REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OFSOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER 22195/2018

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

DATE SIGNATURE

In the matter between:

MOLEFE OMPHILE BASETSANA **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDENT**

JUDGMENT

MANAMELA AJ,

[1] On 2 July 2017, at approximately 16h50 along N4 toll road from Pretoria towards Rustenburg, a collision occurred between a motor vehicle bearing registration number [….] and a motor vehicle bearing registration number [….]. The Plaintiff was a passenger in the first motor vehicle.

[2] The Plaintiff launched a claim against the Road Accident Fund in terms of Section 17 of the Road Accident Fund Act 56 of 1996, amended ("the Act), as a result of the injuries, and as fully set-out in the Summons, for past medical and hospital expenses - R10 000.00, undertaking in terms of section 17(4)(a), past loss of earnings - R100 000.00 and general damages of R250 000.00.

Matters of Common Cause

[3] On 3 June 2020, an order was made in favour of the plaintiff in respect of 100% liability for merits, R500 000.00 in respect of general damages and future medical expenses, and past medical expenses and future earnings claim were postponed *sine die*.

[4] The plaintiff served the following reports in support of her claim for loss of earnings: - Clinical Psychologist – Lufuno Madipa – report date 29 October 2019

- Neurosegion – Dr Segwapa – report dated 12 October 2019
- Orthopertic Segion – Dr Mukansi completed RAF Form 4
- Plastic and Reconstructive Sergion – Dr Selahle report dated 10 September 2018
- Occupational Therapist : Dr Lucia Mmadi
- Actuary : Robert Oketch

[5] All expert reports were served and filed timeously. In relation to the loss of support claim, the Occupational Therapist, considered the hospital records, orthopedic surgeon report, RAF From 4 report, Clinical Psychologist report, Neurosurgeon report, and Plastic Surgeon, and considered that the Plaintiff's highest level of education is grade 12, and she was studying N6 at Orbit College at the time of the accident, and had to stay at home for about 6 months, when he opined that the Plaintiff will not compete fairly in an open labour market.

[6] Following the Occupation Therapist's report, the Plaintiff was referred to an Industrial Psychologist. It was noted that the Plaintiff was employed as an office assistant at Mona-Tech earning R3500.00 at the time of the accident. The Plaintiff never resumed employment after the accident, as a result of the injuries and never earned any income. The Industrial Psychologist opined that the Plaintiff will not be able to compete fairly in an open labour market, as a result of the

injuries. The Industrial Psychologist further opined that a higher than normal contingency may be applied to cater for anticipated accident related sequelae to employment prospects.

[7] The actuary's report set-out a net average of R65 946 for past loss of earning based on 5% pre-accident loss of R30 396 and 15% post-accident loss of R26 925. The computation of future loss is a net average of R1 416 733.00 and the total loss of earnings for both past and future loss is at R1 482 679.00.

[8] From the pre-trial minutes signed by both the Plaintiff and the Defendant, it is evident that the Defendant did not object to notices served in terms of Rule 36(9). The Defendant admitted liability in terms of section 17(1) of the Act. Both the Plaintiff and the Defendant agreed, to file their discovery affidavits by 5 November 2019. The Defendant never filed its discovery affidavit.

[9] On 20 October 2020, this matter was certified ready for trial in respect claims for past medical expenses and future earnings. A notice of set-down for trial was served on the defendant on 3 November 2020.

[10] This matter was enrolled for trial on 25 May 2021 for determination of loss of earnings claim and past medical expenses. Both merits and general damages were settled by way of an order of court dated 3 June 2020. The Plaintiff did not proceed with the claim for past medical expenses, as no vouchers were provided.

