THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 855 / 2021

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

[redacted]

17 FEBRUARY 2022
DATE SIGNATURE

In the matter between:

CLEREY SIBUYI **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 17 FEBRUARY 2022.

JUDGMENT

RATSHIBVUMO J

[1] This was supposed to have been a claim for general damages and loss of earning capacity to the tune of R8 million by the Plaintiff, until it came to light during the trial that the Plaintiff does not have *locus standi in iudicio* to litigate in his own capacity. The claim arises from a motor vehicle accident that took place on 06 September 2020. By the time the court was alerted of the Plaintiff's condition, evidence of the Actuary had been led by the Plaintiff's legal representative. I am as such reluctant to attribute anything that transpired in this case to the Plaintiff as the legal representative seems to have been the driver cum passenger of his own train. Nothing in the practice note filed on behalf of the Plaintiff suggested that he lacked the mental capacity to litigate. To the contrary, the practice note indicated that "the legal standing of the Plaintiff and the jurisdiction in this matter remains undisputed in that the Plaintiff does have the legal standing and the cause of action occurred wholly within the court's area of jurisdiction (sic)."[1] It further reflected that the trial set down for 24 January 2022 was proceeding on quantum only as the merits were conceded by the Road Accident Fund (the Defendant).

[2] There was no appearance for the Defendant and the trial proceeded by way of default. The court was satisfied that the notice of set down was properly served on the Defendant. The trial commenced with the Plaintiff's legal representative making opening address. He immediately drew the court's attention to seven brief statements by the Plaintiff's expert witnesses in which they make reference to their reports filed in the pleadings, suggesting that those reports should be seen as having been made under oath. The Plaintiff's legal representative then requested that the said affidavits be marked as exhibits. At

[1] See paragraph 5 of the Practice Note under "Issues in dispute."

this stage it became apparent that the Plaintiff's legal representative must have had in mind Rule 38(2) of the Uniform Rules which provides,

> "The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit." [My emphasis].

[3] Assuming that the Plaintiff's legal representative may have been making a request in terms of this rule, the court immediately informed him that it was expected of him to lead oral evidence of at least two witnesses, being the Plaintiff and the Actuary. The request to lead evidence by means of affidavits could be allowed in respect of the rest of the expert witnesses. Counsel duly led the evidence of the Actuary informing the court that he would address the court in respect of the Plaintiff. The Plaintiff was not even one of the witnesses listed as persons that would give evidence in the Practice Note.

[4] Once the Actuary's evidence was received, the Plaintiff's legal representative informed the court that the Plaintiff was not in a mental state that he could give evidence. He went on to refer the court to psychiatrist report where the following was endorsed,

> "E. CURATOR AD LITEM:
>
> [The Plaintiff] is incapable of following court proceedings due to the cognitive impairment. The court will therefore need to make provision for the appointment of a curator *ad litem* to represent him during the trial."[2]

[2] See p. 199 of the bundle, para E.

[5] When asked as to why he did not act on the recommendation by the psychiatrist, the Plaintiff's legal representative informed the court that an application was pending for the appointment of a curator ad litem on behalf of the Plaintiff. When asked if the Plaintiff had the necessary *locus standi* to litigate without the curator *ad litem*, the Plaintiff's legal representative conceded that he could not. When asked as to what should now happen to the proceedings underway, he then came up with several suggestions including that the trial should be postponed *sine die* and removing it from the roll.

[6] The court afforded the Plaintiff's legal representative an opportunity to prepare the heads of argument which were promptly made available. I am grateful to his involvement in attempting to fix what can be justifiably referred to as the creation of his own hands. I cannot think of how he thought this was permissible, except that he may have hoped that the claim would sneak in undetected, given the voluminous documents filed, not just in this case, but also in the other matters that a judge is allocated to deal with in a trial week in this Division. If this be the case, I find it to be very unfortunate.

[7] In his heads of argument, the Plaintiff's legal representative addressed the question I had raised on why an order granting absolution from the instance should not be made. He submitted that such an order would be to the Plaintiff's detriment because in the recent case of *Liberty Group Ltd v K & D Marketing & Others*[3], the Supreme Court of Appeal (the SCA) held that it is not permissible to reopen a case under the same case number and on the same pleadings, after an order of absolution from the instance had been granted. He also argued that this judgment confirms that orders of absolution from instance in trial proceedings were not appealable. He reasoned therefore that the trial could not start *de novo* and this would be the end of the matter.

