effect from the 8th of July 2019. The directive relates to and regulates case management, trial allocation and enrolment of trial matters in this division. Paragraph 8 of that Directive, with reference to Case Management Conferences in RAF actions, reads as follows:

'8. The minute referred to in paragraph 7.4.2 shall:

8.1 particularise the parties' agreement or respective positions on each of the following questions:

8.1.1 … … …

8.1.2 … … …

8.1.3 In respect of expert witnesses:

8.1.3.1 The feasibility and reasonableness, in the circumstances of the case, that a single joint expert be appointed by the parties in respect of any issue.

8.1.3.2 If a single joint expert witness is not appointed, why a single expert on a given aspect is inappropriate.'

[5]. As regards the *Trials Interlocutory Court*, dedicated to interlocutory matters in trial matters, the Directive provides as follows:

'23. Any party who, having reason to be aggrieved by the other party's neglect, dilatoriness, failure or refusal to comply with any rule of court, provision of the practice manual or provision of this directive, must utilise the trials interlocutory court to compel compliance and cooperation from the delinquent party.

24. In particular, plaintiffs in category [RAF] matters who allege that the defendant is culpable in any way for an unnecessary delay, must not hesitate to utilise this court.

25. Among the matters which this court will deal with will be:

25.1 the failure to deliver timeously any practice note or heads due,

25.2 a failure to comply with rule 36,

25.3 a failure to sign a rule 37 minute promptly,

25.4. a failure to comply timeously with any undertaking given in a rule 37 conference,

25.5. a failure to secure an expert timeously for an interview with a patient,

25.6. a failure to secure a meeting of experts for the purpose of preparing joint minutes,

25.7. non-compliance with any provision of this directive;

25.8. any other act of non-cooperation which may imperil expeditious progress of a matter may be the subject matter of an application to compel; the list is not closed

26. In a proper case, punitive costs (including an order disallowing legal practitioners from charging a fee to their clients) may be awarded where recalcitrance or obfuscation is apparent and is the cause of inappropriately delaying the progress of any matter.

[6]. Of particular importance is par 25.2, which provides specifically that matters to be dealt with by this court shall include the failure by a party to comply with the provisions of rule 36. The directive does however not expressly deal with a party's failure to avail himself of the provisions of rule 36(9A)(a), which, after all, does not impose on a party a positive obligation to take a particular procedural step in the litigation process. In other words, it cannot be said that a defendant who fails to give notice of his intention to call an expert witness does not comply with rule 36. There is no obligation on a defendant to call expert witnesses. All that the rule provides is that, in the event of the defendant opting to call an expert witness, the procedure outlined in that rule 36(9) should be followed. What the rule 36(9A) provide for is a procedure which encourages parties to reach agreement on the use of a 'joint expert'. My reading of rule 36(9A)(a) is that it does not afford to the plaintiffs the right to insist that the defendant agrees on a 'joint expert'. Far from it, the language used simply states that the parties should try to reach agreement on this issue. If no agreement can be reached, then there is not much more relief available to the plaintiffs.

[7]. In sum, rule 36(9A), which is the primary legislative provision on which the plaintiffs' cause in these interlocutory applications are based, contains no express or implied provisions to the effect that the plaintiffs have the right to an

order that an expert witness appointed by any of them should be 'deemed a joint expert' as envisaged in the said rule. The rule and its wording are unambiguous. The words must be construed objectively. There is nothing in rule 36(9A) to justify the relief sought by the plaintiffs.

[8]. A further difficulty with the applications by the plaintiff is that the relief sought should, according to the Practice Directive, be dealt with at a judicial case management conference. This has not been done at the instance of the plaintiffs in the matters before me by the time they launched their interlocutory applications.

[9]. This means that the insofar as the plaintiffs' application is founded on the provisions of rule 36(9A), it should fail.

[10]. The next question is whether, if regard is had to the provisions of the aforementioned Practice Directive and the facts in the matters, the plaintiffs are nevertheless entitled to the relief claimed in the interlocutory applications. In that regard, par 23 of the Directive (supra) may be instructive. In particular, that provision urges litigants in RAF actions to 'utilise the trials interlocutory court to compel compliance and cooperation from the delinquent party'. Also, the facts in these matters in broad strokes are as follows.

