IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

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

3 / 4 / 2018
DATE

SIGNATURE

CASE NUMBER 578/2016

ERCILIA MACIA AND 16 OTHERS

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

LEGODI JP

[1] The norms and standards issued by the Chief Justice of the Republic of South Africa on 14 February under circular 1 of 2014 have brought about a new dispensation in dealing with the pace of litigation in our courts throughout the Republic. These

norms and standards are binding on all judicial officers across the spectrum of all our courts.

[2] The objectives of the norms and standards are noble ones. *They 'seek to achieve the enhancement of access to quality justice for all, to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts, where applicable. These objectives can only be attained through the commitment and co-operation of all judicial officers in keeping with the oath of their office to uphold and protect the constitution and the human rights entrenched in it and to deliver justice to all persons alike without fear, favour, or prejudice with the Constitution and the law'*[1].

[3] In my view, it is not only the commitment and co-operation of all the judicial officers in keeping with what the oath of their office requires of them. But most importantly, the cooperation and commitment of the practitioners and the litigants. The practice of allowing litigation to run at a snail pace through and to the convenience of practitioners, but at a huge expense to their clients, ought to be arrested and brought to a halt, failing which the norms and standards would be an uneventful piece of paper.

[4] One sometimes is tempted to come to the conclusion that practitioners in particular, would want to question the appropriateness of the norms and standards. Hopefully I am wrong in this regard. But in the event I am right, then it is important to set the record straight and at the same time bring home the point that when change is imminent everyone look for cover and in the process turn into a resistance mode.

[5] In terms of section 165(6) of the Constitution read with section 8(2) of the Superior Courts Act 10 of 2013, the Chief Justice exercises responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions for all courts. The Chief Justice may furthermore issue written protocols, directions or give advice or guidance to judicial officers in respect of the norms and standards for judicial functions[2].

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[1] Paragraph 2 of the Norms and Standards
[2] Section 8(3) of the Superior Courts

[6] Section 34 of the Constitution deals with access to courts and provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and important tribunal or forum. Therefore any delay in finalisation of cases resulting in unnecessary costs of litigation, in my view, impedes on a fundamental right to 'a fair public hearing'. As it is said, 'justice delayed justice denied'. (My emphasis).

[7] On the other hand, section 173 of the Constitution deals with the inherent powers of courts and provides that the Constitutional Court, Supreme Court of Appeal and High Court have inherent power to protect and regulate their own processes and to develop the common law, taking into account the interest of justice.

[8] One way of protecting and regulating the court's own processes is to ensure that matters issued in our courts for resolution of disputes do not take months and years before they are finalised. It is in the interest of justice to expeditiously deal with these matters as they are issued in our courts.

[9] Norms and standards, rules of courts, pre-trial conferences and the directives with strict time lines made during pre-trial conferences are all a way to achieve speedy finalisation of cases in our courts. Therefore, enforcement of these directives with serious consequences where appropriate, appears to be the only way-out to deal with transgressions and those who are in defiance to change.

[10] The core values of the norms and standards are, *inter alia*, equality and fairness, accessibility, transparency, responsiveness and diligence in dealing with matters brought before our courts for adjudication[3]. That being so, it is required of judicial officers in any high court to finalise civil cases within 1 year from the date of issue of summons[4] and within nine months in the magistracy. Judicial officers should take control of the management of cases at an earliest possible opportunity[5], and

[3] Paragraph 3 of the Norms and Standards
[4] Paragraph 5.2.5 (i) of the Norms and Standards
[5] Paragraph 5.2.4(iv) of the Norms and Standards

should take actions and primary responsibility for the management of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay[6]. The Head of each court should ensure that judicial officers conduct pre-trial conferences as early and as regularly as may be required to achieve the expeditious finalisation[7]. No matter may be enrolled for hearing unless it is certified ready by a judicial officer[8] and judicial officers must ensure that there is compliance with all applicable time limits[9]. (My emphasis).

[11] The following cases except one, are all against the Road Accident Fund and were all subject to case management, pre-trial conference and dates for trial were allocated during pre-trial conference with specific time-frames to be complied with by the parties including the dates by which they should be settled if need be and punitive consequences in the form of cost orders for settling on dates of trial and or not being ready for trial:

Macia Ercilia v RAF	Mbombela case no: 578/2016
Cassandra T Butler v RAF	Mbombela case no: 180/2016
Zelda C Ebersohn	Mbombela case no: 863/2016
Hlongolwane H Selowe v RAF	Mbombela case no: 3144/2016
Gift H Mabunda v RAF	Mbombela case no: 52/2017
NS Maphalu v RAF	Mbombela case no: 3516/2016
Nontsikelelo S Thumbathi v RAF	Mbombela case no: 770/2017
Queen D Mokoena v RAF	Mbombela case no: 20/2016
Siphiwe Caipus Mathebula v RAF	Mbombela case no: 159/2016
Johanna P Bezuidenhout	Mbombela case no: 328/2016
Agreenent N Shongwe	Mbombela case no: 91/2016
Ntokozo N Vilane	Mbombela case no: 535/2016
Prince T Bhiya	Mbombela case no: 2050/16
Esther J Vilakazi	Mbombela case no: 170/2017
Aaron D Mokoena	Mbombela case no: 327/2016

[6] Para 5.2.4(v) of the Norms and Standards
[7] Para 5.2.4(vi) of the Norms and Standards
[8] Paragraph 5.2.4(vii) of Norms and Standards
[9] Paragraph 5.2.4(viii) of Norms and Standards

[12] In this Division, no matter is allocated a trial date unless a pre-trial conference before a judge was held during which a date of trial is determined. All matters which come before the court are case-managed with the result that no matter is postponed *sine die*, removed or struck from the roll except those matters struck off from the roll due to lack of urgency. This is meant to ensure that no case remains unattended for a long period of time and thus resulting in a back-log. Cases are expected to be finalised within 1 year from date of issue as contemplated in paragraph 5.2.5(ii) (a) of the norms and standards referred to earlier in this judgment.

[13] In each of the matters mentioned in paragraph [11] above, it was directed that in the event of settlement, draft orders settling each matter be filed by a particular date together with a notice of removal from the trial roll and have the matter enrolled on the settlement roll by the following day upon which settlement agreement or draft order by agreement and notice of removal were filed. This is to ensure that no day passes before settlement agreement or draft order is made an order of the court. But most importantly, is meant to ensure that matters are not settled on the dates of trial or during the weeks of trial. Parties are also encouraged and it has now become a directive in each pre-trial minutes before a judge, that only one legal representative should appear on the settlement date to make the settlement agreement or draft order an order of court. This is intended to safe the public purse or any other litigant of legal costs for appearance in court by parties' legal representatives on the settlement date.

[14] One would have thought that litigants and or their legal representatives would find the arrangement and directives in dealing with these matters as indicated above encouraging especially in a new division like Mpumalanga. Disappointedly, that was not to be the case as it would appear hereunder.

[15] I now turn to deal with the facts of each case at the risk of prolonging the judgment. But it is a necessary exercise hoping that the attitude and trend to seek to settle and asking for stand-downs or postponements on the date or week of trial would

be discouraged. It saddens one that despite strict directives issued during pre-trial conference, one still find defaulters. Of importance to the present matters one of the directives in the updated pre-trial minutes read as follows:

"6. *Should this matter be settled, parties are directed to file settlement agreement together with notice of removal from the trial roll by not later than _____ _____ and then enrol the matter on the settlement roll for the following day at 08h45, in which event the enrolment must be filed with the Registrar by 15h00 of the preceding day.*

7. *It is hereby recorded that should this matter be settled on date of trial, parties run the risk of punitive costs order and or forfeiture of a day's fee, against any person responsible for the late settlement of the matter and any such costs order may include payment out of pocket by whoever is responsible for the late settlement including claim handlers and or attorneys for the parties."*

ERCILIA MACIA

[16] In this matter, a pre-trial conference on loss of support matter was held on 20 June 2017 when a trial date for 5 February 2018 was fixed. During the pre-trial conference, it was directed that the parties should complete any investigation still outstanding including possible substitution of plaintiff and application for a curator by not later than 30 September 2017. That did not happen. Instead only on 1 February 2018 did the defendant (RAF) raise two issues with the plaintiff arising from the assessor's report. First, that the biological mother of the minor in respect of which the aunt (the sister to the deceased) launched the claim as a guardian of the minor child in question, is still alive. Second, that there is another child of the deceased by a different mother. The report was furnished late and as a result counsel asked for postponement on behalf of plaintiff. The postponement was granted and a new date for 26 March 2018 was set. Judgment on costs occasioned by the postponement was reserved.