[11] No other process was served between 3 November 2020 and 25 May 2021, between the parties. On the date of trial the Plaintiff served two interlocutory applications, being an application in terms of Rule 38 of the Uniform Rules of Court served on 27 May 2021 at 08h59 and a Rule 31 application for default judgement served on 25 May 2021 at 16h48. Service of these interlocutory applications at trial has been a point of concern in light of the issuance of the Judge President's directive 1 of 2021, of 18 February 2021[1]. In terms of the said directive the Plaintiff had to be fully complaint with the duty of disclosure similar to an *ex parte* application, and had the recourse of first seeking an order to compel the Defendant for non-compliance with any procedural step or rule. Furthermore the Plaintiff can seek that defendant's defense be struck out. These procedures occurs in the interlocutory trial court and not on trial.

Issues for determination

[12] Whether it is justifiable to grant an order on the basis of the two interlocutory applications served on the Defendant on the date of trial or to proceed with trial as set-down.

Legal framework

[13] The Plaintiff's interlocutory applications were brought in terms of Rule 31 and Rule 38.

[1] This directive has been revised under Judge President Directives dated 11 June 2021

[14] The provisions of Rule 31(2)(a) provides that –

"*Whenever in an action the claim or, if there is more than one claim, any of the claims is not for debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgement and the court may, after hearing evidence, grant judgement against the defendant or make such order as it deems fit."*

[15] Rule 31(4) provides that –

"*The Proceedings referred to in sub-rules (2) and (3) shall be set-down for hearing upon not less five days' notice to the party in default: Provided that no notice of set down shall be given to any party in default of delivery of notice of intention to defend."*

[16] Under Rule 38, the Plaintiff seeks an order that –

a. *That her affidavit be admitted and used as evidence without physical appearance in accordance with rule 38 of this honourable court.*

b. *That the Defendant/Respondent be held liable for loss of earnings in accordance with the Actuarial Report compiled by Ekhaya Risk Services filed before court.*

c. *That the Respondent pay the costs of this application on attorney and client scale in case of opposition and in the alternative to pay the costs in accordance with the draft order.*

d. *Further and/or alternative relief.*

Non-compliance with directive

[17] It is trite that default judgment is entered against a party who has failed to defend a claim that has been brought against it. In relation to the RAF it is at the very least reasonable to suppose that the defendant is not disputing the claim if they have not responded to a reasonable notice. One of these notices is having to file a signed discovery affidavit, which it failed to do, as far back as November 2019.

[18] The point of concern is the lack of effort on the part of the Plaintiff to enforce compliance with the Rules at the soonest. The Plaintiff could

have followed Rule 30A to ensure that the Defendant is placed in *mora*. I find it unjustifiable for the Plaintiff to launch a default judgement on the day of trial without a reasonable notice as provided in Rule 31(4) of not less than 5 days.

[19] The Plaintiff's Notice of Motion for Rule 38, provided that the Defendant may oppose the application by making submissions at the hearing and by making submissions to the Plaintiff/Applicant at her attorney's email, as provided therein. The default judgement application makes no provision for same. Service of the rule 38 was effected on the Defendant on 27 May 2021, at 8h59, will a note that the matter will be heard at 9h00.

[20] The Plaintiff's practice note dated 14 May 2021 only confirms that the matter is proceeding with trial as it was certified ready on 20 October 2020 in respect of loss of earnings.

[21] It is trite that evidence should be given viva voce at trial, but in certain circumstances the court may allow evidence to be led by way of an affidavit, such instances are exceptional based on sufficient reason given to the court, as contemplated under Rule 38(2). Gutta J, in

Bafokeng Land Buyers Association and others v Royal Bafokeng Nation 2018 (3) All SA (NWM) at 64, held that the determination of "sufficient reason" necessarily involves the exercise of a discretion which discretion has to be exercised judicially having regard to the options available to the Court. A Court on appeal may interfere with the exercise of discretion only if there has been a wrong application of legal principle or a misdirection of fact. The Court on appeal does not have the power to substitute its own discretion, on the basis that it would have exercised the discretion differently.

