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

CASE NO: 67072/2017

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **No**

(3) REVISED: **NO**

Date: 25 June 2024

Signature

In the matter between:

W[...] H[...] B[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Coram: FHH KEHRHAHN (AJ)

Heard: 27 & 28 March 2024

Delivered: This judgement is handed down electronically by circulation to the parties' representatives by e-mail and publication on Case Lines and released to SAFLII. The date for the hand-down is deemed to be 25 June 2024.

ORDER

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1. I absolve the Defendant from the instance.
 2. No order as to costs.
 3. The matter is referred to the Legal Practice Council for investigation.
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JUDGEMENT

Coram: KEHRHAHN AJ

Introduction

4. The Plaintiff is B[...] W[...] H[...], an adult born on 10 May 2004. In 2017, when he was still a minor child, his biological mother, R[...] K[...] B[...] instituted action against the Defendant in terms of section 17 of the Road Accident Fund Act 56 of 1996, as amended ('the Act'), pursuant to injuries suffered by the Plaintiff in a motor vehicle accident.
5. The Defendant, who is the Road Accident Fund, a juristic person established in terms of the Road Accident Fund Act,¹ failed to defend the action despite proper service of the summons.

The Defendant's default

6. The matter came before me on the default judgment trial roll. The Plaintiff applied for default judgment by way of a substantive application. In the Notice of Motion, Plaintiff's mother (who was still representing Plaintiff at the time) prayed for R7 474 400 in damages '*as prayed in the particulars of claim.*' Subsequently, the Plaintiff substituted his mother as the Plaintiff in the action on 27 October 2023.

¹ 56 of 1996 as amended.

7. In the founding affidavit, deposed to by the Applicant's attorney, Mr Philemon Machaka Molefe, an amount of R6 423 910 is sought (now excluding the general damages), together with a section 17(4)(a) undertaking.
8. The Applicant further asks that I refer the issue of general damages to the HPCSA.

The Defendant's defence had not been struck out

9. Counsel for the Applicant submitted that the Defendant's defence had been struck out pursuant to a court order granted by Justice Francis-Subbiah (J). This same submission is made in counsel's heads of argument at paragraph 1.2. This submission is echoed under oath by the Plaintiff's attorney of record, at para 5.16 of the founding affidavit in the following terms:

'Due to the non-compliance with the above-mentioned Court Order by the Respondent, the Applicant on application to the above mentioned Honourable Court, was on the 14th day of August 2023 granted an Order by the Honourable Justice Francis-Subbiah J, striking out the Respondent's defence pleaded on the 27th day of October 2017 and that the Registrar to allocate a date to the Applicant to obtain for a hearing of default judgement...'

10. Francis-Subbiah J was indeed seized with the matter on the 14th of August 2023 but she did not strike the defence of the Defendant, as alleged under oath, or at all. Quite to the contrary, the striking-of-the-defence '*prayer*' was deleted by Francis-Subbiah J.
11. Why the Plaintiff's legal representative steadfastly persisted in the submission that the defence of the Defendant was struck out is not clear, given that the Plaintiff was permitted in the same court order to enrol the application on the default judgment hearing roll. The Plaintiff could proceed with the default judgement whether the defence of the Defendant was struck out or not.

12. I took this issue up with counsel, Mr Nyabane, who submitted to the court that he was instructed that the order granted by Judge Francis-Subbiah (J) was indeed a striking-order and persisted to submit that the defence of the Defendant had been struck out. Counsel informed the court that, given these instructions, which is obviously contrary to the actual court order, he may have to withdraw from the matter but ultimately did not withdraw as counsel. I waited for a rational, acceptable, or reasonable explanation for the submission that the Defendant's defense had, in fact, been struck out, but none was forthcoming.

13. In *Hyundai Motor Distributors (Pty) Ltd v The Honourable Mr Justice JMC Smith* 2000 (1) SA 259 (T), Southwood J stated as follows:

'Default judgment proceedings are akin to ex parte proceedings, and that in effect means that there is indeed a duty of disclosure, and that duty of disclosure requires (of counsel) to disclose even the adverse factors in the case...'

14. I expected counsel to submit to the court that he has instructions that are directly contradicted by a court order. Instead, the court had to raise the issue out of its own accord with counsel.

15. The court was clearly brought under the incorrect impression that the Road Accident Fund's defence had been struck out, and I refer this matter to the Legal Practice Council for further investigation.