[17] The defendant's attorney, Mr Makhubele filed an affidavit in terms of which an attempt to explain the delay was offered. The brief explanation goes around like this: On 25 August 2016 the defendant's attorneys advised his client, the defendant to

appoint assessor to investigate *inter alia*, whether the deceased was married and whether the deceased had other children. Mutunia Assessors were appointed in August 2016 for this purpose.

[18] Then in paragraph 5 of the affidavit deposed to on 6 February 2018 Mr Makhubele on behalf of the defendant states:
"After the receipt of the instructions from the defendant, the assessors commenced its investigations as per the defendant's instructions and only completed its investigations on the 25th January 2018. The reasons for the late completion of the assessors' investigations are that the assessors struggled to trace and locate the family members of the deceased who could help with the investigations in that some of the (sic) stay in Mozambique and some are here in South Africa."

[19] What is stated above is a general statement which does not assist the court in determining the extent of the difficulties encountered in the search for the relatives in question here in South Africa and Mozambique. But from August 2016 to June 2017 when a pre-trial conference was held, is long period of time bearing in mind that the summons were served during June 2016 and any form of investigation could have been completed if followed at that time.

[20] However, the period between 20 June 2017 and 30 September 2017 is critical. That is the date on which the defendant and or its attorney knew that the investigations had to be completed by 30 September 2017 as per the directive given during pre-trial conference before a judge. Full explanation was required as to when the directive was brought to the attention of the client, that is, the defendant and the assessor. In particular that any investigation has to be completed by 20 September 2017. The suggestion that it was brought to the attention of the defendant's claim handler one Ms Mmakoma Shrindza has to be seen in context insofar as it is based on the letter of 27 June 2017 addressed to the defendant by its attorneys. Firstly, in the letter the defendant's attention is not drawn to the time-line of 30 September 2017. Insofar as it is suggested that the pre-trial minutes containing the time-line was attached to or enclosed in the letter of 27 June 2017 together with the notice of set down, that seems be refuted by the letter or email of 29 June 2017 in which notice of set down is said to have been attached. To cut the story short, it was incumbent on the defendant's

attorney to specifically draw the defendant's attention to the fact that investigation has to be completed by 30 September 2017.

[21] There is nothing in the affidavit to suggest that the assessors were ever informed of the September 30th time-line. For example, on 3 October 2017 the defendant's attorney wrote to the assessors as follows:
"We confirm that instructions were previously given to your office last year in August 2016 to investigate both merits and quantum.
We urgently request your goodselves to forward us the report for your investigations. Your urgent response will be highly appreciated."

[22] The fact that the defendant's attorney only received the phone number of the deceased's brother from the plaintiff's attorney in December 2017 as alluded to in the affidavit cannot be an excuse. It is not explained why only in December 2017 when such information should long have been obtained. Receipt of the report on 25 January 2018 is in my view, as a result of lack of due diligence on the part of the defendant and its attorneys. For this reason the plaintiff should not be put out of pocket and punitive costs order should be made including forfeiture of a day fee for two days by the defendant's attorneys insofar as such costs were occasioned by the postponement.

[23] The objective of pre-trial conference is obvious. Firstly, it is meant to articulate trial issues and in doing so curtail the duration of the trial. Secondly, it is to ensure that the pace of litigation is not dictated by the litigants at the expense of the other. 'Justice delayed justice denied'. In the present case, there is urgency in finalising this matter regard being had to the fact that one is dealing with loss of support by a minor child who might be going to bed on a hungry stomach. Uncompleted investigation which caused this matter to be postponed could have been completed well in time if the case was attended to with the seriousness and urgency it deserved from the date the claim was lodged or the defendant and its attorneys observed the deadline of 30 September 2017. Failure to comply with the directive given on 20 June 2017 without reasonable explanation deserves the displeasure of this court.

CASSANDRA BUTLER

[24] In this case, the pre-trial conference was held on 22 June 2017 when a trial date for 5 February 2018 was determined to deal with quantum. On the latter date the matter was stood down until 6 February 2018 for argument on costs occasioned by the possible postponement. When the matter resumed on the latter date, an application for a postponement was launched and the court then postponed the matter to 14 May 2018. After argument, I reserved judgment on costs occasioned by the postponement.

[25] During the pre-trial conference, the parties were directed as follows: *"The plaintiff to file all reports by not later than 30 November 2017 and the defendant to file its reports by not later than 31 December 2017. Parties... to file joint minutes by 15 January 2018 and then pre-trial conference amongst the parties to be held by not later than 21 January 2018".*

[26] None of the above was complied with. Instead, on 9 January 2018 parties agreed to rely on the defendant's reports. However on 18 January 2018 it transpired that there was no industrial psychologist report. Based on this, the parties were not in a position to proceed with the matter particularly with regard to loss of earnings.

[27] As a result, this matter had to be postponed because the parties did not heed to the directives given by this court during pre-trial conference of 22 June 2017. Directives made during pre-trial conference before a Judge, if they are not strictly enforced and complied with, it is as good as not wasting time to have pre-trial conferences in accordance with the rules of court and the norms and standards referred to earlier in this judgment. To suggest that rule 36 procedure has not been resorted to, as it was one of the reasons for the un-readiness to proceed with trial in this case and that therefore there is a need to have the matter postponed is a man-made consequence.

[28] It did not appear during argument that any of the litigants are to be blamed for the laxity on the part of their legal representatives. For this none of the parties should be burdened with costs and as a result I intend to make no order as to costs against any of the parties. But that cannot be said about their legal representatives. For them

and in the circumstances of the case, they should be found not entitled to charge any appearance fee for the 5 and 6 February 2018 against their respective clients.

[29] Litigants instruct attorneys because there are procedural and substantive issues litigants are not preview to. Accepting instructions from client is an implied undertaking that his or her case will be dealt with professionally and expeditiously as humanly as is possible. Failure to heed to the undertaking made to client may in certain cases result in unprofessional conduct. In this case, failure to ensure readiness for trial by giving necessary notices as contemplated in rule 36 and failure to provide a satisfactory explanation for such a failure including failure to comply with pre-trial conference directives, entitles this court to meet the conduct with displeasure.

ZELZA CARLAMARIE EBERSON

[30] In this matter, a pre-trial conference which was held on 6 November 2017 resulted in a trial date been determined for 5 February 2018 to deal only with the liability of the two municipality defendants. On the latter date the matter was stood to 7 February 2018 and the parties were directed to file affidavits by not later than 6 February 2018 explaining why the punitive costs order or forfeiture of a day fee should not be made against whoever is responsible for the postponement. On 7 February 2018 I made an order drafted *inter alia* as follows: *"The costs occasioned by this postponement will not be sought from the litigating parties by their respective attorneys of record".*

[31] I gave no reasons for the order. I now do so. The reason for the postponement were characterised as follows: The parties were not ready as the defendant who delivered a notice to amend its plea, which notice was not objected to, failed to effect the amended pages and only delivered the amended plea on the morning of 7 February 2018. Secondly, that the notice to furnish full discovery as contemplated in rule 35(12) delivered by the plaintiff in September 2017 was never adhered to and the plaintiff did not seek to compel the defendant. Similarly, further discovery was only served and filed on the morning of 7 February 2018 and thus in the order referred to above, it was noted that the defendant has delivered the amended papers and that the defendant has only complied with Rule 35(12).

[32] The notice in terms of sub-rule (12) was delivered on 7 September 2017. So as on the date the pre-trial conference held on 6 November 2017 parties knew that there were outstanding issues with regard to Rule 35(12). However both parties, in particular the attorneys elected to move at a snail pace. The defendant did not comply and the plaintiff did not compel as it would have been entitled to do in terms of the applicable rule. This has nothing to do with the parties, but rather their respective attorneys of record. There was no reasonable explanation. Very clear that the attorneys elected to file their respective files and I want to believe in their respective steel cabinets. And as a result forgot about the case after the pre-trial conference was held on 6 November 2017. It is for this reason that an order as quoted in paragraph [30] above was made. The effect of this is that neither of the litigating parties should be held responsible for costs occasioned by the postponement through the laxity on the part of their attorneys.

[33] The notice to amend the defendant's plea as contemplated in Rule 28 which was delivered on 24 October 2017 and not objected to, never saw the light of completion until 7 February 2018 despite the pre-trial conference on 6 November 2017. No acceptable explanation was offered by either party's legal representatives. Instead, parties met on 1 February 2018 to discuss their woes when they purportedly agreed to postpone the case scheduled for 5 February 2018. But of course they should have known better that the court is not bound by their agreement to postpone and without complying with the pre-trial directives.

