



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 3163/2021

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

30 November 2022

Date

K. La M Manamela

In the matter between:

TT XABA

Plaintiff

(previously HAPPY RADEBE obo TT XABA)

and

ROAD ACCIDENT FUND

Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **30 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff's mother Ms H Radebe was the initial plaintiff in this matter, after she sued the Road Accident Fund, the defendant, in her capacity as the mother and natural guardian of the current plaintiff, Mr TT Xaba, who was then a minor. Mr Xaba was born on 3 April 2002 and, therefore, has now attained majority status to act on his own behalf, hence the change in citation of the plaintiff. The formal substitution was effected on or around 17 May 2022.

[2] The plaintiff was injured in an accident which occurred on 24 November 2019. The accident occurred at or along R33 Road between Pomeroy and Dundee Road in KwaZulu-Natal Province. Two motor vehicles were involved in the accident. The plaintiff was a passenger in the motor vehicle which overturned after its driver ('insured driver') lost control thereof. The plaintiff blamed the negligent driving of either of the drivers for the accident. He sustained bodily injuries in the accident, including the following: left clavicle fracture; multiple body injuries, and soft tissue injuries. He suffered damages in the form of past and future medical, hospital and related expenses; loss of earning capacity and general damages.

[3] On 26 January 2021, the plaintiff caused summons to be issued against the defendant for purposes of recovering compensation for her damages in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the Act'). The total amount of the damages claimed from the defendant was initially in the amount of R2 250 000.

[3] This matter came before me for hearing by way of video link on 4 October 2022. Mr JG van den Berg appeared on behalf of the plaintiff. There was no appearance on behalf of the defendant. Counsel informed the Court that all issues are still in dispute in the matter and, therefore, that determination of the merits or liability and *quantum* of the loss of

earnings/earning capacity and general damages was sought from the Court on default judgment basis. After listening to oral submissions by counsel for the plaintiff, I reserved this judgment. But I must add that this appears to be disputed by the plaintiff or his counsel. I will say more about this, below. Counsel had also filed written submissions in terms of the practice directives of this Division.

Events subsequent to the hearing of 4 October 2022

[4] Whilst preparing judgment in this matter I noted that the defendant had delivered both notice of intention to defend and a plea, which led to the delivery of notice of irregular proceedings by the plaintiff. Obviously, in my view, judgment couldn't be handed down without clarity on these issues.

[5] On 7 November 2022, through my erstwhile registrar, I caused communication to be sent to the plaintiff's legal representatives, which included the following material part:

2. The presiding judge Manamela AJ has requested that the following be brought to the attention of the Plaintiff's attorneys:

2.1 the defendant had filed a plea after being ipso facto barred by the plaintiff;

2.2 the plaintiff reacted to the filing of the plea by serving, on 18 August 2022, a notice in terms of Rule 30 notifying the defendant that the delivery of the plea is considered an irregular step. The notice made it clear that the defendant had 10 days to remove the cause of complaint or face an application in this regard.

2.3 on the same date (i.e. 18 August 2022) the plaintiff served on the defendant an application for default judgment, which stated that the defendant was in default of delivery of an appearance to defend.

3. In light of what is stated in 2.1 to 2.3 above, kindly advise if default judgment is competent whilst the irregular step proceedings are pending and there is a plea delivered by the defendant, albeit out of time.

4. It is the preliminary view of Manamela AJ that the matter was always not ripe for hearing, that the matter ought to be removed from the roll with no order as to costs.

5. The submissions requested above should be furnished by no later than 14 November 2022.

[6] On 11 November 2022, Mr JG van den Berg, as counsel for the plaintiff, responded to the communication or email above and made submissions which included the following:

With regards to the above matter and request to make submissions pertaining to the R26 (Barring) and R30 (Irregular Proceedings) notices, we respond thereto as follows:

1. After hearing counsel on 4 October 2022 the draft order was made an order of court, which we believe still stands, unless the Honourable Justice has recalled the order.

CHRONOLOGICAL EVENTS

2. Summons was served on the Defendant on 28 January 2021.

...

3. The Defendant delivered its Notice of Intention to Defend on 25 April 2022 more than 15 months later.

4. The Defendant failed to file its Plea in the prescribed period of 20 days i.e 25 May 2022.

5. On 26 July 2022 the Plaintiff served a Notice of Bar on Defendant, requesting Defendant to file its plea within 5 (five) days after receipt of the notice.

