THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature 19/08/19 Date

CASE NO: 14406/2011

LEATHA NEL **APPLICANT**

and

THE ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

KHUMALO J

[1] In this application, the Road Accident Fund ("the Fund"), ("the Applicant"), seeks an order granting it leave to resile from a concession it made at a pre-trial conference conceding to the merits of the claim that the Respondent, L Nel, has instituted against it on 8 March 2011 in the above honourable court (referred to hereafter as the main action).

[2] This reminded me of the words of Tuchten J in the recent matter of ***Liberty v Telemarketing*** 2019 (1) SA 540, quoting from 'The Rubaiyat of Omar Khayyam' (1048-1131) as referenced by Edward FitzGerald (1809-1883) when he wrote:

'The moving Finger writes; and, having writ,
Moves on: nor all thy Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all thy Tears wash out a Word of it.'

[3] The Respondent's claim is for compensation for damages she suffered as a result of injuries she sustained in a collision that occurred at Veldspaat Street, Polokwane on 6 August 2006 when a motor vehicle with registration number CA 1977874 in which she was a passenger collided with a spoornet train.

[4] The damages claimed amount to R1 500 000.00 and are constituted as follows:

[4.1]	Future Medical Expenses	R200 000.00
[4.2]	Future Loss of Income	R1 200 000.00
[4.3]	General Damages	R300 000.00

[5] The Applicant, represented in the matter by Chauke Attorneys had filed a Plea denying liability to any of the Respondent's claims and there is no Replication.

[6] The parties subsequently agreed at a pre- trial conference held on **7 November 2017** that **the Applicant conceded to the merits of Respondent's claim when it conceded to Respondent's mother's claim that was instituted in the Pretoria Magistrate Court.** The admission was indicated at paragraph 2 of the minutes signed by both parties.

[7] Furthermore at paragraph 4.2 of the minutes, the parties confirmed that the merits have now been conceded, which means it is only the quantum portion of the trial that remains to be considered. In addition it is noted in the minutes that the **Applicant at the last hearing on 7 August 2017 raised a Special Plea of *res judicata*** without that point being raised in the Plea, and in that way engineered a postponement.

[8] On **15 March 2018** the parties held another pre-trial with all the legal representatives present including Senior Counsel for the Respondent. The Applicant had 3 legal representatives in attendance. Neither of the parties raised an issue of prejudice. **Paragraph 2 of the minutes reiterates the admission that the Applicant conceded the merits 100% in favour of the Respondent.** The minutes bore the signature of both parties' attorneys.

[9] These are the two Rule 37 instances where the admission that the Applicant is now seeking leave to withdraw was made. Applicant's explanation of the context of the admission is that in 2007 the Respondent's mother, Ms M S Labuschagne, in her representative capacity as the legal guardian of the Respondent lodged a claim for compensation for Past Hospital and future medical expenses in the amount of R5 000.00 and of R20 000, respectively. After lodging the MMF1 Form with the Applicant, Ms Labuschagne issued summons at the Pretoria Magistrate Court under case number 63413/2009.

[10] The claim was subsequently settled on 12 March 2010 with the parties agreeing that **"the Applicant concedes the merits 100% in favour of the Respondent's mother on the basis that the claim is limited to R25 0000.00 special damages in so far as same is proved**

and the Respondent's mother paid an amount of R2004.90 for the past medical costs. Applicant alleges that the claim was instituted on behalf of the Respondent who was a minor at that time. The Respondent was born on 12 November 1985.

[11] The Applicant further alleges in its Founding Affidavit deposed to by Mr Mgwenya from Chauke Attorneys, the Applicant's attorneys of record that, at the time of Applicant's Plea until the last day of filing a Replication it was not aware that Respondent's claim is based on the same cause of action as the action/**claim** settled **in the Magistrate Court, since the latter action was not handled by them but by a separate firm of attorneys. It therefore did not raise a Special Plea of 'once and for all'** principle or alternatively *res judicata* and/ or prescription (since the claim arose on 6 August 2006) or the fact that the Respondent failed to comply with s 24 (1) (a) of the Road Accident Act ("Act") for which reason its claim was invalid.