[34] It became very clear in the course of oral argument that this case was forgotten. The plaintiff's counsel was instructed only in February 2018 this year. The point is this: The defendant having failed to file amended pages to effect the amendment which was unopposed, it could either have resorted to rule 30A, that is, to compel compliance thereof or to ask for the defence to be struck out. So both parties' legal representatives were at fault. As this was a procedural aspect, they could have on their own enforced compliance with the rules without reverting to their respective clients or seeking instructions. Based on all of the above, I made an order as quoted in paragraph [30] above.

[35] On 24 April 2017 this matter was certified trial ready and there and then fixed trial date as 14 August 2017 to deal with both merits and quantum. The plaintiff was directed to file outstanding reports by not later than 31 May 2017, the defendant by not later than 30 June 2017 and parties were further directed to file joint minutes by 17 July 2017.

[36] On 14 August 2017 draft order settling general damages in the amount of R400 000.00 was handed in and the matter was postponed to 27 November 2017 to deal with outstanding dispute with regard to loss of earnings. The plaintiff and defendant were further directed to file all reports by not later than 29 September 2017, joint minutes by 13 October 2017 and pre-trial minutes by 20 October 2017 after the parties shall have held a pre-trial conference amongst themselves. It was further directed that in the event the matter was to be settled, parties must file settlement agreement and notice of removal from the trial roll by not later than 30 October 2017 and thereafter place the matter immediately on the settlement roll. Lastly, it was recorded that should the matter be settled on the date of trial, the parties run the risk of punitive costs order and or forfeiture of a day fee for late settlement. The latter directive was not heeded to. Instead on 27 November 2017, that is, on the date of trial, the court was presented with a draft order settling the matter in its entirety.

[37] I made the draft order an order of the court in part, and reserved judgment in respect of paragraph 3 which reads as follows:

"3. The defendant should pay the plaintiff's taxed or agreed party and party scale costs on the High court scale which costs should include but not limited to:

3.1 The reasonable travelling and accommodation costs for the plaintiff to attend the medico legal examination by both the plaintiff's and the defendant's experts.

[38] The parties were ordered to file affidavits by 1 December 2017 explaining why the matter was settled on the date of trial contrary to the directive issued on 14 August 2017 and why an order for costs should not be made as previously recorded in the

pre-trial minutes. As on 7 February 2018 the plaintiff's attorneys have not filed such an affidavit.

[39] Ms Dlamini, an attorney on behalf of the defendant provides a very brief explanation as follows:
"An assessor was appointed to investigate quantum in this matter and the defendant was placed in receipt of the assessor's report on 02 November 2017. Instructions were received from the RAF in the afternoon on 23 November 2017. A notice of offer was only sent to the plaintiff attorney on 23 November 2017. There was no sufficient time to remove the matter from the trial roll and place it on the settlement roll for the next day as the plaintiff's attorney had to take instructions from the client. The offer was subsequently accepted by the plaintiff and the parties attended court on the trial date to confirm the settlement."

[40] The explanation clearly puts the blame at the doorstep of both the defendant and its attorney door-steps. The explanation is very scanty. It is not clear when was the assessor appointed and what aspect of quantum was the assessor required to investigate. It is also not indicated whether the assessor was told of the red light pointing towards 30 October 2017. *'Instructions received from the RAF in the afternoon on 22 November 2017',* is also not explained. For example, when was the RAF informed of the date on which the matter ought to be settled if it is capable of being settled. And whether or not the entire directive issued on 14 August 2017 was brought to the attention of the RAF and if so, when. For all of the above, the defendant's attorney should be disqualified from charging any fee against the defendant connected with the late settlement of this matter. On the other hand, the plaintiff should not be put out of pocket due to the delay in settlement. Therefore all costs occasioned by and directly connected to the late settlement ought to be on an attorney and client scale.

[41] The point is this: Had this matter been settled in time as directed by the court, it could have been removed from the trial roll in time. The matter could have been enrolled on the trial roll before 23 November 2017 and only one party's legal representative could have appeared in court provided there was a confirmation letter

to make a draft order an order of court by agreement especially seen in the context of the fact that in RAF matters one is dealing with the public funds. There is therefore a need to curb unnecessary legal costs insofar as it is appropriate in certain circumstances. In the present matter, the plaintiff was forced to be legally represented on the date of trial when it would not have been necessary had this matter been settled in time.

G.H MABUNDA

[42] A pre-trial conference before a judge in this matter was held on 18 August 2017 when a trial date for 11 December 2017 on both merits and quantum was set. The plaintiff indicated his readiness to file all reports by 31 September 2017 and the defendant by 31 October 2017. Furthermore, the parties were directed to file joint minutes of experts by not later than 13 November 2017 and pre-trial minutes after they shall have held a pre-trial conference amongst themselves. On 11 December 2017, that is, on the date of trial, a request was made to have the case postponed and a further trial date for 17 September 2018 was fixed. The defendant was directed to file an affidavit by 15 December 2017 explaining why a punitive costs order and or forfeiture of a day fee occasioned by the postponement against whoever is responsible for the postponement should not be made. I have now been provided with the affidavit by the attorney for the defendant, Ms T.N Khoza.

[43] Merits were settled on the date of trial. Ms Khoza in her affidavit alludes to the fact that the matter has since been settled in its entirety and no need to wait for 17 September 2018.The part settlement of this matter on the date of trial followed by settlement in its entirety after date of trial, suggests that if parties had timeously and seriously sought to settle this matter, that could have been achieved by 4 December 2017 being the date set by this court during the pre-trial as the date by which settlement agreement or draft order thereof should be filed.

[44] The offer of settlement on both merits and quantum came late. The fact that joint minutes were not filed as directed by this court appears to be academic because the case has now been settled in its entirety without such joint minutes. The actuarial calculations made on 6 December 2017 based on the defendant's report could have

been sought and provided well in time as a tool to encourage settlement. On the other hand, the defendant was not informed of the time limits in terms of the pre-trial minutes. For this, it cannot be held liable for punitive costs order. The defendant in all probabilities would have been pro-active seen in the context of the offers it ultimately made had it have been informed of the time-frames. For this reason the defendant's attorney should forfeit entitlement to charge any fee against the defendant (client) insofar as such a fee or costs are occasioned by the late settlement and this should include appearance fee.

NS MAPHALU obo of MINOR

[45] On 6 November 2017 during pre-trial conference before a Judge it was directed that the defendant should seek to settle the matter by not later than 30 November 2017 in the light of the fact that this is a dependant's claim where two vehicles were involved and only 1% of negligence was required to be proved against the insured driver and that therefore contributory negligence, does not apply once such one percent of negligence is shown against the insured driver. I mention this because I was made to believe that the defendant was of the view that contributory negligence was applicable and thus held back in settling merits.

[46] The trial date for 4 December 2017 was then fixed as part of case management. Paragraph (7) of the pre-trial directive quoted in paragraph [15] of this judgment formed part of this matter. On the date of trial, the parties asked for a stand down for discussion amongst themselves with the purpose of settling merits. Later in the course of the day, parties indicated common grounds on the merits and the matter was then postponed to 19 March 2018 to deal with quantum. In paragraph 8 of the draft order, which was made an order of the court, it was directed that' the plaintiff must file an affidavit on or before the 8th December 2017 explaining why the matter had to stand down on the 4th December 2017 and why a pre-trial directive was not complied with.

[47] I must pause for a moment to say that much time is spent during the dates or weeks of trial by the requests for stand downs and engagement in trying to understand the reasons for the stand downs. Very often the requests are made because parties in particular, legal representatives see the dates of trial as an opportune moment to

negotiate settlement in earnest. It is a known fact that the majority of RAF matters are settled on dates of trial.

[48] The motivation for this is said to vary. But whatever the motivation might be, the public purse through which the RAF is funded in compensating victims of motor vehicle collisions becomes a causality. In this matter, the parties were directed to settle merits as indicated above by not later than 30 November 2017. To ask for a stand down on the date of trial was a display of clear disregard to the directive given during the pre-trial conference before a judge. Hours were spent at court by the parties' attorneys due to the plaintiff's attorney not having had the file with him. And this was at the other litigating party's expense, the defendant being funded through the public purse. That should never have happened and hopefully it will not.

[49] Dependant claims are generally easy to settle once merits are resolved and therefore, there can be no justification in delaying such matters especially where dependency and or earning is not in dispute like it appears to have been the case in the present case. As I said earlier in this judgment, these matters must be dealt with expeditiously. At the risk of repetition, there might be minors out there going to bed with an empty stomach and some of them not being able to go to school or further their studies. The courts as supreme guardians of all minors should play pro-active role in ensuring that dependant claims are not unnecessarily delayed.

