REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: 12 August 2024

[redacted]

12 August 2024
DATE

SIGNATURE

CASE NO:055136/2022

In the matter between:

DESMOND VINCENT HUGO **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

(This matter was heard in open court but Judgment was delivered electronically by uploading it onto the electronic file of the matter on CaseLines. The judgment was submitted to the representatives of the parties via uploading it onto CaseLines. The date of uploading onto CaseLines is deemed the date of the judgment).

Summary: *Procedure - Notice of Intention to Defend in terms of Rule 19(5) delivered to plaintiff (but not yet uploaded to the electronic file on CaseLines) the evening before application for default in court - Defendant relying on Rule 19(5) and stating it has no obligation to explain belated delivery or seeking condonation for belated delivery – Proviso of Rule 19(5) does not operate to the exclusion of the provisions of Rule 27 – Explanation should be on oath and application for condonation upon which the Court can property exercise its discretion whether late filing is justified or not and whether such belated conduct constitutes an abuse of process.*

BEFORE: HOLLAND-MUTER J:

[1] The Pretoria High Court entertains on average at least 450 instances of litigation against the Road Accident Fund in any given week spread over daily trial rolls, default judgment rolls, settlement rolls and interlocutory applications. This translates to approximately 1800 matters per month. **See Seronica Nathram v Road Accident Fund unreported judgment under case number 46876/2020 by Davis J, judgment delivered on 24 April 2024** ***for the statistics.***

[2] Similar work loads are experienced in the Johannesburg High Court resulting in a directive dated 26 March 2023 by Sutherland DJP implementing a model to alleviate the problem of the excessively long lead time for hearing Road Accident Fund matters (RAF-matters). The model employed was to set down 200 default judgment cases to be heard by pro bono acting judges. This model is dependant on Legal Practitioners to volunteer to alleviate to pressure created by the multitude outstanding RAF matters.

[3] This model was dependant on the availability of legal practitioners but it cannot be sustained indefinitely by expecting legal practitioners to donate the

resources indefinitely. A drive in the Pretoria High Court during recesses is a similar attempt to address the over loaded trial role.

[4] The experience is that few of these RAF matters actually proceed to a trial where evidence is led by both parties. In most matters where the RAF attend court, matters seldom proceed because the RAF legal representatives are usually unprepared and see the day at court as the day to try and settle matters. Plaintiffs are normally eager to settle because many matters are long outstanding.

[5] The RAF has in many matters been titled to be a perpetual delinquent litigant and normally without proper compliance with the Rules of Court. The conduct of the RAF has been the subject matter of severe criticism by the courts in the past and on many occasions received judicial sanction, normally by adverse cost orders.

[6] The numerous adverse cost orders had little and often no impact on the conduct of the RAF, despite the severe financial distress of the RAF, the financial burden on the *fiscus* and ultimately the public in general. There seems to be a general disregard of Rules by the RAF and its employees. It is rather the exception than the rule that the RAF is timeously ready to proceed and/or that matters are properly investigated.

[7] The present matter is an example of the general new trend experienced by the courts. On the eve before the matter was to be heard on the default judgment role on 18 April 2024, the RAF filed a belated notice of intention to defend the action. The notice was "filed" by email after close of business on 17 April 2024 to the office of the plaintiff's attorney and when the matter was called on 18 April 2024, such notice was not uploaded onto the CaseLines (electronic file of the matter). Mr Vermeulen, counsel for the plaintiff, disclosed the existence of the notice to defend. The defendant uploaded the

notice of intention to defend on 24 April 2024. The plaintiff uploaded the notice of intention to defend on 19 April 2024.

[8] There were at least five (5) other matters on the court's day roll on 18 April 2024 displaying similar belatedness of filing of notices of intention to defend. In the present matter there was no appearance on behalf of the RAF and Mr Vermeulen requested default judgment. In view of his disclosure of the notice of intention to defend, the matter was postponed until 16 May 2024 for arguments by both parties on the issue of Rule 19 (5) of the Uniform Rules of Court and whether the belated notice of intention to defend could be held as an abuse of process.