[12] As a result the Applicant raised the issue of *res judicata* from the bar as a point *in limine* only on 7 August 2017, the date the matter was set down for trial and it was dismissed as the defence was not pleaded. The trial was postponed sine die. Following the postponement the parties attended a pre-trial conference on 17 November 2017 arranged by the Respondent whereupon the merits were confirmed to have been conceded.

[13] **Mgwenya alleges that the making of the admission was an oversight.** He states that the file was allocated to him on 9 March 2018 and he only then realised that the merits were conceded in the previous pre-trial conference. Mistakenly, he thought the admission was authorised by the Fund. As a result he also when he attended a subsequent pre-trial conference with two other representatives on behalf of the Applicant on 15 March 2018 confirmed conceding to the merits of the Respondent's claim.

[14] According to Mgwenya, **he was made aware only on 20 March 2018, two days before the trial on 22 March 2018, that the MMF1 Form referred to in the main action relate to the Magistrate Court matter under case number 63413/2009, therefore there were no lodgement documents in this action.** He on request of the correct documents or Forms from the Respondent was sent the same document whereupon he realised the mistake and Respondent's failure to comply with s 24 (1) (a) of the Act that prescribes that a lodgement form be completed in all its particulars and lodged with the Fund.

[15] **He only then could make out that the Respondent's claim is invalid and that it should have been rejected.** Had the Respondent properly lodged its documents he would have been in a better position to investigate the claim. It was prejudiced in its investigation of the heads of damages that Respondent did not pursue in the Magistrate Court.

[16] He alleges that (1) the admission of liability during the pre-trial conference was made bona fide under the mistaken believe that the Respondent had properly lodged the claim and the Fund was liable. (2) that the Applicant is not liable to the Respondent's claim since she has already instituted same in the Magistrate Court and she is **bound by the once and for all principle that precludes him from instituting the claim in this court, alternatively the *res judicata* principle applies.**

[17] As a result the Applicant implores the court to grant it leave to withdraw the concession made in the pre-trial conference and alleges that the Respondent will suffer no prejudice.

[18] According to the Respondent as expounded in her Opposing Affidavit deposed on her behalf by Deon A Venter, her attorney of record, following Applicants' failed attempt to raise the **Special Plea of *res judicata*, the Applicant filed an intention to amend its Plea but failed to follow that through** until the parties' pre-trial conference **on 7 November 2017. At the pre-trial conference Mr G Mkhari on behalf of the Applicant agreed that the merits of the Plaintiff's case were conceded when the Plaintiff's mother's claim in the Magistrate Court was conceded. The Respondent's failure to file its amended pages was duly recorded in the minutes.**

[19] The concession was further noted at the next pre-trial conference that was held in the Deputy Judge President's office on 12 February 2018, for purpose of allocation of a trial date which Respondent failed to attend.

[20] The Applicant **failed to raise the non-service of the RAF 1 Form in its Plea or at any of the pre-trial conferences** until on the trial date whereupon the matter was postponed to give Applicant an opportunity to bring this action.

[21] The Applicant's attorneys failed to deny its authority to represent RAF at the pre-trial conferences, making concessions in respect of merits without referral to the RAF. They represented to the Respondent's attorney as if they had authority that legal representatives have in Rule 37 proceedings, to make admissions, concessions and often agree on compromises and settlements. The Respondent and its attorneys are as a result **estopped from denying that they had the necessary authority to concede the merits of the Respondent's claim.**

[22] **Mgwenya fails to point out to any steps he took at the time to verify the concession on the merits. The attorney who supposedly made the concession at the pre-trial has not deposed to an affidavit to confirm Mgwenya's allegations.**

[23] They had failed to advance any special circumstances in support of the Application for leave to withdraw /set aside the admission. The Application therefore cannot succeed and Application stands to be dismissed.