[50] Coming to the explanation for stand-down, the parties seem to categorise *locus standi* as merits issue. This was not an issue in contention when this matter was dealt with during the pre-trial conference. What is recorded in a long-hard as part of the pre-trial minutes and directive referred to in paragraph [45] of this judgment, was raised as an issue on merits apparently as suggested by the claim handler to defendant's attorneys of record. This, as I said, was wrong and only served to delay finalisation of the case.

[51] Both parties have filed affidavits and based on their representations made to this court, I do not find it necessary to make any punitive costs order and it is hoped that this matter will be settled by not later than 7 March 2018 as set out in the draft order. However the parties 'legal representatives cannot escape forfeiture of a day

fee. In other words, they are not entitled to charge any fee occasioned by stand down of the case on the date of trial. If the parties' legal representatives acted with the seriousness this matter deserved and complied with the pre-trial directives, in my view, it could have been settled in time and or a substantive application for a postponement could have been launched and heard earlier than on the date of trial.

THULIMBATHI MATTER

[52] On 21 August 2017 this matter was certified trial ready on quantum by Thobane AJ, merits having been settled. A trial date was then set for 4 December 2017. On the latter date, a draft order settling this matter in its entirety was handed in. This was despite the fact that during the pre-trial conference of 21 August 2017 the parties were directed that in the event of settlement, they should file draft order or settlement agreement by not later than 23 November 2017. It was further recorded that parties run the risk of a punitive costs order or forfeiture of a day's fee should the matter be settled on the date of trial.

[53] As it was the case with other matters, the call was not heeded to. This resulted in the judgment on costs being reserved and parties being directed to file affidavits explaining why a punitive costs order or forfeiture of a day fee should not be made. I have now been furnished with such affidavits.

[54] As a start, the plaintiff according to the pre-trial minutes was directed to file all reports by 31 September 2017 and defendant by 31 October 2017. These are the time limits the parties set for themselves. Parties were further directed to file joint minutes of experts by 8 November 2017 and thereafter to have a pre-trial conference held amongst themselves and file pre-trial minutes thereof by not later than 15 November 2017. All of these did not happen.

[55] Perhaps the explanation offered by the defendant is reasonable and acceptable. After the pre-trial conference the plaintiff at the behest of the defendant was referred to industrial psychologist, Dr Kgosana for assessment. However, on 9 November 2017 when Dr Kgosana's office was contacted for the report, the information was that Dr Kgosana has since died before the report was compiled. It

was then suggested that the report of plaintiff's industrial psychologist be used as the basis for negotiations. Using the plaintiff's report aforesaid, it was agreed that an actuary be instructed to calculate loss of earnings.

[56] I do not find it necessary to go into the details of what had happened after 9 November 2017. It suffices to mention that the explanation is acceptable though at one stage the request for actuarial report was sent to the wrong actuaries.

[57] Paragraph 7 to 10 of the draft order reads as follows:

"7. The defendant is ordered to pay the plaintiff's attorneys costs of suit in respect of the determination of merits and quantum on the High Court party and party scale up to date hereof which costs include but not limited to:

7.1 The costs of attending to examinations and obtaining all the medico-legal and actuarial reports addendum reports, as well as the qualifying and reservation fees and court attendances (if any), of specifically (but not limited to) the following:

7.1.1 Report by: C.W Goosen (Orthopaedic Surgeon)

7.1.2 Report by: Janene C White (industrial Psychologist)

7.1.3 Report by: Johan Sauer (Actuary)

8. The costs for counsel.

9. Should the defendant fail to pay the plaintiff's party and party costs as taxed or agreed within 14 (Fourteen) days from date of taxation, alternatively date of settlement of such costs, the defendant's shall be liable to pay interests at a rate of 9% per annum, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

10. The plaintiff shall in the event that the parties are not in agreement as to the costs referred to in paragraph 9 above, serve the notice of taxation on the

Defendant's attorneys and shall allow the defendant seven days to make payment of the taxed costs."

[58] I always have difficulties when the court is almost like requested to direct the Taxing Master how to do his or her work and which items of bill of costs ought to be allowed. In my view, once an order for costs in favour of a particular litigant is made, as to which items must be allowed and at what amount, must be left to the Taxing Master. Paragraph 7 as a whole of the proposed order for example, is completely unnecessary and should be covered by an order of '*costs of suit*'.

[59] As regard 7.1 of the proposed order, any costs that is necessary and relevant in relation to the litigation in question, should be obvious costs to which a successful party should be entitled. However, in this case, addition of "as well as the qualifying and reservation fees and court attendance", whilst it might be necessary costs relevant to the litigation, seeking specific sanctioning by the court for these kind of costs especially in RAF matters, can be subject to an abuse. It can give the impression to the Taxing Master that every item in the bill of costs dealing with '*qualifying and reservation fees and court attendance*', has to be allowed. This would require proof. For example, that a particular expert has been reserved and that he or she has agreed thereto. Attendance as a norm, is through a subpoena and actual proof of attendance by such a witness. The Taxing Master should be able to assess and use his or her discretion whether or not to allow a particular item on the bill without the sanctioning by the court.

[60] In RAF matters, collusion and or escalating costs at all levels have proven the biggest enemy to the survival of the Fund which is funded through the public purse. And therefore, our courts need to be vigilant and pro-active in ensuring that such collusion where it exists is halted. An order like as proposed in paragraph 7.1 quoted above, can be incentive to such a collusion. I would therefore not be willing to make such an order. In my view, the Taxing Master and those attorneys for the RAF who attend taxation proceedings on behalf of the Fund ought to be vigilant to curb the

collusion, if it exists and should resist to be a party to it by either omission or commission.

[61] *'The costs for counsel'* as indicated in paragraph 8 of the draft is also unnecessary for authorisation by the court. Firstly, the record or file ought to indicate who appeared and in case of doubt any party seeking reliance on all items must prove such items in whatever form. Regarding paragraph 9, perhaps it is necessary to make such an order except for '*interests at a rate 9% per annum*'. What I prefer is payment of interest at the applicable tariff. Therefore costs of action plus interest as in paragraph 9 of the quotation under paragraph [57] of this judgment with the qualification, is what I prefer to do

QD MOKOENA obo minors

[62] This case initially was a claim for loss of support. On 7 August 2017 a pre-trial conference was held before a judge and a trial date was determined as 27 November 2017. On the latter date, a draft order settling this matter in the amount of R5 465.00 was handed in. Parties were directed to provide affidavits explaining the reasons for the late settlement and why forfeiture of day fee or punitive costs order should not be made.

[63] The background is this: The defendant was directed on 7 August 2017 to settle the matter with the plaintiff by 14 August 2017 in the light of the fact that this was a dependant's claim. Furthermore, the parties were directed to file settlement agreement by not later than 24 October 2017. Neither of the two was adhered to and as accustomed to by practitioners, on the date of trial the court was presented with a draft settling the matter. It was strange in the first place that loss of support has been settled at R5 465.00. However, the attorney for the plaintiff indicated that, that is the amount they are prepared to settle for, costs to be on a magistrate scale.

[64] Affidavits to explain the late settlement have been filed. The affidavit of Ms Khoza, the attorney is well detailed and she must be commended for the steps she has taken to seek to have the matter be resolved. I do not find it necessary to go into details thereof. It suffices to mention that the explanation is accepted and therefore

paragraph 4 regarding costs remains and the order would appropriately be made hereunder.

S C MATHEBULA MATTER

[65] This is another loss of support claim. On the date of trial, draft order settling the matter in its entirety was handed in. The date of trial of 13 November 2017 was fixed during pre-trial conference before a Judge on 8 September 2017. On 13 November 2017 the case was stood down to 15 November 2017 for possible settlement. Stand down was only allowed because of the nature of the claim, that is, loss of support and it was done in order to avoid any further delay in the resolution of the matter. Such indulgence will not easily be resorted to in the future.

[66] In my view, this matter could long have been settled had it not have been for the defendant's initial view that some of the plaintiffs were working and capable to support themselves. That there was no obligation on the part of the defendant to compensate for loss of support occasioned by the death of the deceased who was married to one of the claimants with children in my view, was unfounded. It was completely wrong because spouses are liable to maintain each other but also contribute towards the maintenance of their children depending on their affordability. The latter contention to fight liability on this basis without more, was unwarranted.

[67] The affidavit by Mr Mgwenya, (the attorney for the defendant), in explaining the late settlement is a bit incoherent. For example in paragraph 3.2 thereof is stated:
"I must immediately indicate that although on the pre-trial held on the 12th November 2017, the defendant alerted that it will revert by the 20th October 2017 was by virtue of the strict pre-trial directive which we need to comply with alternatively that at that point as the defendant's attorneys we would have obtained full instructions as to how we should approach the matter as our client would have pronounced itself."