[9] In order to have the complete picture of the process in this matter, the relevant chronology places the matter in perspective:

9.1 The accident occurred on 29 August 2021.

9.2 The claim was duly lodged with the RAF on 22 July 2022.

9.3 The respective 60 and 120 days in terms of the Act for the RAF to investigate the matter lapsed on 21 November 2022. The RAF raised no objection of kind in the matter.

9.4 Summons was issued and served on 8 December 2022 on the RAF and attorneys' office, some 1 year and 4 months later.

9.5 No notice of intention to defend was filed within the allowed *dies.*

9.6 The plaintiff requested the RAF on three occasions whether the RAF was content to oppose the matter, to file notice of intention to defend. Despite these three letters dd 3 February 2023, 8 February 2023 and 10 February 2023, no response was forthcoming from the RAF. Copies of the letters are on CaseLines p 001-28 to 001-30.

9.7 The plaintiff filed the application for default judgment on 20 February 2023. Despite any obligation on the plaintiff to notify the RAF of the application for default judgment, the plaintiff served the RAF with a Notice of Set-down by hand on 23 May 2023, by Email on 19 May 2023 and again by Email on 22 May 2023.

9.8 The matter was enrolled almost 11 months before 18 April 2024 when the application for default judgment was to be heard. During all this time nothing was forthcoming from the RAF and no appointments with the RAF's proposed experts were made to enable the RAF to investigate the matter and take ant decision on the matter.

9.9 On 17 April 2024, the RAF filed a belated notice of intention to oppose. The notice was not uploaded onto CaseLines and there was no appearance in court on 18 April 2024.

[10] The matter was postponed to 16 May 2024 to enable the RAF to file an explanation why the notice of intention to defend was so far out of time and to explain why the court should grant the RAF the indulgence to have the matter postponed. Knowing that there was a notice of intention to defend, although not yet uploaded onto CaseLines, I deemed it in the interest of justice to grant the RAF the opportunity to explain its non-compliance of not filing a notice of intention to defend.

[11] The postponement of the matter to 16 May 2024 caused two other practitioners in similar matters applying to intervene in this matter and become interested parties for reason of similar conduct by the RAF. This was refused and reasons were given to those parties. It is of no further interest here.

[12] The reason for the postponement was to inform the RAF of the matter and to give the RAF the opportunity to state its case regarding the late filing of the notice of intention to oppose. I was not prepared to grant any order against the RAF under the prevailing circumstances. I requested Mr Vermeulen that his attorney informs the RAF (its attorney) regarding this request for reasons.

[13] The plaintiff filed an affidavit forming part of his trial bundle for the default judgment (CaseLines 17 p 13-17) briefly explaining how the accident happened whilst the defendant filed no affidavit at all. The affidavit by the attorney as part of the application for default judgment reiterates what the plaintiff set out in his affidavit. These affidavits do not address the alleged abuse of process by the RAF because it was drafted months ago.

[14] There is no application in terms of Rule 30, as suggested by Davis J in **Seronica Nathram infra** to have the belated notice of intention to oppose set aside. One of the issues to investigate is whether it was justified to consider striking of the notice of intention to defend without any written application thereto when the application for default judgment is heard.

[15] The defendant filed no affidavit to explain its position but merely relies on submissions made on its behalf by counsel in the heads of arguments when arguing the matter. Written heads of arguments were filed on behalf of the plaintiff and the RAF to be argued on 16 May 2024. The gist of the dispute is

whether the belated filed notice of intention to oppose amounts to abuse of process and whether the court should strike the said notice.

[16] The question to decide is whether the court may, in the absence of any application to strike the belated notice, continue and in terms of its inherent jurisdiction, strike the belated notice of intention to oppose.