[24] **In respect of the RAF 1 Form the Respondent contends that it was not necessary for the Plaintiff to submit the form since her mother had already submitted a MMF 1 Form on her behalf to the RAF.**

[25] The Respondent denies that there was an obligation upon her to comply with s 24 (1) (a) of the Road Accident Fund Act. She points out that the Applicant has failed to explain how it would have been in a better position to investigate the claim with the form and how it has been prejudiced.

[26] It as a result moves for the dismissal of the Applicant's Application with costs on an attorney and client scale.

[27] In summary the Applicant is saying the reason for wanting to resile from the concession is because at the time it was made it was not aware (i) of the matter that was settled in the magistrate court (ii) of the fact that the Respondent had not filed a RAF 1 Form as is required by s 24 (1) a of the Act (prior notice (iii) The Respondent's claim had in any case prescribed at the time of her action. It therefore seeks an opportunity to be able to raise the defences of *res judicata* since it means it has conceded to a matter that has been finalized and also that of the application of the principle of once and for all rule or to challenge the validity of the claim due to failure to comply with s 24 (1) (a) plus that of prescription.

Legal framework

[28] Rule 37 was designed to curtail the proceedings and promote effective disposal of litigation, cutting costs and expedite the trial by limiting the issues that come before court: See *Hendricks and President Insurance Co Ltd* 19993 (3) SA 158 © at 166 E; *Rauff v Standard Bank Properties* 2002 (6) SA 693 (W) at 704 B. A litigant at a Rule 37 conference is not compelled to agree to anything during the course of the proceedings therefore any agreement or concession is to be by consent of the party and legally binding. The parties are required in a *bona fide* manner, to attempt to reach settlement either on issues that would serve to shorten the proceedings or resolve the main issues: see *Kriel v Bowels* 2012 (2) SA 45 (ECP) at 48J-49A.

[29] In the case of *Tolstrup NO v Kwapa* NO 2002 (5) SA 73 (W) the Court stated the following:

> "where parties have agreed that the merits and the quantum of a dispute are to be separately determined, and the defendant afterwards concedes the merits, which concession is accepted by the plaintiff, the parties have reached an agreement of compromise (transactio). By compromising the merits the defendant precludes himself from being able to revisit the merits as surely as if a judgment had been given thereon.
>
> The concession on the merits is more than an admission; it is an agreement of compromise on that part of the action from which not even a court could release one party without the consent of the other."

[30] As a result, for a party to resile from an agreement deliberately reached at a pretrial conference (where the bona fides of the parties are not at issue) special /exceptional circumstances would have to exist. Otherwise the object of the Rule will be negated if the parties are willy-nilly allowed to retract concessions made at such conferences; *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA) at 126 E-G.

[31] There is no fast and hard rule as to what constitutes special circumstances, each case is to be decided on its own facts. The concession of a major issue the purpose of which is to limit the ambit of the case, being more significant and usually binding; see *Hendricks* at 166E-H. Therefore a concession by a defendant of the merits of the plaintiff's claim is tantamount to an admission of liability and an agreement thus reached. As explained by Harmse J A *in F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (A) at 524F) that:

> "[s]oos met enige skikking ondervang dit die onderliggende dispute, ook die wat op die geldigheid van n skuldoorsaak betrekking het"

[32] The questions that arises in this matter is whether or not the Applicant has established any special circumstances that justifies granting it leave to resile from the concessions made in the pretrial conferences. The Applicant alleges that an error was made. What has to be established is if it was a bona fide error (which is to be determined from the circumstance under which the error is alleged to have been made and reasons given for seeking withdrawal). The Applicant will also have to address the issue of prejudice and whether or not the withdrawal would be in line with the interest of justice.

