

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

NOT REPORTABLE

Case No.: 3719/2021

In the matter between:

SANDRA MOYO (formerly KAMBONJE)

Applicant

And

ROAD ACCIDENT FUND

First Respondent

LANCE JOHNSTONE

Second Respondent

JUDGMENT

EKSTEEN J:

[1] This matter has been contrived in an endeavour to set up an application for contempt of court against the second respondent, Mr Johnstone. The applicant, Ms Moyo, had successfully sued the first respondent (the RAF) and had obtained a monetary judgment and an order that the RAF provide an undertaking, in terms of s 17(4)(a) of the Road Accident Fund Act¹ (the Act), to pay for all future medical and related expenses as and when they arise. The RAF has failed to give effect to the judgment and Ms Moyo now seeks what is essentially an interdict against Mr Johnstone, in his personal capacity. No relief is sought against the RAF, against whom

¹ Act 56 of 1996.

the judgment was given, save for an order for costs. The notice of motion asks for an order against Mr Johnstone:

- “1. Ordering the Second Respondent to forthwith authorise and direct immediate payment by the First Respondent to the Applicant in the sum of **R1 112 252.00**, payment to be made to the Applicant’s attorneys of record.
2. Ordering the Second Respondent to forthwith authorise and direct payment by the First Respondent to the Applicant of mora interest on the said sum of R1 112 252.00, calculated at the prescribed legal rate of interest from 10 November 2022 to the date on which payment of the capital sum of R1 112 252.00 is effected, payment to be made to the Applicant’s attorneys of record.
3. Ordering the Second Respondent to forthwith ensure that the Applicant is provided with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act.
4. Ordering the Second Respondent to notify the Applicant’s attorney of record within **three** days that payment of the aforesaid amounts has been authorised and directed, and that the undertaking has been issued and sent to the Applicant.
5. Granting the Applicant leave to set this matter down for further hearing, on **five** days’ notice to the Second Respondent, notice to be given by e-mail, on the same papers, duly amplified where necessary, for contempt of court proceedings against the Second Respondent, in the event of the Second Respondent failing to comply with his obligations as set out in the preceding paragraphs of this order.”

Background

[2] Ms Moyo, a Zimbabwean citizen, was seriously injured in a collision in Gqeberha during October 2019 (the accident). She instituted action against the RAF in which she sought to recover damages that she had suffered as a result of the accident. Initially the RAF entered an appearance to defend and filed a plea. The plea denied knowledge of the applicant's allegations that she had been involved in the accident and put her to the proof of her allegation. However, at the doors of court, the RAF capitulated, acknowledged their liability to Ms Moyo, and settled the claim. The settlement was made an order of court, by agreement, on 25 October 2022. The RAF was ordered to pay the capital amount of R1 112 252.00, together with interest, as reflected in the notice of motion, and to provide an undertaking in terms of s 17(4)(a) of the Act.

[3] As I have said, the RAF did not give effect to the judgment within the stipulated timeframe set out therein. Accordingly, Ms Moyo's attorney, Mr Walter, requested payment from Mr Johnstone, the manager of the RAF's East London branch. Still payment was not forthcoming. Rather, Mr Johnstone, on behalf of the RAF, demanded that various other documents be provided before payment would be made, including a "proof of life affidavit" and copies of Ms Moyo's passport reflecting her entry into and departure from the Republic of South Africa. These were duly provided and, on 13 June 2023, Mr Johnstone advised that the request for payment had been rejected as it was said that the date stamps in the passport did not correlate with the date of the accident. Various correspondence followed between Mr Walter, the State Attorney (representing the RAF) and the RAF in an endeavour to resolve the impasse but, to no avail.

[4] On 26 June 2023, Mr Walter addressed a letter of demand to Mr Johnstone and advised of Ms Moyo's intention to bring an application for contempt of court. He recorded:

‘Please note that this Application, in the absence of you providing us with the name of the Officer at the Road Accident Fund who is refusing to authorise the payment, will have to be brought against you in your personal name.’

Mr Johnstone did not respond.

[5] Ms Moyo made no attempt to execute on the judgment in her favour but, rather, chose to launch this application against the RAF and Mr Johnstone, in his personal capacity. In doing so she contended that the RAF’s East London branch has an undertakings department. She then proceeded to record:

‘I respectfully submit that it is for the claims handler to ensure that the undertaking is furnished in accordance with the court order, and that it is the duty of the Second Respondent to ensure that it is done.’

No factual basis was alleged for either of these submissions.

[6] In opposing the application, Mr Johnstone, on behalf of the RAF, raised an argument *in limine*. Mr Johnstone explained that in terms of s 17(1) of the Act Ms Moyo could only claim compensation if she was able to prove that she had suffered bodily injury caused by or arising from the driving of a motor vehicle at any place in South Africa. Hence, he explained that after the order of court, the RAF had, through its East London office, set in motion a process to comply with the order. The request for documentation, so the argument unfolded, was aimed at satisfying the requirements for payment. He proceeded to say:

‘The RAF contends that the applicant failed or refused to support the payment process when (she) failed to establish (her) presence within the Republic at the time of the cause of action.’

