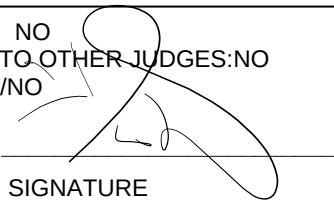


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **A5039/2022**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
23 May 2023	
DATE	SIGNATURE

In the matter between:

MDUDUZI PHILLIP SIMELANE

Appellant

(Plaintiff a quo)

And

ROAD ACCIDENT FUND

Respondent

(Defendant a quo)

ORDER

[1] The whole of the judgment and order of the court below is set aside.

[2] The RAF is to pay the costs of the appeal.

NEUTRAL CITATION: *Advocate Zinhle Buthelezi N.O. obo Mduduzi Phillip Simelane v Road Accident Fund* Case No.: A5039/2022 [2023] ZAGP JHC 494 (23 May 2023).

JUDGMENT

Fisher J (Windell and Crutchfield JJ concurring)

Introduction

- [1] This is an appeal against the whole of the judgment handed down in an action for damages between the appellant and the Road Accident Fund (RAF) under circumstances where there was no appearance for the RAF when the matter was called.
- [2] The claim is based on the allegation that the appellant was a pedestrian in a “hit and run” accident as a consequence of which he suffered severe injuries including traumatic brain injury and serious orthopaedic injuries.
- [3] The direct evidence filed of record in the form of the hospital records from the date of admission of the appellant to the date of his discharge reflect life changing traumatic brain injury and orthopaedic injuries. The appellant’s expert reports confirm these significant injuries as well as sequelae which translate into profound loss of amenities of life.
- [4] The trial hearing proceeded without formal opposition.
- [5] There had been a joinder of issues at the pleading and pre-trial phases under the representation of the RAF’s attorneys. However, the mandate of the RAF’s attorneys was terminated before the trial date. This occurred as a result of a decision taken by the Board of the RAF to terminate the mandate of its panel attorneys in all but selected cases.

[6] The further participation of the RAF in the proceedings was then apparently dealt with by employees of the RAF, if it was dealt with at all.

[7] It appears from what the court was told by counsel for the appellant at the trial that there were engagements in relation to settlement of issues in the action between an employee of the RAF and counsel for the appellant. These engagements took place immediately before and continued during the course of the hearing.

[8] The status and import of these engagements with the RAF relating to settlement of issues for the purposes of the trial is at the heart of this appeal. I turn to deal with the issues.

The issues before the court a quo

[9] In terms of the pleadings the RAF put all aspects of the claim in issue.

[10] A pre-trial conference was held between the parties prior to the termination of the RAF's attorney's mandate. It was indicated on behalf of both parties that they were ready to proceed to a trial which they both estimated would last for two days.

[11] No factual admissions were made at the pre-trial conference. The jurisdiction of the court thus remained circumscribed by the pleadings as they stood.

[12] I move to deal with how the trial unfolded at the hearing a quo.

The hearing

[13] The hearing proceeded on a virtual platform.

[14] When the matter was called the appellant's counsel appeared as did the curator ad litem who had previously been appointed to the appellant. There was no appearance for the RAF.

[15] Counsel for the appellant informed the court that she had been instructed that morning that the RAF intended to send a practitioner from the State Attorney to appear on its behalf.

- [16] The court expressed that it would be preferable if the RAF was represented and allowed the matter to stand down in the hope that someone on behalf of the RAF would make an appearance. The learned judge went as far as to direct that an attempt be made by the appellant's attorney to contact the State Attorney to ask that a representative come to court.
- [17] On resumption of the hearing, counsel informed the court that "it looked like the State Attorney did not want to come to court" but that settlement negotiations were underway. The matter was allowed to stand down again for settlement to be explored further.
- [18] Counsel for the appellant later informed the court that the settlement negotiations had progressed to a stage where the RAF's liability and the apportionment thereof (80/20 in favour of the appellant) had been agreed as had the special damages portion of the quantum relating to loss of earnings and earning capacity and entitlement to general damages. She reported that all that was still to be agreed was the quantum in respect of general damages.
- [19] Counsel then went further and disclosed to the court the basic terms on which she believed the issues had been settled.
- [20] Counsel then proceeded on the erroneous assumption that the court should be bound by the settlement terms as disclosed in respect of all issues other than the quantum in respect of general damages. The record is instructive as to how the error occurred. I quote verbatim therefrom.

"MS GUBENI: What has developed M'Lord is that they have increased the offer on general damages, however, it is still unacceptable. The issues have been narrowed down significantly; we have accepted the offer on ... (Indistinct)

COURT: I cannot hear you.

MS GUBENI: Just general damages.

COURT: I did not hear you repeat that?

COURT: Why can you not agree on general damages?

MS GUBENI: It is the extent of the injuries that have been sustained M'Lord, I am of the view that the defendant is trying to settle for as little as possible without considering the injuries.

MS GUBENI: M'Lord, I am saying that the Fund has given us an offer on loss of earnings which we have accepted as well as on, they have considered liability M'Lord, however, we are not reaching consensus when it comes to the issue of general damages, and we wish to proceed on that basis M'Lord.

After setting out the figures agreed to as far as special damages were concerned counsel continued as follows in relation to general damages:

“MS GUBENI: We are looking at 1.6 million M'Lord. Forgive me M'Lord, it is 1.8 million M'Lord.

COURT: You are asking for 1.8 million?

MS GUBENI: Yes M'Lord we can justify the figure that we are asking for based on the injuries that the plaintiff has sustained M'Lord, given an opportunity M'Lord.

COURT: Well you are given that opportunity.