[33] In summary the Applicant is saying the reason for wanting to resile from the concession is because at the time of the concession it was not aware (i) of the matter that was settled in the magistrate court (ii) of the fact that the Respondent had not filed a RAF 1 Form as is required by s 24 (1) a of the Act (prior notice (iii) The Respondent's claim had in any case prescribed at the time of her action. It therefore seeks an opportunity to be able to raise the defences of *res judicata* since it means it has conceded to a finalized matter and the application of the once and for all rule or of the invalidity of the claim plus that of prescription.

Res Judicata

[34] The Applicant alleges that it was not aware that the action was not being lodged for the first time as it did not know of the action instituted and settled at the magistrate court. It only became aware when the matter was being prepared for trial. The reason being that the action in the magistrate court was not handled by Applicant's current attorneys (Chauke Attorneys) **but by a separate firm of attorneys.** This is the main reason given in the Founding Affidavit by Mgwenya and repeated in the heads.

[35] However this is far-fetched. The order of the Magistrate Court, dated 12 March 2010, indicated as Annexure "TM2" to Mgwenya's Founding Affidavit that records the settlement agreement between the parties is signed on behalf of the Applicant/Defendant in that action by T M Chauke Attorneys. According to Mgwenya's Founding Affidavit in support of this Application he practices under the name and style Chauke Attorneys. It is obvious that the same attorneys, Chauke Attorneys were involved in the Magistrate Court action. Mgwenya's allegation therefore lacks any merit and shows Applicant's lack of *bona fide*. This is very disconcerting that an inaccurate statement is made under oath by an officer of the court. The matter needs to be taken up with the relevant body governing the legal profession.

[36] In its heads of argument the Applicant alleges that the other reason for not being aware was because the action in the magistrate court was in the name of the Respondent's mother as at the time the Respondent was a minor whilst the one in the High Court was in the name of the Respondent. Notwithstanding the Respondent not taking issue to this allegation, it needs to be dealt with as it is also inaccurate. The facts as presented by both parties indicate that at the time the Respondent's mother lodged the claim **on 11 October 2007, the Respondent was actually a major** as she was born on 12 November 1985. She had turned age 21 on 12 November 2006. So, she might have been a minor at the time of the accident but became a major, three (3) months after the accident and was a major when her

mother lodged the claim with the Applicant. The Applicant, represented by Chauke Attorneys, nevertheless admitted the claim in the subsequent action of the Respondent's mother instituted in 2009, long after Respondent became a major. The Respondent's mother was compensated only for the medical expenses she incurred on behalf of the Respondent, understandably; see s 17 (5) of the Act . The parties could not have settled any other damages since the Respondent's mother was unsuited or lacked *locus standi* to claim on Respondent's behalf. This is what Mgwenya seems to have overlooked or missed when he alleged that the Respondent's action in the Magistrate Court was instituted by her mother. It would therefore seem probable that even though the Applicant was aware of the finalised action in the Magistrate Court it would have still deliberately conceded to Respondent's merits at the pretrial conference. It already had all the information it needs. It's a matter of lack of due diligence.

[37] An additional notable fact is that in the Magistrate Court action the Plaintiff is cited on the Court Order recording the settlement as Labuschagne M S (Claim for past medical expenses paid on behalf of L Nell) which Mgwenya alleges to have clouded the Attorneys ability to recognize the capacity under which Labuschagne instituted the action. However the Applicant's attorneys were allegedly not aware of that action as they were according to Mgwenya not involved. It seems they only had the RFA 1 Form ("Form"). So that cannot be a valid reason. Especially as the concession was made after the Applicant was aware of the availability of the *res judicata* defence and had tried prior the pretrial conference raising the defence during trial, albeit unsuccessfully.