[68] In his affidavit, he does not indicate when and what he did to ensure expeditious attention to the matter seeing that the red light was flickering towards 20 October 2017 being the date the matter should have been settled. Secondly, the defendant was required to file actuarial report by not later than 30 September 2017 if it so wished.

The time limits were not heeded to. It is not clear in the affidavit if the defendant's attention was drawn to this time limits. The strange view about the defendant not being liable for loss of support added to the problem.

[69] It is one thing to attend pre-trial conference where time-frames are set directing certain things to be done by certain dates. And, it is another to bring the time-frames to the attention of those who must act on them and give instructions. The advantage of settling in time and removing the matter from the trial roll and have it enrolled on the settlement roll, is obvious. For example, only one party with a letter of confirmation could appear and enormous legal costs can be saved thereby. There would also be no need to instruct counsel for this purpose.

[70] In this case both parties were represented by counsel. This could have been avoided. Causing this matter to be seriously attended to only on the date of trial and causing further stand down for the purpose of settlement with all the red tapes involved in the approval of the amount for settlement, in this case well above R2 million, could have been done in advance and the matter could have been removed from the trial roll. Both the defendant and its attorney were at fault. A punitive costs order and forfeiture of day fee occasioned by the late settlement and stand down to 15 November 2017, in the circumstances, is justified.

[71] Being able to settle on the date of trial is indicative of one thing. That is, if this matter was timeously and seriously attended to with the same vigour as it was displayed on the date of trial, settlement could have happened as directed during pre-trial conference of 8 September 2017 and lot of legal costs could have been saved. For example, there would have been no costs for preparation for trial, no cost for attendance in court by counsel and so forth.

[72] The draft order was made an order of the court only in respect of paragraph 1 to 3 of thereof. Paragraphs 4 to 6 of the draft dealt with costs and as I said previously in this judgment, 'costs of suit' on a punitive scale against the defendant and forfeiture of a day fee occasioned by the late settlement and stand down and settlement on the date of trial, should be found appropriate.

JP BEZUIDENHOUT MATTER

[73] The trial date was set for 11 December 2017 and on the said date a draft order settling the matter in its entirety was handed in. Paragraphs 1, 2, 3, 7 and 9 of the draft was made an order of the court by agreement. I reserved judgment in respect of the other paragraphs of the draft dealing with costs.

[74] In terms of the pre-trial directive, it was directed that if the parties were to settle, they must do so by not later than 27 November 2017. But as with other cases mentioned in the preceding paragraphs, that was not to be despite the directive having being given on 26 June 2017. This resulted in the court directing the parties to file affidavits explaining themselves.

[75] The attorney for the plaintiff in her affidavit seeking to explain the late settlement states as follows:
"Both parties utilised the time efficiently by using the directive issued by the above Honourable court as guidelines to reach an amicable settlement in advance with the directives".

[76] As regards the issue of preparation fee for the doctors is stated:
"In replying to the directive issued by the above Honourable Court to file an affidavit to explain why the experts mentioned in 4.2 to 4.2.8 should be paid a preparation fee, it is submitted that:

7.1 I did consult plaintiff's experts in preparation for the pre-trials and trial. Therefore it is submitted that the plaintiff experts are entitled to preparation fees.

7.2 The parties agree that the plaintiff's experts are entitled to preparation fees, subject to the discretion of the Taxing Master (My emphasis).

7.3 The parties also agree that the plaintiff's experts are entitled to reservation fees, subject to the discretion of the Taxing Master. I would submit that Dr JA Smuts would not be entitled to reservation fees because no reservation letter was addressed to Dr JA Smuts.

7.4 *Paragraph 4.2 dealing with the costs of the plaintiff's experts are concerned, inter alia, as follows: "...reservation fees, preparation fees, as well as the reasonable travelling fees, if any and within the discretion of the Taxing Master...." Which clearly confirms the discretion of the Taxing Master whom the Bill of costs is to be taxed."* (My emphasis)

[77] I prefer to start with the issue of costs first. I have already dealt with this issue earlier in this judgment when dealing with the matter of THULIMBATHI under paragraphs [57] to [61]. In my view, the point made therein is relevant here. I should be concerned that the attorneys in particular for the RAF in general easily consent or agree to payment of preparation and reservation fees without much ado. It should be noted that every specific order for cost that is sought, out to be justified. Similarly every costs order other than framed as "costs of action or suit", ought to be justified. If that justification has to be presented to the Taxing Master as it is suggested in the draft order, based on his or her discretion, then the court should be wary of making any order to which the Taxing Master has a discretion.

[78] In all probabilities when the defendant and or its attorney in the present case agreed to any such reservation and or preparation fees for the experts, it was done without being satisfied of proof thereof. Such a concession or agreement has to be fact based. The plaintiff is required to lay out the table clear by providing documents or information satisfying the making of an order for costs as it has been sought in this case with reference to the experts.

[79] A statement like, "*Dr JA Smuts would not be entitled to reservation fees, because no reservation letter was addressed to Dr JA Smuts*", seems to suggest that once a letter is produced in court or to the Taxing Master during taxation proceedings, production thereof for example, stating that: '*You are hereby reserved for trial on 11 December 2017*', should be sufficient proof to justify reservation fee.

[80] Of course that cannot be. The expert must confirm his or availability or willingness to be so reserved. In the present case, I am required to find that all of the doctors, namely, Drs Goosen, Pauw and Brauteseth including Ms Taylor and Ms Radley are entitled to reservation and consultation fee. I am not prepared to do so.

Firstly, there is no proof that they are so entitled. Secondly, if they want to participate in the costs issue, they should file affidavits with the Taxing Master confirming same. I say same also with reference to consultation fees. In this regard for example, specifying the dates of consultation and the duration of each consultation as alluded to by attorney for plaintiff, must be satisfied. For now, it suffices to conclude by stating that the appropriate order would be "*costs of action for the plaintiff*".

[81] I now turn to the reasons for settling on the date of trial amongst themselves. On 14 November 2017 the parties held a pre-trial conference as directed by the court. The minutes of this pre-trial conference do not seem to have been filed. What is however alluded to is that the parties communicated telephonically and in writing attempting to settle the matter by 27 November 2017 as directed during the pre-trial conference before a judge. However, it is not stated when such a communication did take place and what was the nature of the pre-trial conference of 14 November 2017 and why the matter could not be settled on that day.

[82] Whilst this matter was allocated a trial date on quantum for 11 December 2017 during the pre-trial conference of 26 June 2017, only on 22 November 2017 did the defendant instruct its attorney to have the matter referred to the Health Profession Council of South Africa for general damages. That is, to determine whether the plaintiff qualifies for general damages. I should be worried by this late referral of the matter for general damages to the Health Profession Council when all reports were available as on 30 October 2017. But this will not be used against the defendant because I do not think it is directly responsible save for its legal representatives. Ms Khoza in her affidavit, states that as on 27 November 2017 "*none of the parties had filed their actuarial calculations*". This statement of course does not seem to be correct because in the next paragraph she states: "*We received the plaintiff's actuarial calculation on 7 November 2017...*"

[83] It was only on 28 November 2017 that the defendant's attorney, apparently based on the defendant's actuarial report, sent an opinion to the defendant (client), proposing settlement and the nature thereof. By this date the horse has already bolted as the date by which the matter should have been settled was 27 November 2017. The offer was then sent by the defendant to its attorney on 7 December 2017 which

was then sent on the same date to the plaintiff's attorneys. Despite the trial date of 11 December 2017 looming, only on the latter date did the plaintiff respond to the offer by stating: "We are obtaining instructions and would revert to you". Then in paragraphs 12 and 13 of the defendant's attorney's affidavit is stated:

"12. *The plaintiff and defendant representatives engaged each other a day before trial, for a discussion regarding the offer whether it was acceptable or not, a discussion was held regarding the contingencies applied on the loss of earning calculations. The issue to be considered by the court was the issue of contingencies and we agreed on the contingencies to be applied and the matter was settled.*

13. *It is my humble submission that none of the parties should be held liable for punitive costs, most of the heads of damages were settled before trial and parties received their calculations after the date in which this Honourable Court directed to file a settlement. Both parties engaged each other and this led to the matter being settled, I understanding the court's attitude regarding settlement on the date of trial but we tried to save the court's time by settling the matter between the parties."*

[84] As I said, I am reluctantly hesitant to make a punitive costs order against the Road Accident Fund. However, I must be worried that both legal representatives for the parties appeared in court and started negotiating and discussing the offer on the date of trial despite the plaintiff having received the offer on 7 December 2017. Knowing that the trial date was on 11 December 2017 and that there was an offer on the table, parties could have taken pro-active steps to settle the matter. This process and its pace could have been driven by the respective legal representatives. For example, if the matter was settled on 7 or 8 December 2017, this could have avoided both attorneys for the parties appearing in court on 11 December 2017 could have been avoided. And the defendant (RAF) being at the receiving end for legal costs for both legal representatives could also have been avoided.