...

6. The *dies* to file its Plea expired on 2 August 2022.

7. The application for Default Judgment enrolled for 4 October 2022 was emailed to Defendant on 4 August 2022.

...

8. After Defendant had received notice of the application on 4 August 2022 it filed its Plea on 18 August 2022 which was outside the prescribed of 5 (Five) days. The Defendant was *ipso facto* barred from taking further steps in particular to serve its Plea.

...

9. On 18 August 2022, after Plaintiff had received the Plea, served a Notice in terms of R30, informing Defendant that the proposed Plea constituted an irregular step.

...

10. The same application for Default Judgment which was emailed to Defendant on 4 August 2022 was **served** on Defendant on 18 August 2022.

...

11. The Notice of Set-Down for 4 October 2022 was served on Defendant on 18 August

2022.

...

12. Defendant was requested to settle the matter on 23 August 2022.

...

13. There can be no doubt that the Defendant did not know that Plaintiff was proceeding with the matter on 4 October 2022.

14. Despite of all notices given to Defendant, it refused and/or failed to file any documents to resist Plaintiff's claim.

15. ...

16.

17. ...

18. It is respectfully submitted that the Honourable Court can condone any non-compliance of the rules. As almost 3 months have passed since the delivery of the R30 notice, the Defendant has done nothing and prays that the Court condone same insofar it might be necessary.

19. Furthermore, that more than 6 weeks have passed since 18 August 2022 to 4 October 2022 in which the Defendant could have made application to court for a removal of bar. Nothing was done.

20. The Defendant did not even request the Plaintiff to agree that to a removal of bar as envisage by Rule 27(1).

21. The Plea delivered by the Defendant, is with respect, for reasons set out hereinabove, not before the court as the Defendant was barred from delivery its Plea.

22. It evident from the above and delays caused by the Defendant, that it has no *bona fide* intention in bringing the matter to finality, particularly the fact that the Plaintiff was a passenger. A concession that should have been made a long time ago.

23. It is further respectfully submitted that the removal of the matter will cause unnecessary delay and is not in the best interest of justice.

24. In view of the above Plaintiff prays that the order which was granted on 4 October 2022 not be recalled.

[7] In the light of counsel's submission regarding the need to recall the order made on 4 October 2022, I caused to be typed – through my erstwhile registrar - the recording of the

ending of the hearing of this matter. The following is the recorded final part of the exchanges between counsel and myself when the matter was heard on 4 October 2022:

MANAMELA AJ: If you can forward a word version draft order, an order will be made in terms of the draft, it's not going to be instantaneously. It may be in a day or 2. I don't think I'll require further submissions, if I do I will communicate those.
But for now Mr Van Den Berg, unless you have something else, you are excused.

MR VAN DEN BERG: No, my Lord. I've got nothing to add, except just to mention that I did e-mail the draft order in Word to your registrar yesterday afternoon. I think actually, yesterday morning. But yesterday I did mail it through.

MANAMELA AJ: Then then we should. We should have that. Thanks a lot for that.

[8] On 23 November 2022 I caused another communication to be sent to counsel for the plaintiff:

1. Following receipt of further submissions/memorandum by Advocate JG van den Berg dated 11 November 2022, Manamela AJ directed that the attached transcript be made from the recording of the hearing of this matter and further that the following be send to the plaintiff's legal representatives for consideration:
 - 1.1 that, it was clear at the end of the proceedings that no order has been made as yet;
 - 1.2 that, it is conceded by Manamela AJ that the words "*an order will be made in terms of the draft*", when viewed in isolation, are capable of leading to the conclusion that an order was to follow in terms of the draft order, and
 - 1.3 that, when the words quoted in 1.2 above are considered jointly with the rest of the transcript it is clear that the order to be made in the matter was not necessarily to be exactly in terms of the contents of the draft order because further submissions could have been required as borne by the following from the transcript "*I don't think I'll require further submissions, if I do I will communicate those*".
2. Manamela AJ regrets the confusing choice of words reflected in 1.2 above and apologises for the unintended message the words sent. The correct position is that the order was to follow as soon as a determination of all the issues in the matter (including monies to be awarded as damages) was finalised, and the draft order in WORD format was to be used for that purpose.
3. But whether the order was to be made in the exact terms of the draft order or not, the situation is that considering the "hanging" irregular steps proceedings initiated by the plaintiff, it is the preliminary view of Manamela AJ that the order is impossible.