16. Clause 9.7 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities ("The Code of Conduct")² demands that legal practitioners not recklessly make averments or allegations unsubstantiated by the information given to the legal practitioner. Clause 18.15 mandates the attorney, in any communication (which includes the founding affidavit), not to represent anything as

² Published in GG 42364 on 29 March 2019.

true that the attorney knew or reasonably ought to know is untrue. These provisions apply to attorneys.

17. As for counsel, the Code of Conduct, clause 25.3 is clear: Counsel shall exercise personal judgment over a matter, and no person shall dictate to counsel how the matter is to be conducted. Irrespective of the counsel's instructions, it was still incumbent upon counsel to convey his instructions to the court and the fact that his instructions are mutually exclusive to the court order.
18. Clause 57.4, which binds all legal practitioners, counsel and attorneys alike, provides that in *ex parte* proceedings (which include default judgment proceedings per the *Hyundai* decision *supra*) the legal practitioner must disclose to the court every fact known to the legal practitioner that may reasonably have a material bearing on the decision of the court.
19. The Code of Conduct, clause 57.1, enjoins all legal practitioners, counsel and attorneys alike, to take reasonable steps to avoid, directly or indirectly misleading the court.
20. The fact that a defence is struck out has serious implications³ for the Defendant. Although there seem to be contradictory decisions on the ultimate effect in this division, the striking of a defence is an extremely drastic remedy where the court has the power to give judgment⁴ for the plaintiff, as if the action were undefended and the Defendant is no longer before the court and has no further right of appearance.⁵ Tlhabi J held that the doors is effective shut for the Defendant.⁶

³ *Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* 1971 (3) SA 455 (T) at 462H – 463B; *MEC, Department of Public Works v Ikamva Architects & Others* 2022 (6) SA 275 (ECB) at para 18-21 and *Ikamva Architects v MEC, Public Works* [2014] ZAECHC 70.

⁴ *Langley v Williams* 1907 T.H. 197; *Leggat and Others v Forrester* 1925 WLD 36; *Mostert v Pienaar* 1930 WLD 151; *Minister of Safety and Security and Another v Burger* (59473/2012) (Gauteng Division Pretoria) [2015] ZAGPPHC 346 (15 May 2015) para 12.

⁵ See *Motor Marine (Edms) BPL v Thermotron* 1985 (2) SA 127 (SE) at 128; *Minister of Safety and Security and Another v Burger* (59473/2012) (Gauteng Division Pretoria) [2015] ZAGPPHC 346 (15 May 2015) para 12 referring with approval to *Langley v Williams* 1907 TH 197. Cf *Stevens and Another v RAF* (26017/2016) [2022] ZAGPJHC 864 (31 October 2022); *Motala NO v RAF* (42353/2019) [2023] ZAGPJHC 1323 (15 November 2023); *Minister of Police v Michillies* (1011/2022)[2023] ZANWHC 90 22 June 2023.

⁶ *Minister of Safety and Security and Another v Burger* (59473/2012) (Gauteng Division Pretoria) [2015] ZAGPPHC 346 (15 May 2015) para 12.

21. It is in this latter part where there the case law differs. I am aware of judgments, and which found that the Defendant may still participate in cross-examination of the witnesses. One such a recent judgement is *T.P.R obo P.M.M v Road Accident Fund* (9117/2019) [2024] ZAGPPHC 387 (18 April 2024) where Davis J reconciled the difference between the old authorities with reference to Section 34 of the Constitution and the serious nature of the striking order.

22. I need not decide this issue, but in my view, the defendant, whose defense has been struck out, can no more proceed and participate in the case than a plaintiff whose claim has been struck out.

23. To be clear, I make no factual finding on whether the court was misled. This calls for an investigation by the Legal Practice Council. This judgement is referred to the Legal Practice Council for further investigations.

The merits

24. I also raised with counsel the concern that I had in respect of the merits. My concern was twofold:

24.1. First, there was a discrepancy in the pleadings and the evidence. The Plaintiff pleaded that he was a passenger at the time of the accident, and at the same time, he alleges in an affidavit that he was a pedestrian.

24.2. Secondly, irrespective of whether the Plaintiff was a passenger or a pedestrian, there was no evidence on which to adjudicate the matter.

25. Despite these concerns raised with counsel, the Plaintiff persisted in the relief sought. Counsel for the Plaintiff did mention that an amendment may be sought, but in the end no such an application was made.