[38] However as accordingly established, when the Applicant Attorneys conceded to the merits of the Respondent's case, they, as Applicant's attorney of record in the settled action in the Magistrate Court, were aware of the action and the order. Notably the mentioned paragraph in the pretrial minute records the concession with specific reference to the settled merits in the Respondent's mother's case, with no qualification suggesting that to have been Respondent's case. The minute also refers to the issue of *res judicata* raised at the trial on 7 August 2017, prior to the pretrial conference. Therefore notwithstanding those issues alive at the time, Applicant conceded to the merits in favour of the Respondent. The Applicant's indisputable full awareness of the action and apparent incline to bring the *res judicata* defence at that time, did not discourage it from conceding to the merits of Respondent's claim. Applicant's concession was consequently deliberately made, with no oversight established. For that reason Applicant has failed to establish a special circumstances to can justify a withdrawal of the concession.

[39] The same applies with the defence of the special plea of once and for all principle. The Applicant knew prior to conceding to Respondent's merits, of the action that was brought in the Magistrate court action since its attorneys have been on record in both matters and were aware of the principle being available as a possible defence. It has failed to give an explanation why notwithstanding having that knowledge a concession was made. It instead sought to deny being aware of the Magistrate Court action and not to provide a full and frank explanation by failing to file an affidavit by Mr Mkhari, the legal representative from Chauke Attorneys, who attended the pretrial conference and agreed to the concession to explain the real circumstances under which it was made. Mgwenya only took over after the concession was made.

[40] That once and for all principle defence is in any case not a clear cut available defence against Respondent's claim due to the glitch that still remains on the capacity of the litigant in the Magistrate Court action who seem to have settled only a personal claim, which Applicant did not bother to investigate even though its current attorneys were involved in the matter.

In respect of the RAF 1 Form

[41] The other circumstance stated is that the Applicant's attorney was not aware that the Respondent had not lodged a RAF 1 Form (prior notice) in this action as is required by s 24 (1) (a) of the Act and had labored under the mistaken belief that such form has been filed. It alleges that to have been an oversight. Both parties have agreed that due to the accident having occurred in 2006 the Transitional Act applies.

[42] The Respondent's claim is said to have arisen on 6 August 2006 and therefore is governed by the following provisions of the Road Accident Fund Act 1996 (the Act):

[42.1] s 24 (1) (a) that provides that:

> 'A claim for compensation and accompanying medical report under section 17 (1) shall be set out in the prescribed form, which shall be completed in all its particulars.'

[42.2] In respect of the completion of the RAF Form, s 20 (4) of the Act provides that:

> '(a) Any form referred to in this section which is not completed in all its particulars shall not be acceptable as a claim under this Act.

[42.3] S 24 (5) provides:

> If the Fund or the agent does not, within 60 days for the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in all respects.

[43] The statutory requirements of the Act relating to the submission of the RAF 1 or MMF 1 claim form and medical report are peremptory, whilst those relating to the contents of the form are directory. This means that substantial compliance with the latter requirements suffices whilst strict compliance with the former is required; see *Pithey v Road Accident Fund* **2014 (4) SA 112** (SCA) the Supreme Court of Appeal held at 120 (para 19):

> "It has been held in a long line of cases that the requirement relating to the submission of the claim form is peremptory and that the prescribed requirements concerning the completeness of the form are directory, meaning that substantial compliance with such requirements suffices. As to the latter requirement this court in 'SA Eagle Insurance Co Ltd v Pretorius' reiterated that the test for substantial compliance is an objective one."

[44] It therefore follows that exact compliance with the requirements relating to the submission of the claim form is first required before the issue of substantial compliance in relation to the content thereof can arise.

