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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1931/2020

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

In the matter between:

RAISIBE JOHANNA CHIDI N.O

For the late Khomotso Dorreen Chidi

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

KGANYAGO J

[1] Kgomotso Dorreen Chidi (deceased) was involved in a motor vehicle accident on 28th January 2018 whilst a passenger in the insured motor vehicle. As a result of the accident, the plaintiff sustained bodily injuries. At the time of the accident the deceased was employed as an educator. The deceased had lodged a third party claim with the defendant. The defendant had failed to settle the deceased claim within the prescribed time period and that led to the deceased issuing summons

against the defendant on 4th March 2020. The summons was served on the defendant on 23rd March 2020.

[2] The defendant did not enter an appearance to defend the deceased action within the 21 days afforded to it, or at any stage. The deceased passed away on 4th August 2022 before her claim was finalized. Raisibe Johanna Chidi (plaintiff) was appointed as the executor of the deceased estate on 26th August 2022. A notice of substitution was filed on 26th August 2022 with the plaintiff intending to proceed with the deceased's claim in respect of merits, general damages and past loss of earnings.

[3] Merits in this matter are still in dispute. According to the deceased's section 19(f) affidavit, on 27th January 2018 she was a passenger in the insured motor vehicle whilst the insured driver lost control of the vehicle at a curve which resulted in the vehicle overturning. As result of the accident the deceased sustained serious injuries. The accident report corroborates the deceased version. As per plaintiff's particulars of claim, the accident was caused by the negligent driving of the insured driver in that he failed to keep a proper lookout; he failed to exercise control of the vehicle he was driving; and has failed to avoid a collision when by the exercise of reasonable care, he could and should have done so.

[4] The deceased at the time of the accident was a passenger in the insured motor vehicle. For the plaintiff to succeed with her claim against the defendant had to proof one percent negligence against the insured driver. The version of deceased as it appears in her section 19(f) affidavit and particulars of claim proves that the insured driver has failed to keep a proper lookout and care when he negotiated a curve which resulted in him losing control of the vehicle. The defendant is therefore held liable 100% for the agreed or proven damages.

[5] Turning to quantum, the deceased has passed away before her claim was finalized. With regard to past loss of earnings, there is nothing contentious. Even though the deceased has passed away before her claim was finalized, the claim for past loss of earnings is transferable and that empowers the executor of the deceased to proceed with the claim on behalf of the estate. Plaintiff will be entitled to

claim the deceased past loss of earnings up to 4th August 2022. The actuary had calculated the past loss of earnings to amount to R74 490.00 and thereafter applied a contingency deduction of 5%. The 5% is the normal deduction and this court does not find any reason to interfere with that. The amount of the past loss of income after the contingency deduction amounts to R70 765.50.

[6] What this court must determine is whether the claim for general damages is also transferable. Counsel for the plaintiff has submitted that they have been in contact with the defendant in relation to the claim for general damages, and that the view of the defendant is that the claim for general damages is not transferable in the light of the deceased death. Counsel for the plaintiff has submitted that the deceased had died after *litis contestatio*. The defendant had failed to enter an appearance to defend to date and that the time to do so has lapsed as far back as 2020. That even if the defendant had filed their intention to defend timeously, the time for them to file their plea had lapsed. That the deceased passed away on 4th August 2022 which is approximately 2 years after the time the defendant had to enter into an appearance to defend had lapsed.

[7] Counsel for the plaintiff has further submitted that the claim for general damages should be transmissible irrespective of whether the stage of *litis contestatio* has been reached or not at the time of the deceased death. That for the plaintiff in the case at hand, *litis contestatio* has been reached at the time of the deceased death, and that the plaintiff has a claim in respect of general damages.

[8] In *Nkala v Harmony Gold Mining Co Ltd*¹ Mojapelo DJP and Vally J said:

“...the executor can sue for any patrimonial loss the deceased suffered before his death, as well as the funeral expenses, which is a patrimonial loss suffered after death, and the dependants can sue for any patrimonial they themselves will suffer as a result of the premature death of their financial provider or breadwinner. Neither can sue for any personal injury such as pain and suffering, loss of amenities of life or disfigurement (general damages) the

¹ 2016 (5) SA 240 (GJ) at para 188

deceased suffered prior to his death. There is, however, an exception to the rule, which is that where the deceased had already commenced action and the claim had reached the stage of *litis contestatio* before his/her death, and the claim is continued by the executor of his/her estate, the claim for personal injuries does not abate. In such a case the law allows for the claim for such general damages to be transmitted to the estate.”

[9] Rule 29(1)(b) of the Uniform Rules of Court (Rules) provides that pleadings are considered closed if the last day allowed for filing a replication or subsequent pleadings has lapsed and it has not been filed. In the case at hand the defendant did not enter an appearance to defend and has also not filed any plea to the plaintiff's particulars of claim. The time period within which the defendant was allowed file its appearance to defend or plea has lapsed. A replication may only be filed if the defendant has filed its plea. In this case it is common cause that the defendant did not file any document defending the plaintiff's action. Rule 29 as it stands, has been designed for matters which are defended and all the parties to the case have joined issue and there are no longer any new or further pleadings. It does not cater for undefended matters. In undefended matters the question will be when will it be considered that pleadings have closed.