[85] Forfeiture of a day fee occasioned by the late settlement is directed at curbing these unnecessary legal costs payable by the RAF. Reservation, preparation and travelling fees mentioned in paragraph 4.2 of the draft quoted above, if indeed have

been incurred, could have been avoided as on 7 or 8 December 2017. I therefore come to the conclusion that neither of the parties' legal representatives should be entitled to any fee against RAF occasioned by the late settlement, including a day's fee for 11 December 2017. The defendant of course will have to pay costs of the action on a party and party scale insofar as such costs have not been occasioned by the late settlement. The order in paragraph 122.16 hereunder effectively means that how and by whom counsel is to be paid, is a matter between counsels and instructing attorneys.

A N SHONGWE

[86] This matter was initially struck off from the roll on 19 September 2016 by Mabuse J. On 24 October 2016 the matter was laid before a judge for pre-trial conference. On 30 May 2017 it was again laid before Mphahlele J when it was directed that further pre-trial conference before a judge be conducted on 7 August 2017. On the latter date, a date for trial was set as 27 November 2017. On date of trial a draft order settling general damages in the amount of R250 000.00 was presented to court and damages for loss of earning was scheduled to be heard on 5 March 2018.

[87] Parties were directed to file affidavits why the matter was settled in part on the date of trial and why the other part of damages had to be postponed. The affidavits have since been filed. On the side of the plaintiff the delay is summed up as follows: *'On 15 August 2016* they *requested occupational therapist who could not finalise the report in time as she mentioned that she was in and out of court attending to other matters. The reason is that we cannot conclude or submit the report of the industrial psychologist without the report of the occupational therapist that was the delay'.*

[88] 15 August 2016 to 27 November 2017 is a long period of time to come up with an industrial psychologist and occupational therapist reports. Assuming that the 2016 report is meant to refer to 2017, this too was sufficient to submit such reports which are now mentioned as the reason to justify the postponement of the matter on loss of earnings.

[89] Writing a letter on 20 November 2017 and asking the defendant's attorney if they had any offer on general damages to which they received no response, in my view, was just too late to result into any meaningful discussion to settle the matter. During pre-trial conference parties were directed to try and settle by not later than 13 November 2017. That of course did not happen and seeking to settle by asking for an offer on general damages when the horse has already bolted, suggests not taking the directive seriously. Clearly the snail pace in the matter can only be placed at the door-step of the attorneys for the parties. If they were worried that they run the risk of forfeiture of a day fee for settlement on the date of trial, one would have expected them to be pro-active and take the lead in ensuring that the matter was settled timeously. It looks like this is one of the forgotten files after the pre-trial conference.

[90] In the present case, it is not only settlement on the date of trial, but also postponement for determination of loss of earning. The matter was first laid before court in May 2016. For the matter still to be in limbo for settlement as on 27 November 2017 leaves much to be desired. That is not the pace appreciated by the norms and standards alluded to earlier in this judgment. There is no acceptable explanation for the late filing of the expert reports and therefore forfeiture of a day's fee occasioned by the late settlement of general damages and postponement of the claim for loss of earning should be the outcome and this cannot be blamed on the litigants. The rest of costs to be costs in the cause pending finalisation quantum on loss of earnings.

N N VILANE

[91] On 2 June 2017 the matter was laid before Mphahlele J during pre-trial conference when the trial was set for 7 August 2017. On the latter date the matter was laid before me and another trial date was set for 13 November 2017 and on this date I was presented with a draft order settling this matter in its entirety. Having made part of the draft an order of the court, judgment on costs occasioned by the late settlement was reserved.

[92] Pre-trial directive required of the parties to settle by not later than 30 October 2017. That did not happen. On 7 August 2017 during pre-trial conference, the defendant set for itself through its attorneys the 29 September 2017 as the date by

which it would have filed its reports, the plaintiff's attorney having indicated that all his reports have been filed. Parties were directed to file joint minutes by 23 October 2017 and pre-trial minutes by 27 October 2017 after they shall have held a pre-trial conference amongst themselves.

[93] The plaintiff's attorney in his affidavit alluded to the fact that on 9 September 2017 he removed the matter from the roll on his own. This he could not do. Once a matter is enrolled, none of the parties is entitled *mero motu* to remove the matter from the roll. It has to be done with the sanctioning of the court unless it has been settled as directed. In the explanation for the delay, it is further stated that after removal, an offer on the same date was received. I find it necessary to quote what the attorney for the plaintiff exactly said:

6.

"I attended to contact the plaintiff in order to discuss the offer but were unable to make contact with him.

7.

On the 13th September my office were able to make contact with the plaintiff after which the plaintiff accepted the offer.

8.

My candidate attorney intended to set the matter on the settlement roll for the following day, but were unable to set it down due to the fact that the clerk of the court were unable to locate the file.

9.

On the 16th November 2017 the clerk of the court located the file after which I requested the clerk to set the matter down on the settlement roll.

10.

The clerk informed me that the soonest date on which the matter can be set down was the 11th November 2017 due to the fact that there was only motions in court the following week.

11.

I therefore set the matter down on the settlement roll for the 27 November 2017"

[94] Removal of the matter from the roll was not as a result of the parties having settled. It was because the plaintiff sought an amendment as contemplated in Rule 28 which notice for amendment was delivered on 9 September 2017. When he received the offer he had already filed the notice of removal. The matter could have been settled before the 30 October 2017 as directed by the judge during pre-trial conference.

[95] If the matter was not incorrectly and without the sanctioning of the court removed from the roll, there would never have been 17 November 2017. The offer having been accepted by the plaintiff on 13 September 2017, there is no explanation why by the following day the matter was not placed on the settlement roll. But hopefully this would be a lesson not to remove matters from the roll without the sanctioning of the court. For this, I do not find it necessary to make punitive order for costs against any of the litigating parties. However, the plaintiff's attorney is disentitled to debit any day's fee against client insofar as such costs shall have been occasioned by the late settlement.

P T BHIYA

[96] On 4 December 2017, that is on the date of the trial, just like with the rest, I was furnished with a draft order intended to be made an order of the court by agreement. Only paragraphs 1, 2 and 3 settling the matter in its entirety in the sum of R811 882.85 and an undertaking for medical expenses were made an order of the court. With regards paragraph 4 relating to costs, I reserved judgment to enquire as to who is responsible for the late settlement and or liable for costs occasioned by the late settlement including forfeiture of any day fee connected to the late settlement that might have been occasioned by the late settlement. This also included an explanation why experts should be paid a fee for preparation. I have now been provided with the explanation on behalf of the plaintiff.

[97] The pre-trial conference in this matter was held on 22 June 2017 when a trial date for 4 December 2017 was fixed and parties were required to file all reports by 31 October 2017. Joint minutes of experts were to be filed by 10 November 2017 and settlement agreement if any, by not later than 21 November 2017.

[98] In paragraph 5.7 of the affidavit by the plaintiff's attorney, Mr Eastes states:

"(5) The defendant's attorney and myself continuously communicated to settle the matter on or before 21 November 2017.

The parties were able to settle the issues pertaining to the merits, past-hospital and medical expenses and future expenses.

The parties agreed as to the basis of the calculations in respect of loss of income, but could not reach an agreement as to the contingencies to be approved.

The parties could further not reach an agreement as to a reasonable award in respect of general damages

5.8 The parties agreed, taking cognisance of the joint minutes, that this matter should proceed on trial on 4 December 2017 on the basis that the evidence of the plaintiff should be led and argument to be presented on the joint minutes in respect of loss of income and general damages.

It is further submitted that the reason why the parties agreed that argument should be led on the joint minutes was done purely to save costs and court time. The above honourable court should take cognisance of the fact that the matter was set down for the week of 4 December 2017 and should all 13 experts (8 for the plaintiff and 5 for the defendant), be present at court, it may have resulted in reservation fees of the experts in the excess of R1 000 000.00 (One Million Rand). (My emphasis)

[99] Starting with the latter statement pertaining to costs, in the draft order presented on 4 December 2017, preparation fee of 8 experts for the plaintiff is sought. This does seem to coincide with the statement that: 'The parties agreed- *that this matter should proceed on trial on 4 December 2017 on the basis that the evidence of plaintiff* should be led and arguments to be presented on the joint minutes in respect of loss of income and general damages.' (My emphasis)

[100] Critical question is preparation for what? If it was for trial, why should experts prepare for trial when parties had agreed to rely on the joint minutes and oral evidence of the only witness being the plaintiff. Our courts need to be on the outlook as I said

earlier in this judgment, for possible abuse and sometimes collusion. I am not suggesting for a moment that this is the case in the present matter. All what I am saying is that an order for preparation fee for experts should never be '*preparation fees, if any'.* There has to be certainty. It is either there was preparation or none. "If any" suggests that the one who is supposed to know, does not know.