[7] He challenged Ms Moyo to provide positive proof that she was indeed in the Republic of South Africa at the time of the alleged motor vehicle collision. Thus, the RAF contended that it could not make payment in terms of the judgment without ensuring that the statutory requirements for liability, as described in s 17(1) of the Act had been met.

Conduct of the RAF

[8] The stance adopted by the RAF is spurious and misguided for the reasons which follow. When a victim of a motor vehicle accident seeks to claim damages from the RAF they are obliged to first submit their claim to the RAF in terms of s 24 of the Act. The claim must be completed in the prescribed form giving a clear reply to each question and providing all the information, including precise details in respect of each item under the heading 'Compensation claimed', where applicable, supported by verifying vouchers.² They are thereafter required to submit to the RAF an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out.³ In terms of s 24(6) of the Act no claim is enforceable by legal proceedings commenced by summons before:

- (a) the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the RAF; and
- (b) the affidavit referred to in s 19(f) has been delivered.

[9] The purpose of these provisions was explained in *Constantia Insurance Co. Ltd v Nohamba*⁴ where at 39G-H, Galgut AJA explained them thus:

‘As we have seen from the *Commercial Union* case ... and the *Gcanga* case ... the purpose of the form is to enable the insurance company to "enquire into a claim" and to investigate it. It is designed to "invite, guide and facilitate such investigation". It follows, in my view, that, if

² Section 16(4)(d).

³ Section 19(f).

⁴ 1986 (3) SA 27 (A).

an insurance company is given sufficient information to enable it to make the necessary inquiries in order to decide whether "to resist the claim or to settle or to compromise it before any costs of litigation are incurred", it should not thereafter be allowed to rely on its failure to make the inquiries.'

[10] The requirement relating to the submission of the claim form is peremptory and the prescribed requirements concerning the completeness of the form are directory, meaning that substantial compliance with such requirement suffices.⁵

[11] In *Multilateral Motor Vehicles Accident Fund v Radebe*⁶, to put the matter into perspective, Nestadt JA said:

'[T]he benefit which the claim form is designed to give the fund must be borne in mind and given effect to. The information contained in the claim form allows for an assessment of its liability, including the possible early investigation of the case. In addition, it also promotes the saving of the costs of litigation ... These various advantages are important and should not be whittled away. The resources, both in respect of money and manpower, of agents and particularly of the fund are obviously not unlimited. They are not to be expected to investigate claims which are inadequately advanced. There is no warrant for casting on them the additional burden of doing what the regulations require should be done by the claimant.'⁷

[12] What emerges from all of this is that the moratorium of 120 days, provided for in s 24(6), is to enable the RAF to carry out an investigation into the circumstances of the accident and, where appropriate, to settle the claim, before any costs have been incurred. The RAF is entitled to rely on the information contained in the claim form and it is not required to carry out a further investigation relating to other possibilities, where

⁵ See *Rondalia Versekeringskorporasie van Suid-Afrika Bpk v Lemmer* 1966 (2) SA 245 (A); *Nkisimane and Others v Santam Insurance Co. Ltd* 1978 (2) SA 430 (A), particularly at 435F-436E; *AA Mutual Insurance Association Limited v Gcanga* 1980 (1) SA 858 (A) at 865B-F; *Evins v Shield Insurance Co. Ltd* 1980 (2) SA 814 (A) at 831B-F; *Guardian National Insurance Co. Ltd v Van der Westhuizen* 1990 (2) SA 204 (C) at 210B-211F.

⁶ 1996 (2) SA 145 (A).

⁷ At 152E-I.

the claimant has provided inadequate or incorrect information.⁸ However, it is imperative to carry out such an investigation diligently at an early stage, for the purpose of the saving of costs, because the RAF administers public funds. The investigation which the RAF now purports to have embarked on, after judgment, ought to have been carried out even before summons had been issued. Significantly, when summons was issued in this case the RAF entered a plea in which it said, remarkably, that it had no knowledge of whether the provisions of s 24 had been complied with at all. This, in itself, suggests that it had not considered the claim, which would constitute a candid admission of a dereliction of duty.

[13] Of course, if the RAF is not satisfied as to its liability, or any part thereof, after having carried out its investigation, it is entitled to require of a plaintiff to issue summons and to prove its case, as occurred in this matter. In her particulars of claim Ms Moyo alleged that on 10 October 2019 she was in Gqeberha and was involved in the accident when she, as a pedestrian, was struck by a motor vehicle. She identified the vehicle by its registration number and provided the identity of the driver of the vehicle. The RAF denied any knowledge of the collision and put her to the proof thereof. Her presence in Gqeberha and her involvement in the collision was, accordingly, a dispute pertinently raised in the litigation and Ms Moyo was required to prove these facts. However, she was deprived of the opportunity to do so by the RAF's capitulation and, by necessary implication, their admission that she had been involved in the collision. The claim was settled on that basis and the dispute resolved which resulted in a final order by consent.