[10] In defended matters a party will be able to apply for a trial date after the pleadings have closed. In a case where the defendant had only entered an appearance to defend, but did not file a plea, the plaintiff will be entitled to apply for a date for a default judgment after filing a notice of bar and the defendant has been barred from pleading. Therefore, in that situation, the pleadings are considered to have been closed after the defendant has been barred from pleading.

[11] Where the defendant has failed to enter an appearance to defend or filed any plea, the plaintiff will be able to apply for the default judgment after the time period within which the defendant is allowed to file an appearance to defend has lapsed. In the case at hand the defendant was served with the combined summons on 23rd March 2020, and the defendant had 21 days within which to file an appearance to defend but has failed to do so. The time period within which the defendant was supposed to have filed an appearance to defend had lapsed whilst the deceased

was still alive. When that time period lapsed, the plaintiff was in a position to apply for date for a default judgment. In my view, in undefended matters pleadings will be considered to have closed after the time period within which the plaintiff is allowed to file an appearance to defend has lapsed.

[12] In the case at hand, the deceased had passed away on 4th August 2022. The plaintiff was appointed as the executor of the deceased estate on 16th August 2022 and the notice of substitution was signed on 19th August 2022 and filed on 26th August 2022. Set down setting the matter down for hearing on 15th May 2023 was signed 18th August 2022 before the signing of the notice of substitution and filed on 19th August 2022. On 22nd August 2022 the plaintiff filed a notice of intention to amend the particulars of claim in terms of Rule 28. The notice was giving the defendant 10 days within which to object failing which the pleadings shall be deemed to have been amended. The defendant did not object, and the amended pleadings were filed on 14th September 2022.

[13] The plaintiff's claim is currently been based on the amended particulars of claim which was effected after the deceased death. By filing the notice of intention to amend, the plaintiff was re-opening the pleadings which were initially closed. The defendant had now an opportunity to object to the amendment. Rule 29(1) provides that pleadings are closed if either party has joined issue without alleging any new matter, and without adding any further pleading. By filing an amendment, the plaintiff has added a further pleading. That has occurred after the deceased death, and therefore the initial *litis contestatio* has fallen away and was restored after the filing of the amended pleadings. Generally, the plaintiff's claim for general damages can therefore not be transmissible to the estate or executor of the deceased since the pleadings closed after the deceased death.

[14] In the *Nkala v Harmony Gold Mining Co Ltd* at paras 215 to 216 Mojapelo DJP and Vally said:

“[215] In the light of these circumstances and bearing in mind the injunctions of ss 8(3) and 39(2) of the Constitution, it is our view that the common law has to be developed to allow for the claim for general damages to be transmissible

to the estate or executor of a deceased mineworker, even though the stage of *litis contestatio* had not been reached at the time of his death. Also, the development is necessary in the light of the court's general duty to do justice by the persons affected by its orders.

[216] The development should not be restricted to the case where the plaintiff has died pre-*litis contestatio*. It should also apply to the case where the defendant or potential defendant has died pre-*litis contestatio*, as the same principles as those that apply to plaintiffs apply to them."

[15] From the principle formulated in the Nkala case it is immaterial whether the deceased died before or after *litis contestatio*, the executor of the deceased is entitled to proceed with the action for a claim for general damages which award will fall into the estate of the deceased. In the case at hand, the plaintiff who is the executor of the deceased estate, is entitled to proceed with the claim for general damages on behalf of the deceased estate. The defendant is therefore liable to pay the deceased estate for general damages should the defendant find that the deceased injuries were classified as serious.

[16] With regard to costs, normally the amount awarded to the plaintiff as damages for past loss of earnings will generally attract costs to be awarded on a magistrate court scale. However, the issues raised in this matter are complex by nature, and therefore in my view, it will be appropriate to award costs on a High Court scale.

[17] In the result the following order is made:

17.1 The plaintiff is entitled to 100% of her proven or agreed damages;

17.2 The defendant pays to the plaintiff the amount of R70 765.50 being for past loss of earnings in full and final settlement, by paying into the plaintiff's attorneys trust account with account number 03[...] at Standard Bank White River, within 180 days from date hereof, during which period interest shall not be payable.

17.3 Should the defendant fail to make payment as set out in paragraph 17.2 above then, in this instance, the defendant shall be liable for payment of interest, calculated from 14 days after date hereof, at the *tempore morae* rate.

17.4 The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale to date subject to the Taxing Master's inherent discretion.

17.5 There is a valid contingency fee agreement.

17.6 It is declared that the defendant is liable to pay to the plaintiff the deceased general damages should it find them to be classified as serious.

17.7 General damages postponed sine die.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	: Adv FA Ras
Instructed by	: Frans Schutte & Mathews Phosa Inc
Counsel for the defendant	: In default
Date heard	: 15th May 2023
Judgment electronically circulated	: 10th July 2023