[101] There has to be certainty to avoid the court making orders which might bind and interfere with the discretion of the Taxing Master. Factual basis has to be there to make such an order binding the Taxing Master. In this case, no such factual basis has been laid. This court is therefore unwilling to make an order for preparation fee of the eight experts. In any event, this is a matter which must be left to the discretion of the Taxing Master and there is no reason why 'costs of suit' should not be appropriate. The Taxing Master ought to be directed to be vigilant by insisting on proof for example, affidavit from any of the experts and nature of any such fee.

[102] Turning to possible costs occasioned by the late settlement, one is fascinated by the quotation in paragraph [98] of this judgment. In particular the lack of information relating to specific dates on which the attorneys '*continuously communicated to settle the matter on or before 21 November 2017 on which they were able to settle the issues pertaining to the merits, past-hospital and medical expenses'*, and on which they '*agreed as to the basis of the calculations in respect of loss of income.'* And furthermore the reason why they could not initially agree and why the ultimate agreement on the date of trial.

[103] The suggestion seems to be that the parties agreed on the date of trial to settle because '*another matter*' (referring to another matter on the date of trial), ... *proceeded on trial and the defendant's attorneys and myself utilised the time to argue and negotiate the outstanding issues as the court was not available at that stage to hear the matter'.* (My emphasis).

[104] Statement is revealing and this is a trend. Settlement on the date of trial at a blink of a stand down suggests that the parties did not in time negotiate seriously to settle as directed by the court. Settlement on the date of trial particularly with regards to RAF matters gives the impression that the incentive is to make a good fee.

Unfortunately at the expense of tax payers. Assuming that this is not the case in the present matter, what boggles this court mind however is why it became only possible to settle on the date of trial, as I said at a blink of a stand down.

[105] Taking it a step further, the parties in June 2017 were directed to file joint minutes of experts by not later than 10 November 2017. Joint minutes are very critical especially in circumstances were the parties are relying on the opinion of expert like it was the case here. In the joint minutes, you are told of the basis for agreement and disagreements. In this case, for the parties seeking to rely on the joint minutes for the purpose of trial without calling the experts to take the witness stand, suggests that there were little disagreements and this should have paved the way to negotiate settlement in earnest well in time before 4 December 2017. But of course that did not happen except on the date of trial.

[106] The parties and their legal representatives knew as far back as 26 June 2017 that settlement of the matter on a date of trial was a "no-no go area". But still that did not incite the parties and their legal representatives to seriously seek to settle the matter in time. That means, both parties and their legal representatives are to be blamed and this should result into no order for costs between the parties insofar as such costs were caused by late settlement. The respective attorneys insofar as they did not do enough to comply with the pre-trial directives should forfeit a day fee for appearance on date of trial including any other costs occasioned by the late settlement.

E J VILAKAZI

[107] On 8 September 2017 a trial date of 13 November 2017 was fixed during pre-trial conference before a judge. Merits were settled and trial was to proceed on general damages and loss of earning. The plaintiff's attorneys were directed to file all reports by not later than 18 September 2017. The defendant undertook to file the reports by 9 October 2017. Parties were then directed to file joint minutes on 16 October 2017 and thereafter hold pre-trial conference amongst themselves by 20 October 2017 and by 23 October to file pre-trial minutes.

[108] As usual, in paragraph 7 of the pre-trial minutes relating to a pre-trial conference before a judge on 8 September 2017, it was recorded that should the matter be settled on the date of trial, the parties run the risk of punitive costs order or forfeiture of a day fee. Of course this did not deter the parties or their legal representatives from their steadfast course to settle on the date of trial. On 13 November 2017 the court was provided with a draft order in terms of which the plaintiff was to be paid R450 000.00 for general damages and R377 161.25 for loss of earnings. I reserved judgment regarding the issue of costs and directed the parties to file affidavits by 17 November 2017 explaining why the punitive costs directive of 8 September 2017 should not be enforced.

[109] None of the parties filed any affidavits as directed by the court. On Tuesday February 2017 the Registrar of this court was directed to send a reminder to the parties and to file affidavits by not later than Friday 9 February 2017. This request was not heeded to. Therefore this court is in the dark whether late settlement was due to the plaintiff or defendant and or their respective attorneys. I am prepared to assume that there are no good grounds for having not complied with the directive issued during pre-trial conference before a judge on 8 September 2017. For this purpose, this court will make no order as to costs regarding the parties and their respective attorneys to forfeit day fee and any other costs incurred due to late settlement of the matter. Lastly failure to file affidavits displays defiance to an order of court. For this reason, the order I make hereunder should be brought to the attention of the Law Society of the Northern Provinces.

AARON MOKOENA

[110] On 2 June 2017 Mphahlele J certified the matter ready for trial. On 31 July 2017 a trial date for 27 November 2017 was fixed. On the latter date the court was provided with a draft order which draft was made an order of the court in part. Judgment on costs was reserved subject to the parties filing affidavits by no later than 1 December 2017 explaining why a punitive costs order and or forfeiture of a day's fee should not be granted against the party or attorney who is responsible for the late settlement.

[111] I have now been provided with the affidavits. On 24 November 2017 the attorney for the defendant (Ms Dlamini) spoke and explained to RAF that she had not received any offer from it. By that time Ms Dlamini had already proposed an offer to her client, the RAF. The offer was seen by the plaintiff's attorneys as '*quite lucrative and a good settlement in its entirely and acceptably fair'.*

[112] I think they were right. R700 000 for general damages, R83 030 for past loss of earnings, R291 612 for future loss of earnings totalling to R1 074 642 indeed is lucrative. Unfortunately by R24 November 2017 the horse has already bolted. I say so because when the date of trial was allocated, the plaintiff undertook to file the reports by 25 August 2017 and the defendant by 29 September 2017. They were directed to file joint minutes by not later than 31 October 2017 and thereafter hold a pre-trial conference by 8 November 2017. It was further directed that in the event of settlement, the parties must do so by not later than 13 November 2017 and have the matter removed from the roll and be placed on the settlement roll. During the said pre-trial conference in July 2017, the parties were warned that settlement on the date of trial may result in punitive costs order or forfeiture of a day fee.

[113] Attorney Mr Dibakwane in his affidavit explains the delay in settlement, *inter alia, as follows*:

4.

"In the morning of the 27th Mrs Dlamini made calls to the RAF in my presence, where after she explained to me that her client advised that the offer be ready in the next one and half hour.

5.

It is quite clear that it was not a wilful delay on the part of the defendant's attorney to get settlement timeously".

Mr Dibakwane seems to be wanting to speak for Ms Dlamini instead of speaking for himself. If the matter can be settled in an hour and half on the date of trial, why would it not have been settled earlier or at least by not later than 13 November 2017 as directed court. But of course Mr Dibakwane in his affidavit elected not to address himself to the time frames which was set by this court during pre-trial conference in

July 2017 alluded to earlier in this judgment. One gets the impression that after July 2017 pre-trial conference, the file was forgotten.

[114] Mrs Dlamini in her affidavit which has been purportedly been commissioned on 30 November 2017 by someone who has not identified herself and not signed by Ms Dlamini in paragraphs 5 to 9 is stated as follows:

"5. In terms of the minutes of the judicial pre-trial conference held on 31 July 2017, the parties were directed to endeavour to settle the matter by 13 November 2017.

6. The defendant encountered challenges in obtaining the report of the Orthopaedic Surgeon from the expert, who is a former service provider. This in turn delayed the release of the reports of the Occupational Therapist, Industrial Psychologist and Actuary.

7. This delay in the receipt of the reports resulted in Executive Summary being sent to the RAF the week before the trial.

8. Attempts were made to settle the matter in the week preceding the trial. However, either the senior claims hander or the claims handler or both were not at work on the days leading up to the trial.

9. Instructions on the matter were only received on the day of the trial, from another claims handler who was requested to assist, as the senior claims handler and the designated claims hander were once again not at work.

[115] It looks no one is taking this court seriously in this matter. And hopefully the remarks in this judgment will bring to the fore the seriousness nature of not complying, not only with the directives made by our judges during pre-trial conferences but also with the orders by our courts, in this case the order of 27 November 2017 for an affidavit.