26. I turn to the first issue raised with the Plaintiff next.

27. The Plaintiff, duly assisted by his mother at the time, but via his attorney of record, lodged a claim with the Defendant on 9 November 2016. At paragraph 5 of the RAF 1 claim form, the Plaintiff informed the Defendant that he was injured in the accident in his capacity as a passenger. Such lodgement is a procedural requirement.⁷ In order to succeed, the Plaintiff must demonstrate substantial compliance with the prescribed formalities.⁸ I make no finding on the substantial compliance with the provisions of the Road Accident Fund Act 56 of 1996.

28. The claim seemed to have been accompanied by a section 19(f) affidavit deposed to by the Plaintiff's mother, wherein she said the following:

'On the 16 day of February 2015 on or near Ext 07, Diepsloot, Johannesburg, Gauteng Province, my child, B[...] W[...] H[...], was involved in a motor vehicle accident where he was a passenger in the motor vehicle ...'

29. It was pleaded in the particulars of claim that the Plaintiff (a minor at the time of the accident) was a passenger. When the particulars of claim was amended in 2020, the Plaintiff persisted in pleading that the Plaintiff was a passenger.

30. In a settlement proposal made to the Defendant on 18 June 2021, which proposal was submitted to the court, it was stated that the Plaintiff was a passenger.

31. At a pre-trial conference held between the parties on 16 July 2019, at a time that the RAF was legally represented by Maponya Inc, the Plaintiff is recorded as being injured in the accident in his capacity as a passenger. This is recorded in the pre-trial minute at paragraphs 1.1 and 2.1. In fact, at paragraph 1.1, the typed reference to '*pedestrian*' was deleted and replaced with the word '*passenger*' in manuscript.

⁷ sec 24 of the Road Accident Fund Act 56 of 1996, as amended; *Protea Ass Co Ltd v Soul* 1991 (3) SA 43 (E) at 45.

⁸ *RAF v Busuku* 2023 (4) SA 507 (SCA) at para 9; *Pithey v RAF* 2014 (4) SA 112 (SCA) para 19 at 120; *Sithebe Mmapule Esther v RAF* (33165/17) Gauteng Division, Pretoria (11 March 2021) para 8.

32. To the contrary, in the founding affidavit, deposed to by the Plaintiff's attorney, it is alleged that the Plaintiff was a pedestrian at paras 5.1 and 6.3. In the heads of argument, the Plaintiff was also referred to as a pedestrian.
33. The section 19(f) affidavit by R[...] K[...] B[...], the Plaintiff's mother, confirms that the Plaintiff was involved in a motor vehicle accident as a passenger. She goes on to say that the accident was caused by the sole negligent driving of Edwards Ramudzuli, in that he failed to keep a proper lookout, failed to keep his vehicle under proper control and he failed to apply breaks timeously.
34. The Plaintiff deposed to a 'damages affidavit' confirming that on 16 February 2015 at Diepsloot, Extension 07, he suffered injuries as a result of an accident. He was knocked down by a vehicle driven by the insured driver in his capacity as a pedestrian.
35. The hospital records attached to the application, and on which records the Plaintiff rely, simply says that the Plaintiff was 'allegedly hit by a car'. Dr T Enslin, and H Enslin recorded in their medico legal reports, which was before the court under oath, that the Plaintiff was a pedestrian. This collateral information could only have come from the Plaintiff.
36. What further exacerbates the above inconsistencies is the following passage from a settlement offer:

'The Plaintiff has received the offer of merits settlement previously from the Defendant and the Plaintiff accepted same and a court order dated 11 September 2019 confirm same as settled at 80% in favour of the Plaintiff'.

37. This compromise on the 'merits' was not pleaded, and I was specifically asked in both the practice note and in open court, when the matter was called, to make a finding on the merits. The suggestion that the merits were settled compared to the relief sought before me leads to an unresolved discrepancy. Which had no bearing on my ultimate judgment. There was no evidence before me that the matter was in fact settled.

38. The court in *Vermeulen and Others v Minister van Veiligheid en Sekuriteit en Andere* (1377/2008) [2011] ZANWHC 85 (10 March 2011) at para 11 quoted Jacob & Goldrein with approval:

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings. . . . For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation. . . . Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called ‘any other business’ in the sense that points other than those specified in the pleadings may be raised without notice.”