[17] Superior courts, differing from lower courts, have always had inherent jurisdiction to make orders in respect of matters before it, subject to certain limitations imposed by common law. It is safe to hold that superior courts may do what the law does not forbid. See **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa 5th** Ed Vol 1 p 49.

[18] **Section 173** of the **Constitution** enshrines this inherent jurisdiction which provides that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process. In **S v Lubisi: In re S v Lubisi 2004 (3) SA 520 (T) at 531** Bertelsmann J held that section 173 allows a court to grant orders which extended the powers of the courts.

[19] Applicable to this matter, the question is whether the court may strike the belated notice of intention to defend in the absence of a formal application to that regard. In **Seronica Nathram infra,** Davis J held that held that any determination by a court to declare such a belated delivery of a notice of intention to defend an abuse of process should be case specific and only after the RAF has been given the opportunity to respond to a call of abuse of process by the opponent. In this matter, having invited the RAF to set out its position, nothing but a set of heads of arguments was forthcoming from the RAF. The contents of the heads do not amount to evidence to address the situation the RAF finds itself in.

[20] The conduct of the RAF to file belated notices of intention to defend at the very late stage, mostly not more than a day before the set down matter, has attracted the attention of several judgments in this division in the recent past. Three judgments were delivered in the Johannesburg and one in the Pretoria Court. Although not yet reported to date hereof and my knowledge, these judgments addressed the same problem of belated notices to defend matters. This conduct at best can be seen as an attempt to buy time by the RAF and to slow down process. The RAF's conduct does not seem to be deterred by adverse costs orders against it.

[21] The matters referred to above are the following:

* ***Delport, Stephanus Phillipus v Road Accident Fund***, *Johannesburg case number 10978/2020 by Kilian AJ on 8 December 2023;*

* ***Nyawo, Mandlankosi Philane v Road Accident Fund***, *Johannesbug case number 11267/2022 by Block AJ on 11 April 2024;*

* ***Seronica Nathram v Road Accident Fund***, *Pretoria case number 46876/3030 by Davis J on 26 April 2024; and*

* ***Madiphoso Dinah Mabaso v Road Accident Fund***, *Johannesburg case number 35849/2021 bY Kriel AJ on 4 July 2024. (Referred to as Mabaso).*

[22] In some of these matters the point was argued whether the provisions of Rule 19(5) of the Uniform Rules of Court applies supreme to the exclusion of inter alia the provisions of Rule 27. Rule 27 is about extension of time, removal of bar and condonation.

[23] Rule 19(5) clearly provides for a late filing of a notice of intention to defend, even where, a defendant failed to deliver its notice of intention to defend within the prescribed times frames provided for in Rule 19(1). The reasonable inference from Rule 19(5) is that the drafters had no intention to

shut the door on a respondent/defendant from filing such notice, even out of time.

[24] Rule 27 is about extention of time, removal of bar and condonation. Sub-rule (1) is as follows:

"In the absence of agreement between the parties the Court may upon application on notice, and on good cause shown make an order extending or abridging any time prescribed by these rules, or by an order of Court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as do it seems meet".

[25] Although not prescribed in Rule 19(5), it was held in **Mabaso supra** p 7, that there is an obligation to give an explanation for the belated delivery of the notice of intention to defend. To find opposite would encourage defendants to follow Rule 19(5) without any explanation for belatedness to the detriment of plaintiff litigants. It was held in **Mabaso supra** that rule 19(5) does not operate to the exclusion of rule 27.

[26] It is trite that the Court has the inherent jurisdiction to regulate and protect its own proceedings. See [1[& [18] supra. Section 173 of the Constitution of South Africa, 1996 is authority to this. Although the court in **Buthelezi Emergency Medical Services (Pty) Ltd and Another v Zeda Car Leasing (Pty) Ptd t/a Avis Fleet Services and Another (78303/19) [2020] ZAGPPHC 623 922 October 2020) at** [par 62] held that *"This Court is of the opinion that it is not a legal requirement in terms of rule 19(5) that a defendant explain their late filing of such notice or to seek condonation for same"* , the court in **Mabaso supra** held that the dicta in **Buthelezi supra** was wrong.