[116] Challenges expressed in paragraph 6 of the purported 'affidavit' quoted in paragraph [114] above must be seen in context. And the context is this: The filing of the reports by 29 September 2017 is what she understood the plaintiff will do and was a time-frame set by herself. Secondly, if she had challenges, the question is, when

did she experience such challenges and what did she do to overcome the challenges. Of course if the matter was forgotten and experts were not contacted in time, the results will be as it has happened in this matter. I find the explanation by both attorneys unacceptable and they should forfeit entitlement to any fee occasioned by the late settlement including a day fee. In other words, neither of them should be entitled to debit a fee against their respective clients insofar as such fee relates to or is occasioned by the late.

N NDIMANDE

[117] In this matter a pre-trial conference before a judge was also held on 2 June 2017 when it was recorded that merits have been settled. Trial date was fixed for 11 December 2017. Plaintiff's attorney undertook to file all reports by 30 September 2017 and the defendant's attorney by 30 October 2017. Joint minutes were to be filed by 7 November 2017 and pre-trial conference minutes amongst the parties by 14 November 2017. In the event the matter was to be settled, parties were directed to settle by not later than 30 November 2017.

[118] On the latter date the court was presented with a draft order for interim payment in the amount of R1 150 000.00. The matter was then postponed to 17 September 2018 for the remaining dispute regarding general damages and loss of earning. The parties were then directed to file affidavits by not later than 15 December 2017 explaining why the offer for interim payment was only made on the date of trial and why the party responsible for postponement of the matter should not be ordered to pay costs on punitive scale, forfeiture of a day fee and or payment out of pocket occasioned by the postponement.

[119] I have now been provided with the affidavits. The explanation by Mr Makhubela on behalf of the defendant and supported by emails he has written to ensure that resolution of the matter is expedited have been provided. The delay appears to have been occasioned by the industrial psychologist whose report was insufficient and despite been told the correct the report to enable the actuary to do quantify the claims for loss of earning, there were still problems. In the circumstance, I find no one liable for any costs or forfeiture of a day fee occasioned by the postponement. Mr

Makhubele is commended for all steps he took and proof thereof in ensuring that he is backed up for all what he did after the pre-trial conference of June 2017 before a judge. No order as to costs occasioned by the postponement is made.

N S SHABANGU

[120] On 24 was April 2017 this matter was laid before a judge during pre-trial conference. The 27 November 2017 was set as a trial date. Parties were directed to file pre-trial minutes by not later than 15 August 2017. On the date of trial, this court was presented with a draft order settling general damages in the sum of R300 000.00 and parties sought postponement of the matter to deal with loss of earnings which date was fixed to be 19 March 2018. The matters were then directed to file affidavits by not later than 1 December 2017 explaining why costs occasioned by late settlement on general damages and postponement of the matter on other head of damages should not be paid by whoever is responsible.

[121] Ms Ramarumo explains herself by starting with the difficulties she had experienced in not obtaining the expert report in time. I am not prepared to accept the explanation. As regards the joint minutes, this too could not be filed in time because the industrial psychologist went on maternity leave. Then in paragraph 7 of her affidavit she expresses herself as follows:
"We submit further even if it did not have directives (referring to pre-trial minutes before a judge) we tried to work out the matter but only that the Fund gave instructions on general damages which we have requested offer on the 30th October 2017 but with no response and that on the date of trial and the issue of loss of earning we needed to stood it down for us to get calculations as the defendant expert has signed the joint minutes."

[122] I am unable to understand the essence of the statement. But it looks like on the date of trial, parties wanted the matter to be stood down so that they can discuss or get the calculations on the issue of loss of earning. This is a trend which is followed by legal practitioners. They wait until the date of trial and at the door-step of the court then seek to settle when costs have already been incurred and at the expense of the court's time being wasted on stand down matters. Perhaps what helps the parties

here is that the consequences of settling and postponing on the date of trial was not part of the pre-trial minutes of April 2017. For this, I am prepared to make no punitive costs order, but hopefully something like this will not happen again in the future.

[122] Consequently, I hereby make an order in all the 18 matters as follows:

In Marcia Ercilia case

122.1 Costs occasioned by the postponement to be by the defendant on an attorney and client scale.

122.2 The defendant's attorneys are hereby ordered to forfeit any day fee or disbursement chargeable against the defendant insofar as such a fee or disbursement was directly related to and occasioned by the postponement herein.

In Cassandra Butler case

122.3 No order as to costs occasioned by the postponement is made against any of the litigating parties.

122.4 It is hereby ordered that the parties' legal representatives including counsel if any, shall not be entitled to recover any appearance day fee, cost and or disbursements from any of their respective clients (litigating parties) insofar as such a fee, costs and or disbursement is directly related to and or occasioned by the postponement.

In Zelda Carlamarie Eberson case

122.5 I hereby hand down the reasons for the order in terms of which the costs occasioned by the postponement was not to be recovered from the litigating parties by their respective legal representatives.

In H H Selowe case

122.6 The defendant to pay costs of the action on a party and party, except those costs occasioned by the late settlement which costs shall be on an attorney and client scale.

122.7 The defendant's attorney is hereby disentitled to levy or debit any fee against the defendant (client) insofar as such a fee is connected to and occasioned by the late settlement including forfeiture of day's fee for 27 November 2017.

In G H Mabunda case

122.8 The defendant to pay cost of action on a party and party scale.

122.9 The defendant's attorneys are hereby ordered to forfeit entitlement to charge any fee, costs and or disbursement against the defendant (client) including appearance day fee on date of trial insofar as such a fee, costs and or disbursement is connected to and or was occasioned by the late settlement.

In N S Maphalu obo minor

122.10 No order as to costs occasioned by the postponement is made against any of the litigating parties and the parties, legal representatives are hereby ordered not to recover any fee, costs and or disbursement including appearance day fee on the date of trial, insofar as such fee, costs and or disbursement is connected to or was occassioned by the postponement herein.

In Thulimbathi case

122.11 No punitive costs order is made and therefore the defendant is to pay costs of the action on a party and party scale and any interest

to which the plaintiff is entitled to charge shall be at an applicable interest rate.

In Q D Mokoena obo Minors

122.12 No punitive costs order is made and the defendant is ordered to pay costs of action on a party and party magistrate scale.

In S C Mathebula

122.13 The defendant to pay costs of action on a party and party except those costs occasioned by the late settlement which costs shall be on an attorney and client scale.

122.14 The defendant's legal representatives are hereby ordered to forfeit a day fee, costs and or disbursement connected to and or occasioned by the late settlement.

In J P Bezuidenhout case

122.15 The defendant to pay costs of the action on a party and party scale except those occasioned by the late settlement to which neither of the litigating parties shall be entitled to.

122.16 Legal representatives of both the plaintiff and defendant are hereby ordered not to recover any fee, costs and or disbursement including day fee for appearance on 11 December 2017 from their respective clients insofar as such a fee, costs and or disbursement is connected to and or was occasioned by the late settlement.

In A N Shongwe case

122.17 The parties' legal representatives are hereby ordered not entitled to a day fee and or costs occasioned by the late settlement of general damages and postponement of the matter on 27 November 2017.

In Vilane case

122.18 The defendant to pay costs of the action on a party and party scale. It is hereby ordered that the plaintiff's attorney shall not be entitled to debit any fee against client (plaintiff) insofar as such fee shall have been occasioned by late settlement.

In Bhiya case

122.19 Costs of action for plaintiff.

122.20 The Taxing Master and defendant are hereby directed to insist on proof of any costs and or preparation fee by experts for the plaintiff.

122.21 The parties' legal representatives including their respective counsel if any, are hereby disentitled from debiting or levying a fee, costs and or disbursement against their clients insofar as such fee, costs and or disbursements are directly connected to and or were occasioned by the late settlement.

In E J Vilakazi case

122.22 Costs of action for the plaintiff except those occasioned by the late settlement in terms of which 'no order as to costs' is hereby made.

122.23 The parties' legal representatives including their respective counsel if any, are hereby disentitled from debiting or levying any fee, costs and or disbursements against their clients insofar as such fee and or costs are directly connected to and or were occasioned by the late settlement.

In Aaron D Mokoena case

122.24 The defendant to pay costs of action on a party and party scale and legal representatives of the parties are hereby ordered to be disentitled to charge their clients for any fee, including a day appearance fee and disbursements occasioned by the late settlement.

In N Ndimande case

122.25 The defendant to pay costs of action on a party and party scale.

In N S Shabangu case

122.26 Costs to be costs in the cause of action pending finalisation of the case on loss of earnings.

LEGODI JP

DATE OF HEARING: 23 OCTOBER 2017
DATE OF JUDGMENT:

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