[45] In *Molokoane v Multilateral Vehicle Accidents Fund* [1998] ZASCA 72; 1998 4 All SA 486 SCA at 491 (a)-b) *Melunsky* AJA (as he then was), said:

> "In my view the appellant cannot rely on the principle of substantial compliance to excuse her failure to send the MMF 1 form to the entity which had to deal with it. **It was a peremptory requirement** of the agreement that the claim for compensation had to be sent to **the appropriate appointed insurer or the MMF, as the case maybe, before the commencement of legal proceedings.** This is clear from the provisions of article 62 (a). (See Nkisimane and others v Santam Insurance Co. Ltd **1978 (2) SA 430** (A) at 433 E-G and 435A-H; Evans v Shield Insurance Co Ltd **1980 (2) SA 814** (A) at 831E and SA Eagle Insurance Co. Ltd v Pretorius 1998 (2) 656 (A) at 663A-B). It is true that the object of the legislation was to provide the widest possible protection to injured person but this does not entitle a court to overlook the failure to follow a procedure that required exact compliance. In the result the submission of the claim form to Mutual and Federal had no legal effect."

[46] The Respondent disputes that it has not complied and that Applicant is entitled to bring that up now. She further **contends that she was not obligated to submit another MMF 1 form as required in** s 24 (1) (a) of the Act as **her mother had already submitted it on her behalf to the Applicant. The Applicant** has also not **raised the non-service of the RAF 1 Form in its Plea or at any of the pre-trial conferences. Most significantly** she points out that the Applicant has **failed to** explain how it would have been in a better position to investigate the claim with the form and how it has been prejudiced.

[47] It is the Applicant's case that the claims handler from the Applicant's office contacted Mgwenya from the Applicant's attorneys' office on 20 March 2018, 7 years after 8 March 2011 when the action was instituted, and 2 days before a third set down of the matter for trial on 22 March 2018, asking for the RAF 1 Form filed in this action. According to Mgwenya he referred the claims handler to the RAF 1 Form ("Form") which was in the file. He only realized when the claim handler pointed it out that the Form relate actually to the claim lodged for the Magistrate Court action. Mgwenya says he was also furnished with the same Form when he requested the Respondent's attorneys for a copy for the main action (action in this court). The Respondent's Attorneys confirmed that it is the same form that was also lodged in the Magistrate Court action. The Applicant regards that as fatal to the Respondent's claim. Mgwenya argues that on this basis the Applicant should be allowed to withdraw the concession as **when it was made he was not aware of this defect in Respondent's claim.** He further argues that the claim should have been rejected as the Respondent in such an instance cannot be liable.

[48] As it has been indicated the documents indicate that Chauke Attorneys were actually involved in the Magistrate Court action. The disputed Form was lodged for the action in the Magistrate Court and also used for the action in this court. Applicant and or its attorneys had the Form in their possession all the time. If Applicant had genuinely used the Form for its prescribed purpose, to investigate the Respondent's claim, it would have, in time, realized its unsuitability for this action as alleged, and the need to reject the claim or raised a Special Plea and at least be able in this application to indicate how it was prejudiced in its investigation reliant on the Form. Instead it seems to have been unconscientious in dealing with this matter. It all this time had the Form, and did not at any stage challenge its validity and has failed to prove any prejudice it suffered as a result thereof.

[49] Section 24 (5) is very clear and need not be interpreted that ' If the Fund or the agent does not, within 60 days for the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in all respects.

[50] There is no proper and satisfactory explanation as to why enquiries about the claim form only done after such a long time and not prior to *litis contestatio* when it is an issue that is to be dealt with in the pleadings. Recognizing the purpose of the claim form that it is required to assess compliance and investigate the validity of the claim prior to pleading, the Applicant has failed to proffer any defendable reasons why the alleged unsuitability of the form was not detected earlier. The reasons stated do not justify the alleged oversight. Whoever dealt with the matter prior Mgwenya taking over was supposed to have filed an affidavit explaining what really led to the Applicant not being aware of the point they want to now raise regarding the Form so that the court can consider the matter from the interest of justice perspective. More so, since part of Mgwenya's version is contradicted by the documentary evidence he relied upon. The Applicant has therefore failed to sufficiently make a proper case for a favourable consideration of the Application so that it can be granted an opportunity to revisit the issue of the Form.