[22] The Plaintiff demonstrated in her founding affidavit that the reasons for using affidavit for evidence are that -

"*5.1.The risk of covid-19 is still high within the jurisdiction of this Honourable Court and it will therefor be convenient to tender evidence through affidavit,*
5.2. Further, the Defendant has not demonstrated intention to cross examine experts in respect of loss of earnings and it is not participating in this proceedings.
5.3. Furthermore the application of contingencies on the actuarial report is within the discretion of the Court and it is cost effective to use expert affidavit than giving evidence in person."

[23] I have no doubt that given the current status of the Defendant, it would most likely be convenient and justifiable for the Plaintiff to lead evidence by way of affidavit, however I do not agree that it is justifiable not to comply with the Rules of Court in so far as giving the Defendant a reasonable notice of such an application under Rule 38 even when is it inevitable that the Defendant is not participating in the legal process.

[24] The Plaintiff had more than enough time to bring this application since the matter was certified ready for trial in October 2020 and bring an application on the day of trial is simply an abuse of court process. This non-compliance with the Rules can be cured by an appropriate cost order as well having the Defendant's defense struck out.

[25] The Judge President's directive provides under chapter 6 paragraph 17, that -

> "*17. This chapter requires, from a Plaintiff, full compliance with the duty of disclosure as would be expected in an ex parte application and any failure shall imperil an Order being granted and may also result in punitive costs Orders against practitioners, a referral of the infraction to the Legal Practice Council and the professional representative Societies/Associations.*

[26] It follows that the effect of non-compliance with the directive will consequently affect the order sought by the Plaintiff; in the absence of the Defendant, as the Plaintiff is expected to be fully compliant.

The Discretion of the Court

[27] In **Southern Insurance Association Ltd v Bailey N.O** 1984 (1) SA 98 (AD) at 116G-117A Nicholas JA had this to say about the discretion of a trial judge:

"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case."

[28] An actuarial assessment report merely serves as an assistive aid to the court (**Shield Insurance Co Ltd v Hall** 1976 (4) SA 431 (AD) at 444F).

[29] It would have been advisible for the Plaintiff to consider amending its particulars of claim in line with the order sought at trial, it would therefore not be justifiable to even consider the amount sought in respect of loss of earning, as it was not pleaded.

[30] On the issue of costs, it would also be worth to mention that the directive from the head of this court is binding upon practitioners, at least until set aside or amended. **(See Oudekraal 7 Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) para 26)**. In **Judicial Service Commission v Cape Town Bar Council 2013 (1) SA 170 (SCA)** Brand JA said in para 13 as follows: "*As I see it, the short answer to this contention is, however, that this is not so. The mere fact that an administrative decision was unlawful does not visit all its consequences with automatic invalidity. Unless and until an administrative decision is challenged and set aside by a competent court, the substantive validity of its consequences must be accepted as a fact* (see eg Camps Bay Ratepayers' and Residents' Association

and Another v Harrison and Another 2011 (4) SA 42 (CC) (2011 (2) BCLR 121) para 62). Moreover, even if an administrative decision is challenged and found wanting, courts still have a residual discretion to refuse to set that decision aside (see eg Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others 2008 (4) SA 43 (SCA) ([2008] 3 All SA 245 para 13). In a sense, the 'invalid' administrative decision is then, in the exercise of the court's discretion, clothed with validity (see eg Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA) ([2005] 4 All SA 487) paras 28 – 29; Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA) para 9).

[31] The directive providers for a punitive cost order against practitioners, if the Plaintiff did not comply therewith. It is on this basis that costs of the two interlocutory applications are disallowed.

ORDER:

It is ordered that:

1. *Default judgement is refused, and the Plaintiff is directed to fully comply with the Judge President's Directives;*

2. *No order as to costs;*

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PN MANAMELA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Plaintiff: Masweneng Attorneys

On behalf of the Defendant:

DATE HEARD: 25 May 2021

DATE OF JUDGMENT: 8 September 2021