MS GUBENI: Thank you M'Lord. Should I proceed M'Lord?

COURT: Yes, you may proceed.”

The appellant's counsel responded to this invitation by delivering argument in respect of the quantum for general damages only. No evidence was led, and no other issue was canvassed.

- [21] After hearing this argument, the court adjourned and reserved judgment.
- [22] The information placed before the court as to this alleged settlement of issues was not corroborated by any documentation and nor was it ever confirmed to the court by any representative on behalf of the RAF.
- [23] There was furthermore no indication that the person to whom counsel or her attorney had spoken was authorised to conclude the settlement. The person was not even named.

[24] It is difficult to fathom the purpose for which the court was provided with the information relating to the settlement of the issues. It appears that what counsel believed herself to be doing was placing information before the court in order to curtail the issues.

[25] However, what emerges is that the court and counsel were operating at cross-purposes in relation to the status of the alleged settlement.

[26] The judgment reflects this confusion. I now deal with the judgment.

The judgment a quo

[27] The judgment is brief. It records that the court took cognizance of the documents filed of record and that it determined with reference thereto a globular amount as to loss of earnings of R 400 000 and general damages of R 700 000. The total quantum for damages awarded was thus R 1 100 000. The court further awarded costs and ordered that the RAF make an undertaking in terms of section 17 of the RAF Act for the costs of future medical expenses.

[28] As I have said, the gravamen of the complaint in this appeal is that the court should have taken the settlement into account and that it erred in failing to do so.

[29] I thus move to examine the question of what the court was bound to do in relation to the alleged settlement.

[30] The relief sought in the appeal proceeds from the proposition that the court was bound to apply the settlements disclosed to it by counsel.

[31] The court was, however, not called on to make these purported settlement's orders of court. Had this been the case, the terms of the settlement would have to have been formally recorded and confirmed on record on behalf of both parties.

[32] To the extent that a consent order was sought this would have to have been in writing. Indeed, it is prudent that any admission placed on record during a trial be reduced to writing and confirmed on record by persons whose authority is

likewise confirmed. This is more especially the case where one of the parties is unrepresented, as was the case here.

[33] There was no formal record of any settlement or admissions. The court asked for a draft order but no order reflecting confirmation by consent was ever forthcoming.

[34] The learned Judge was thus, with respect, entirely correct in not taking the unsubstantiated information placed before him at the hearing into account.

[35] However, as emerges from the portion of the record quoted above, the purported settlements were nonetheless allowed to loom large in the conduct of the trial. This ultimately led to a procedural misdirection.

[36] I deal now with this misdirection.

The misdirection

[37] Rule 39(1) deals with a court's obligations when there is no appearance on behalf of the defendant. It reads as follows in relevant part:

"If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden."

[38] Instead of directing that the trial proceed in accordance with this rule of court and on the basis that the disputes were as described by the pleadings, the learned Judge allowed the appellant's counsel to proceed with argument on a limited basis. This limited argument furthermore took place in the absence of admissible evidence.

The appeal

[39] The appeal is premised on the contention that the court should have taken the terms of the settlement as placed before it into account. The relief thus sought on appeal is that this court make an order in accordance with the purported settlement and that the amount determined for general damages be increased.

[40] This would not be a competent order for the court to make in light of the fact that the settlement was not proved. Furthermore, no admissible evidence is on record to enable a determination of damages by this court of any issue.

[41] The misdirection which occurred is such that it vitiates the proceedings as a whole. The only competent order for this court to make is thus that the appeal is upheld on the basis the entire judgment and order of the court a quo is set aside.

[42] On this basis the appellant has, to my mind, secured substantial success. The RAF should thus bear the costs of the appeal.

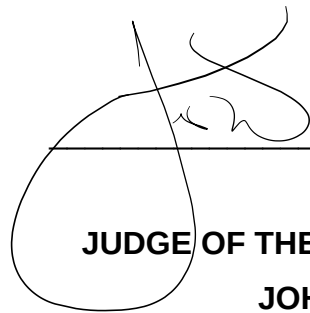
Conclusion

[43] The action was unopposed at the hearing. The appellant is, in the absence of any further engagement between the parties, entitled to set the case down in the default judgment court.

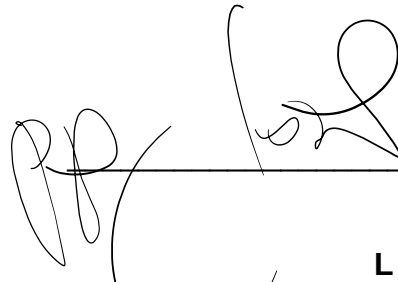
Order

[44] I propose the following order:

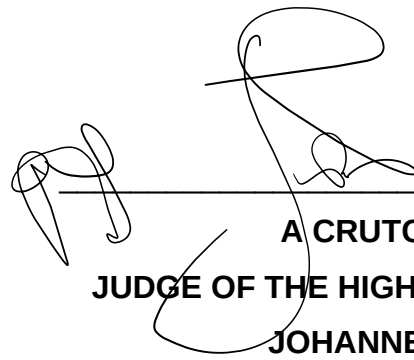
1. The whole of the judgment and order of the court below is set aside.
2. The RAF is to pay the costs of the appeal.



D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG


I agree.

L WINDELL
JUDGE OF THE HIGH COURT
JOHANNESBURG


I agree.

A CRUTCHFIELD
JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard:

1 March 2023

Delivered:

23 May 2023

APPEARANCES:

For the Appellant:

Adv M Ngobeni-Moyana

Instructed by:

Maja Muzarakuza Inc.

For the Respondent:

The State Attorney

Instructed by:

Adv M Khan