[51] This aspect has been addressed by the Respondent extensively in its heads of argument, it being the principal issue between the parties. The Respondent contends that she was not required to lodge the claim again after her mother did that in the Magistrate Court action. The claim with that Form was accepted by the Respondent and the contention was never raised. I presume the Respondent was furnished with the form twice, seeing that it bore an additional acknowledgement of receipt stamp dated 24 June 2009, besides that of 2007. However the question to consider is whether is it fair that the question of its validity would arise now after the matter has been partly settled when there is no convincing and justifiable reason proffered why the oversight occurred and it was not dealt with as is provided by the Act.

[52] It is interesting that both the Respondent and Applicant's attorneys referred to the disputed Form when a lodgment or claim form for this matter was required. Its lodgment therefore cannot be in dispute. The content thereof was supposed to have been scrutinized within 60 days after its receipt and a response given to the Respondent. After the 60 days it became good for the claim to be deemed valid. Presumably the concession was made on the basis of its deemed validity and suitability for Respondent's action as nothing is shown to suggest that Applicant was not ever not satisfied with the claim or Form. Both parties having considered the Form to be for Respondent's action as well with no non-compliance with the Act having been raised. Mgwenya only became unhappy with the Form when its supposedly non-acceptability was pointed out by the Applicant's claims handler. Therefore until the time when the Applicant made the concession there was no issue about the Form and therefore no justification for its legality to be only questioned now.

[53] The most ironic fact is that neither the Applicant's attorneys or the Fund has denied that a mandate to concede to the merits was given. Mr Mgwenya has not identified the capacity of any of the persons who accompanied him when he attended the pretrial conference or explained whether it was Applicant's instructions that they confirm the concession. He did not explain why after he had sight of the pretrial minutes of 7 November

2017 he did not investigate the basis upon which the concession was made before attending the pretrial in March 2018, and confirming same. He has again failed to provide either a satisfactory or a *bona fide* explanations that could constitute a special circumstance.

Prescription

[54] The Applicant alleges that the prescription it seeks to raise is a special circumstance and contingent to the issue of the Form. It argues that the available Form is only relevant to the Magistrate Court action and thus defective for the Respondent's claim. As a result failure to lodge another Form for the Respondent's action in this court, has led to the prescription of the claim. Undesirably the Applicant never rejected the Form until after the formal admission of the merits of Respondent's claim and when the matter was set down for trial for the third time. I have not found any cogent explanation why the Applicant could not have dealt with the issue of the Form earlier in the matter and in its Plea. The Applicant only questioned the Form's acceptability 6 years after the action has been instituted, that is way in excess of the (60) sixty days prescribed by the Act. A court should not come to the assistance of a litigant displaying such magnitude of inattentiveness which might cause grave injustice to the innocent party. The Applicant lost its right to reject the Form and failed to make a case for the deemed validity of the Respondent's claim to be revisited for the purpose of considering Prescription that might have resulted. Granting the Applicant leave to withdraw the concession after such an unreasonable period of delay based on deficient and incorrect explanations tendered by the Applicant will certainly not be in line with the interest of justice; President Versekeringsmaatskapy Bpk v Moodley 1964 (4) SA 109 (T) at 110H -111A.

[55] Furthermore it is generally known that the fact that a claim has prescribed does not bar the debtor from instituting his claim due to the fact that prescription cannot be invoked *mero motu* by the court if it is not raised as a defence. The Applicant as it has been established, was aware of the claim that has been brought in the Magistrate Court, the date when the claim arose and was instituted and had access to the documents lodged. For inexplicable reasons did not address the issue of the claim Form whereafter it conceded to the merits in more than one pretrial conference sitting. Applicant's concession is therefore binding and its withdrawal would not be in line with the interest of justice.

[56] The Applicant has therefore failed to establish any special circumstances justifying the granting of the relief it seeks.

[57] I have also been requested to consider the granting an order for costs on an attorney and client scale, I could not find any reasons that justify such an order:

[58] Under the circumstances I make the following order:

1. The Application is dismissed with costs

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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