[3] 1290/18) [2020] ZASCA 41

[8] The conclusions reached by the Plaintiff's legal representative are not supported by the case he seeks reliance on. The alternate proposal he suggested, to the effect that the trial should be postponed pending the application for and the appointment of a curator *ad litem* puts the Plaintiff in a more adverse situation than what he consider to be the detrimental consequences of an absolution order. I mention this mindful of the fact that the Plaintiff's claim will only prescribe in 19 months from today. *Liberty Group* judgment did not concern the question on whether a judgment in which absolution from the instances is granted was appealable or whether reopening of a case was permissible under the same case number. Issues *in casu* are also distinguishable in that the order of absolution from instance was granted at the end of the trial as opposed to when it is granted at the end of the Plaintiff's case and the Plaintiff chose not to appeal against that order. The Plaintiff's claim would have prescribed had they opted to issue new summons against the Defendant. For that reasons, the Plaintiff chose to reopen its case under the same pleadings and case number. The trial court held that it was impermissible. The Plaintiff appealed to the SCA which dismissed the appeal.

[9] Upon further reading of the *Liberty Group* judgment, it is apparent that it is an authority to disprove the argument advanced by the Plaintiff's legal representative especially when Ledwaba AJA said the following:[4]

> "Counsel on behalf of Liberty relied on the decision of this court in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563 as authority for its submission that it was entitled to reopen its case on the same papers. In *African Farms*, Steyn CJ said the following (at 563E-F):
>
> 'As pointed out in *Purchase v Purchase* 1960 (3) SA 383 (N) at 385, dismissal and refusal of an application have the same effect, namely a decision in favour

[4] *Liberty Group Ltd v K & D Marketing & Others (supra)* at para 13.

> of the respondent. The equivalent of absolution from the instance would be that no order is made, or that leave is granted to apply again on the same pers.' That dictum relates to motion proceedings. In motion proceedings, usually in unopposed matters, an applicant might be given leave to approach a court on the same papers, supplemented if so advised. That is not an order susceptible to appeal. It is no authority for the proposition that it is permissible, after an order of absolution from the instance, to reopen a trial under the same case number on existing pleadings. The only equivalence is that in either instance a defence of *res judicata* could not be raised. This would be so when an action is instituted *de novo* or when the application, in terms of leave having been given, is brought on the same papers, supplemented, if so advised. That is what the dictum in African Farms was conveying." [My emphasis].

[10] In *MV Wisdom C Enterprises Corporation v STX Pan Ocean Co Ltd*[5] Farlam JA said,

> It was common cause before us that Cleaver J, following *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D), was correct in applying the *lex fori*. It is clear that in our law a defendant who has been absolved from the instance cannot raise the *exceptio rei judicatae* if sued again on the same cause of action: see *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuyzen* (1888) 6 SC 259; *Corbridge v Welch* (1891 - 2) 9 SC 277 at 279; *Van Rensburg v Reid* 1958 (2) SA 249 (E) at 252B - C; Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed 1997 544 and 684. It was held in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563G - H that the dismissal of an application (which ordinarily would be regarded as the equivalent to granting absolution from the instance: *Municipality of Christiana v Victor* 1908 TS 1117; *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A)) can give rise to the successful raising of the *exceptio rei judicatae* where, regard being had to the judgment of the court which dismissed the application, the import of the order [was] clearly that on the issues raised the Court found against the appellant [which had been the

[5] 2008 (3) SA 585 (SCA) at para 9.

> applicant in the previous proceedings], and in favour of the respondent. It is thus clear that it is not the form of the order granted but the substantive question (did it decide on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits.

[11] As indicated above, I am of the view that a decision to postpone this trial which is partly heard, puts the Plaintiff in a worse situation in that an action that was started by a person who could not give any mandate to litigate, remains pending. Once the foundation is wrong, the whole litigation based on it becomes contaminated and fatal to a claim, no matter how well-reasoned it could be. I am also mindful of the fact that the case (purported to be that) of the Plaintiff was not closed yet. There is however no further movement that can be legitimately expected of the legal representative as he literally has no mandate to close the case, as much as he never had a valid mandate to lead evidence in the first place. It is fair to deem the case for the Plaintiff to be closed for purpose of the order I intend to make in granting absolution from the instance.

[12] The following order is therefore made:

[12.1] Absolution from the instance is granted to the Defendant.

[12.2] No cost order is made as the action is undefended.

[redacted]

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF	**: ADV. MOKOENA**
INSTRUCTED BY	**: NM MABUNDA ATTORNEYS NELSPRUIT**
FOR THE DEFENDANT	**: NO APPEARANCE**
DATE HEARD	**: 25 JANUARY 2022**
JUDGMENT DELIVERED	**: 17 FEBRUARY 2022**