Therefore, to the extent that it is necessary the “order” made will be recalled, if needs be.

4. The plaintiff or the plaintiff’s legal representatives are requested to consider the above and furnish a response by no later than 29 November 2022.

[9] On 28 November 2022, counsel for the plaintiff in reaction to my communication of 23 November 2022 made the following further submissions:

With regards to the above matter and request to make submissions pertaining to the “*hanging*” R30 (Irregular Proceedings) notices, we respond thereto as follows:

1. On 28 November 2022 the Plaintiff has served a Notice of Withdrawal in respect of the irregular proceedings in terms of R30.
...
2. As stated in the Submissions document dated 11 November 2022, there is no Plea before the court as the Defendant was *ipso facto* barred from taking further steps in particular to serve its Plea.
3. Insofar as it might be necessary, Plaintiff refers to its submissions document dated 11 November 2022.
4. In view of the above notice, it is respectfully submitted that there exists no reason why the order should be recalled.

Conclusion

[10] I must respectfully state that I find the abovementioned position adopted by the plaintiff, as borne by the theme of plaintiff’s counsel’s submissions, to be surprising. It appears to be that the quest is for the plaintiff to be awarded what he seeks in the default judgment and everything else ought to yield to that. It makes me wonder whether the fact that the attention of the Court wasn’t specifically drawn to the existence of the notice of bar and the notice of irregular proceedings during the hearing of this matter was not part of this quest. But I will not draw any conclusion in this regard as the material issues appeared in counsel’s written submissions, which prompted me when I reviewed same again for purposes of judgment to take up all these issues with the plaintiff’s legal representatives.

[11] But once all this proverbial smoke or fog clears, one thing is crystal clear: I cannot grant judgment in this matter whilst the notice of irregular proceedings by the plaintiff is still pending. This is how the plaintiff, legally advised, chose to react to the late delivery of the plaintiff's plea. The relevance of the plaintiff's conduct, including as enumerated by plaintiff's counsel above, should form or ought to have formed part of the consideration of what is to be done before judgment is granted, including default judgment. This would have been the case if the issue was properly raised in Court on 4 October 2022 for purposes of a ruling. Whatever happened on the day there was no ruling on the issue and it is still 'hanging'.

[12] The reported withdrawal of the notice of irregular step on 28 November 2022 by the plaintiff does not affect my view on this matter. Firstly, the withdrawal was not necessary if I had already granted judgment on 4 October 2022, as counsel for the plaintiff emphatically submits. Secondly, if I had granted judgment whilst ignorant of the pending notice of irregular proceedings, the subsequent removal of such notice, cannot without more or *ipso facto* serve to retrospectively justify an erroneous order. In fact, the notice of withdrawal also appears irregular if one consider that it is done after the plaintiff had already launched and moved his application for default judgment.

[13] Therefore, a proper order to be made here will be to remove the application for default judgment from the roll with no order as to costs. I will also add to the order made some consequential terms to ensure that this matter proceed in a proper manner. I think this turn of events was preventable in that it was completely foreseeable. I will avoid saying more on the issue.

[14] To avoid doubt, I did not make an order as alleged. I was going to make an order upon further reflection of the issues. I may or may have not called for further submissions, including revised actuarial calculations reflecting different contingency deduction. There is clearly no evidence that the plaintiff was awarded everything he sought and that when the Court adjourned on the matter there was a judgment or order. But to the extent that such may be anyone's impression, which is regrettable, I will recall the 'order'.

Order

[15] In the premises, I make the order, that:

- a) to the extent that an order was made in this matter on 4 October 2022, such order is hereby recalled and replaced with the order in the following terms:
 - i) the application for default judgment is removed from the roll with no order as to costs;
 - ii) the application for default judgment shall not be enrolled for hearing without compliance with the practice directives of this Court and proof of service of the notice of set down of such application on the defendant, and
 - iii) a copy of this order shall be served on the defendant within 10 (ten) days from date hereof.



Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing	:	4 October 2022
Date of Final Submissions	:	28 November 2022
Date of Judgment	:	30 November 2022

Appearances:

For the Plaintiff	:	Adv JG van den Berg
Instructed by	:	T Shabalala Inc Attorneys, Johannesburg
For the Defendant	:	No appearance