[14] The order of court is final and it is binding on all the parties thereto, even if it may be wrong, until and unless it is set aside by a court of competent jurisdiction.⁹ It is not open to the RAF, after judgment, to require of a judgment creditor to prove, again, to the satisfaction of the RAF, the very same issues that were resolved in the litigation. Of course, Mr Johnstone is correct that the RAF cannot accept liability to a plaintiff without

⁸ There is no suggestion in this instance that Ms Moyo had provided inadequate or incorrect information.

⁹ *Bezuidenhout v Patensie Sitrus Beherend Beperk* 2001 (2) SA 224 (E) at 229B-D; *Kotze v Kotze* 1953 (2) SA 184 (C) at 187F; *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC), para 87.

ensuring that the statutory requirements for liability, as described in s 17(1) of the Act, had been met. As I have said, her presence in Gqeberha and her involvement in the accident were the central issues in the litigation and the RAF was indeed obliged to satisfy itself as to the correctness of these allegation before admitting them. In the litigation the RAF had the means to obtain full discovery of all relevant documents in order to satisfy themselves of Ms Moyo's involvement in the accident, or, if not satisfied, to challenge her claim. That was the purpose of the litigation. If they had made the admission in reckless disregard for the statutory provisions which bind them, it seems to me to constitute a further breach of their duty. But, whatever the position, the admission has been made, judgment has been delivered, and the RAF is bound by the judgment until, and unless, it is set aside by a court of competent jurisdiction and no such application has been made.

The relief sought

[15] However, Ms Moyo, too, has misconstrued her remedy. The judgment is one sounding in money, together with an order, at the election of the RAF, to provide Ms Moyo with an undertaking in terms of s 17(4)(a). Ms Moyo is entitled to proceed and execute on the money judgment. She has made no attempt to do so.

[16] As outlined above, there is no judgment against Mr Johnstone and I know of no authority, nor was I referred to any, to suggest that he attracts a personal obligation flowing from his failure to advise Ms Moyo as to the identity of the responsible official. Save to allege that Mr Johnstone is the manager of the RAF's East London branch no basis has been laid for the suggestion that Mr Johnstone has the power to direct payment from the RAF's bank account. The Board, established in terms of s 10 of the Act, is the accounting authority of the RAF entrusted with the power to exercise overall authority and control over the financial position, operation and management of the RAF.¹⁰ The chief executive officer is charged with the conduct of the current business of

¹⁰ Section 49, read with s 46 of the Public Finance Management Act, 1 of 1999 and s 11 of the Act.

the RAF, subject to the directions of the Board.¹¹ He is responsible for the investigation and settling of claims and the management and utilization of the money of the RAF for purposes connected with, or resulting from, the exercise of its powers or the performance of its duties.¹² The Act confers no powers to make payment from its bank account on the management of a local branch of the RAF. I accept, for purposes of this judgment, that the Board is entitled to delegate such powers¹³ to a manager, or any other official in the employ of the RAF, but it has not been alleged that they have done so nor have any facts been alleged from which it can be inferred. In fact, it is plain from Mr Walter's letter of 26 June that the applicant does not know who is responsible. Accordingly, the inescapable conclusion to which I come is that no case has been made to support the orders set out in paragraphs 1 and 2 of the notice of motion.¹⁴

[17] I turn to the prayer that the second respondent be ordered to ensure that the applicant is provided with an undertaking in terms of s 17(4)(a). This order is on a slightly different footing to a monetary judgment. Ms Moyo advanced a 'submission' that because there is an undertakings division at the branch in East London Mr Johnstone, the manager of the branch, is personally responsible for delivering the undertaking. As I have said no factual basis is laid for this submission and Mr Niekerk, on behalf of the applicant, relies firmly on the failure by Mr Johnstone, in his answering papers, to refute the submission. There are two difficulties with the argument. First, I do not consider that a 'submission' constitutes a factual averment to which the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹⁵ can be applied. At best, it would be a conclusion that could be drawn from other primary facts that must be alleged in the affidavit. There are none. Secondly, the 'submission' is irreconcilable with the duties and functions entrusted to the chief executive officer that I have explained earlier. For these reasons relief sought in paragraph 3 of the notice of motion could not be granted either and the dismissal of paragraphs 4 and 5 must follow.

¹¹ Section 12(2).

¹² Section 12(2)(a) as read with s 4(1)(b) and (c).

¹³ Section 11(1)(h).

¹⁴ Outlined in para 1 hereof.

¹⁵ 1984 (3) 623 (A).

Costs

[18] The issue of costs remains. Costs are always in the discretion of the court and, although the ordinary rule is that costs would follow the result, I consider that the conduct of the matter by the RAF, outlined by Mr Johnstone in his answering affidavit, as I have explained earlier, is worthy of censure. Accordingly, I consider it would be just and equitable to make no order as to costs.

[19] In the result, the application is dismissed.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv D Niekerk
Instructed by: Jock Walter Inc, Gqeberha

For Respondents: Adv T Manyage
Instructed by: Mpoyana Ledwaba Inc c/o
Rwexana Attorneys, Gqeberha

Date Heard: 22 February 2024

Date Delivered: 05 March 2024