[11]. In all the matters the pleadings had closed during or about the latter quarter of 2019. Therefore, in terms of rule 36(9)(a) the RAF was required to deliver its notices of intention to call specific experts within sixty days from the date of the close of the pleadings, which it predictably did not do.

[12]. The plaintiffs, on the other hand, addressed communications to the defendant shortly after *litis contestatio* and requested them (the RAF) to agree that certain experts, which they (the plaintiffs) intended appointing, could be utilised as 'joint experts' in specified fields of expertise. No responses were received from the RAF to these initial communiqués or to several further follow-up requests. The plaintiffs thereafter went ahead and delivered notices in terms of rule 36(9)(a), giving notice to the RAF that they intended calling certain medico- legal expert witnesses. It is in this context and on the basis of par 23 of

the Practice Directive that the plaintiffs believe that they are entitled to the relief prayed for in their notices of motion.

[13]. I am not persuaded that there exists a sound legal basis for the relief sought. The facts in the matters do not change the basic principle that rule 36(9A) does not entitle the plaintiffs to the relief sought in the applications. I say so for the simple reason that a linguistic interpretation of the rule suggests that the plaintiffs' cause of action is bad in law. By the same token, the spirit of that provision, as well as that of par 23 of the Practice Directive, whilst it promotes and encourages co-operation between parties in order to achieve efficacy, efficiency, expeditious, cost-effective and time-saving progress towards trial preparedness, it does not change the RAF's entitlement in terms of the rule to elect not to qualify expert witnesses. That is the law and the doctrine of the rule of law requires that I apply that principle in the adjudication of these interlocutory applications.

[14]. It is so, as submitted by Mr Nel, who appeared on behalf of the plaintiffs, that the Practice Directive encourages plaintiffs to approach the Interlocutory Court if they believe that the RAF is being dilatory and obfuscating. However, in these applications, I do not believe that the relief sought is underpinned by the rule governing the procedure.

[15]. I am therefore of the view that all the interlocutory applications by the plaintiffs should be dismissed.

Costs

[16]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[17]. There are in my view two reasons for departing from this general rule, in addition to the fact that the RAF did not oppose the applications, although notices of intention to oppose were filed in one or two of the applications. Firstly,

in launching the applications in the Trials Interlocutory Court the plaintiffs, in my view, acted out of a genuine desire to act in the spirit of the Directive issued by the JP of this Division. I believe that the plaintiffs are desirous to ensure that the actions are brought to trial readiness, without any undue delays and without unnecessary and avoidable legal costs, and as expeditiously as possible. They acted *bona fide*, although their causes were misguided. The aforegoing is confirmed by the fact that, in their notices of motion, no costs orders are prayed for by any of the plaintiffs. It therefore cannot possibly be suggested that the plaintiffs are abusing the processes of this Court.

[18]. Secondly, the legislative provisions relied upon by the plaintiffs in their applications are relatively new and untested. The law and the applicable principles are as yet far from settled. The *Biowatch* principle therefore finds application.

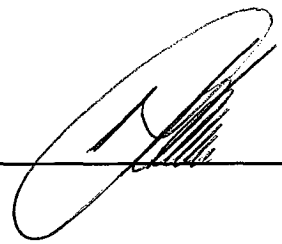
[19]. I am therefore of the view that no order as to cost would be fair, reasonable and just to all concerned. Therefore, in the exercise of my discretion I intend granting no order as to costs in all the applications.

Order

Accordingly, I make the following order:-

(1) The interlocutory applications of the above five plaintiffs against the RAF under the above case numbers are all dismissed.

(2) There shall be no costs orders in any of the interlocutory applications.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	1st June 2020
JUDGMENT DATE:	3rd June 2020
FOR THE PLAINTIFFS IN ALL FIVE APPLICATIONS:	Mr Combrink Nel
INSTRUCTED BY:	Kruger & Pottinger Incorporated
FOR THE DEFENDANTS IN ALL FIVE APPLICATIONS:	No appearances
INSTRUCTED BY:	Various RAF Panel Attorneys