39. Parties to civil proceedings are bound by their pleadings – the object thereof being to delineate the issues to enable the other party to know what case has to be met. It is impermissible to plead one particular issue and seek to pursue another at the trial.⁹

⁹ *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* [2014] 1 All SA 158 (SCA) at para 39; *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) at para 7; *Imprefed (Pty) Ltd v National*

40. In *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality*¹⁰ (2 June 2017) at para 28, the court held that pleadings are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants.¹¹

41. It is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case he or she is called upon to meet. These requirements in respect of pleadings are the very essence of the adversarial system.¹² The Defendant obviously laboured under the impression that the Plaintiff's claim was a pedestrian claim. In a pedestrian claim, the Plaintiff need to prove only 1% negligence to succeed with an unlimited claim and will normally not be able to reduce to claim under the Apportionment of Damages Act 34 of 1956. The Defendant may very well have defended the action had the Particulars of Claim and the RAF 1 form, read with the s19(f) affidavit made it clear that the claim was in fact a pedestrian's claim as opposed to a passenger's claim.

42. The prime function of a judge is to hear evidence in terms of the pleadings, to hear argument and to give a decision accordingly.¹³ In *Imprefed (Pty) Ltd v National Transport Co* 1993 (3) SA 94 (A) at 107G-H it was stated:

'At the outset it need hardly be stressed that: "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed."' (Durbach v Fairway Hotel Ltd 1949(3) SA 1081 (SR) at 1082.'

43. It is not clear exactly what the Plaintiff's case is. Is he relying on the fact that he was a passenger or a pedestrian? From the admissible evidence advanced, it seems that the Plaintiff was a pedestrian. The Plaintiff, however, pleaded that he was a passenger.

Transport Commission 1993 (3) SA 94 (A) at 107G-H and *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

¹⁰ [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA).

¹¹ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

¹² *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623-462.

¹³ *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623-462.

44. On this basis, the Plaintiff has not presented the necessary evidence to substantiate the allegations made in the particulars of claim. Despite the fact that I pointed out this concern to counsel, the Plaintiff failed to bring an application to amend the particulars of claim and the Plaintiff persisted on the relief sought on the pleadings as they stand..
45. On this basis I must absolve the Defendant from the instance. The Plaintiff must stand and fall by the case pleaded in the particulars of the claim.¹⁴
46. Even if I am wrong, the same result must follow in relation to the second issue raised with counsel for the Plaintiff. I deal with this second issue next.
47. There was no evidence before the court to make a finding for the Plaintiff. The only evidence was an affidavit from the Plaintiff and his mother.
48. The Plaintiff's mother was not present when the accident occurred. The probative value of the evidence advanced by the Plaintiff's mother does not depend upon her credibility. It is inadmissible hearsay evidence. Her version is in any event contradicted by that of the Plaintiff.
49. The Plaintiff submits that he was a pedestrian at the time of the accident. He then, without laying any factual basis whatsoever, alleges that the sole cause of the accident was the insured driver, repeating the grounds of negligence as pleaded in the particulars of claim. It is for the court to draw inferences on the negligence of the insured driver, from the proven facts. The Plaintiff cannot usurp this function of the court by making sweeping allegations which are found wanting for lack of sufficient particularity. Simply making bold allegations without more is not enough to establish any negligence. The *ipse dixit* of the Plaintiff is not enough. No negligence is established from the Plaintiff's affidavit.

¹⁴ *Minister of Safety & Security v Slabbers* (668/2009) [2009] ZASCA 163 (30 November 2009).

50. In terms of Section 17 of the Road Accident Fund Act 56 of 1996, the Defendant is only liable if the insured driver caused the accident negligently. I had no evidence before to make a finding of any negligence on the part of the insured driver.

51. Even had the Plaintiff amended the particulars of claim, to plead that the Plaintiff was a pedestrian, the result would have been the same. The Plaintiff merely made sweeping all-encompassing allegations, effectively repeating allegations made in the particulars of the claim. There was no evidence explaining the circumstances of the accident with sufficient particularity to assist the court in drawing inferences from the facts and making a finding on the merits. I was simply not placed in a position to assess the merits. The relief sought is not for the mere asking, and the Plaintiff has an onus to prove negligence on the part of the insured driver.

52. The *ipse dixit* or sweeping allegation of negligence, devoid of any facts as to how the accident occurred, is not enough.

53. In the result, I make the following order:

1. I absolve the Defendant from the instance.
2. No order as to costs.
3. The matter is referred to the Legal Practice Council to investigate.

FHH Kehrhahn AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

For the Plaintiff:

Instructed by:

Date of the hearing:

Adv VC Nyabane

Molefe Machaka Attorneys

27-28 March 2024

Date of judgment:

25 June 2024