[27] I am in agreement with the **Mabaso Case** on this issue. To hold opposite will encourage defendants to deliver belated notices of intention to defend as

rule, resulting in an almost untenable situation that the majority of litigation will be stumbling on belated notices of intentions to defend forcing unnecessary postponements at the eleventh hour, a trend already noticeable in the Pretoria and Johannesburg High Courts. The already over clogged court roles will ultimately be the long term victims of such practice.

[28] I am further of the view that each case should be judged on its own facts and that it is not possible to formulate a general rule to follow where belated Notices of Intentions to Defend are delivered.

[29] An ***abuse of process*** occurs where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that object. Put differently, when an attempt is made to use for ulterior purpose, in this instance Rule 19(5), the machinery designed for the better administration of justice. The onus of proof of an abuse of process rests on the party alleging such abuse and it is not an easy one to discharge. **South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) 2007 (6) SA 628 (D) at 634 A** and **Erasmus, Superior Court Practice 2nd Ed D1-509.**

[30] Counsel on behalf of the RAF dealt with the issue of ***abuse of*** process and as starting point submitted that a proper reading of Rule 19(5) excludes any abuse of process. A defendant's electing to make muse of this sub-rule should not be construed as an abuse of process, but rather a necessary step in the administration of justice. Counsel relied on **Lawyers for Human Rights v Minister in the Presidency and Others 2017 (1) SA 645 CC on par 20** *[In Beinash, Mahommed CJ stated that "there could not be an all-encompassing definition of 'abuse of process' but that it could be said in general terms 'that an abuse of process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the trust are used for a purpose extraneous to that objective".*

[31] In **Hudson v Hudson and Another 1927 AD 259 at 268** it was held that the Court has a duty to prevent any abuse and every Court has the inherent power to prevent an abuse but such power has to be exercised with great caution.

[32] The abuse complained about is the belated delivery of a Notice of Intention on the eve before the application for default judgment was set down for adjudication. A brief synopses of the litigation is set out in [9] above. Is it clear from the synopses that the RAF at all material times failed/neglected to participate in the litigation process, even after at least three requests were sent to it on behalf of the plaintiff, to become involved in the matter.

[33] In view of the above, I am satisfied that the plaintiff did more than expected to engage with the RAF to have the RAF involved in the matter. The RAF, like in many other matters, declined/failed/neglected to fulfil its statutory duty and displayed no intention in having the matter finalised until the proverbial wolf was at the door. The "grounds" for consideration averred in the heads of arguments on behalf of the RAF does not amount to evidence and carries little if any weight.

[34] In light of the above I find that the RAF's belated delivery of the notice of intention to defend constitutes a gross abuse of process of this court and it is therefore set aside.

[35] The plaintiff may proceed to enrol the matter for default judgment to have the issue of quantum of damages adjudicated.

[36] In the premises, the following order is made:

ORDER:

1. The defendant's notice of intention to defend as delivered in terms of Rule 19(1) on 18 April 2024 is set aside.

2. The plaintiff may proceed to enrol the matter on the Default Judgment Roll for adjudication of the quantum portion of the claim.

3. The defendant is ordered to pay the plaintiff's taxed or agreed costs for 16 May 2024, and costs to include the wasted costs incurred on 18 April 2024. The costs to include cost of counsel on scale C.

HOLLAND-MUTER J

Judge of the Pretoria High Court

12 August 2024

Matters heard on: 18 April, 26 April and 16 May 2024.

(The application to intervene heard and refused on 26 April)

Judgment handed down: 12 August 2024

APPEARANCES:

On behalf of Plaintiff: Adv P J Vermeulen SC

On behalf of intervening party: Adv De Wet Keet

On behalf of Defendant on 16 May 2024: Adv J Magodi