IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 10018/2016P

In the matter of:

THULANI ERIC SITHOLE **PLAINTIFF/RESPONDENT**

and

THE MEC FOR HEALTH: KWAZULU-NATAL **DEFENDANT/APPLICANT**

ORDER

The following order is granted:

1. The application is dismissed with costs.

JUDGMENT

PIETERSEN AJ:

[1] The defendant, who is the applicant in this application, seeks an order declaring that she is entitled to defend the plaintiff's damages claim arising out of the negligence of the defendant's employees in their treatment of the plaintiff, who is the respondent in this application. In the alternative, the defendant seeks an order declaring that the

plaintiff has abandoned and/or waived his right to proceed by way of default judgment in respect of the quantum of his damages. The defendant, therefore, requests that the matter proceeds to trial on the issue of quantum and that the plaintiff be ordered to pay the costs of the application on a punitive scale. The parties will be referred to throughout as they are in the main action.

[2] The plaintiff was treated at Addington Hospital during December 2015. It is the plaintiff's case that he suffered a serious injury to his left hand and that the defendant's employees' failure to provide adequate medical care caused the plaintiff to be permanently disfigured and unable to use his left hand. As a result of this injury, the plaintiff submits that he has been rendered unemployable and seeks damages suffered from the defendant in the sum of R4 149 700.

[3] The matter was defended and both parties delivered their discovery affidavits. The plaintiff was dissatisfied with the defendant's discovery and delivered notices in terms of rule 35(3) and (6) to request certain medical records which, according to the plaintiff, the defendant had not provided. The exact timeline of the events pertaining to the further and better discovery sought by the plaintiff is not apparent from the papers before me but it is common cause that this application culminated in an order granted on 29 November 2017 by Hadebe AJ (as she then was), which reads as follows:

'1. The Respondent's defence is dismissed with costs.

2. The Respondent be and is hereby directed to pay the costs of this application.'

[4] It is further common cause that the defendant proceeded to deliver a notice of application for leave to appeal against the aforesaid order but the application was never prosecuted for reasons unrelated to this application.

[5] Despite the court order striking out/dismissing the defendant's defence, the plaintiff did not proceed to apply for default judgment. Instead, the plaintiff proceeded

to convene a pre-trial conference which was held on 7 February 2019. The minutes of this conference contain the following recordal at paragraphs 3 and 6:

‘The matter proceeds for the determination of quantum only, the plaintiff having obtained a judgment in his favour in respect of the merits with the defendant to make payment of 100% of the proven damages.’

[6] A further pre-trial conference was held on 31 August 2020, and the parties again recorded the following at paragraph 3 of the minutes:

‘The defendant is liable to make payment of 100% of the plaintiff’s proven or agreed damages and the matter proceeds for the determination of the quantum of those damages only.’

[7] On 20 October 2021, the defendant delivered a request for further particulars. The plaintiff also made himself available for various assessments by the defendant’s expert witnesses for purposes of the preparation of medico legal reports. The plaintiff proceeded to deliver his expert reports and also attended to an amendment of his particulars of claim. The matter was then set down for trial on 5 November 2021, on which day the trial was adjourned *sine die* with the defendant directed to make an interim payment to the plaintiff.

[8] The matter was then eventually set down for trial again on 13 February 2023 for three days. Shortly before the trial was to commence, the plaintiff’s representatives raised the fact that the defendant’s defence had been struck out and that the defendant was thus non-suited.

[9] The current dispute then arose and the trial was adjourned, with the defendant directed to institute this application on or before 20 February 2023.

[10] The defendant submitted that the court order of 29 November 2017, striking out its defence, only related to the issue of liability and not to the issue of quantum. In the alternative, the defendant argued that the parties subsequently entered into a written agreement that the plaintiff's claim would be determined in a trial and that the plaintiff waived his right to proceed by way of default judgment in respect of the determination of the quantum of his claim. The defendant further submitted that the plaintiff is estopped from proceeding by way of default judgment, as he had represented to her that the determination of the quantum of his damages would be done in a trial and that she acted on such representations to her detriment.

[11] The plaintiff submitted that the court order was not limited to liability only and that the striking out of the defendant's defence included both aspects of liability and quantum. The plaintiff further submitted that the court order stands until set aside and that there is no evidence to show that the plaintiff has abandoned the order in compliance with rule 41(2). As a result, so the plaintiff concluded, the defendant is barred from participating in the hearing, as her defence has been struck out and the plaintiff is entitled to set the matter down as an undefended action in order to seek default judgment.

[12] It is immediately apparent from the court order that the defendant's defence has been struck out. The extent of the order is not limited to the defence on the merits and it follows that the defence in respect of the quantum was also struck out.

[13] It has been held in *Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* that:[1]

'The striking out of a defendant's defence is an extremely drastic step which has the consequence that the action goes forward to trial as an undefended matter . . . In the case, if the order were granted, it would mean that a trial Court would eventually hear this action without reference to the justification which the defendant has pleaded and which it might conceivably be in a position to establish by evidence.'

[1] *Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* 1971 (3) SA 455 (T) at 462H-463A.

[14] The court in *Wilson* relied on *Langley v Williams,*[2] where the court found that if the defence is struck out, the defendant cannot appear at the trial and cross-examine the plaintiff's witnesses.

[15] The recordal by the parties in subsequent pre-trial minutes that the plaintiff has obtained a judgment in his favour in respect of the merits is evidently incorrect. Judgment has not been granted in favour of the plaintiff and it is common cause that the defendant has conceded liability in respect of the merits. However, it is possible that the reference in the pre-trial minutes to the plaintiff having obtained judgment in his favour may be to the order striking out the defendant's defence. Regardless, the inaccurate recordal of the factual position in the pre-trial minutes cannot restrict or amplify the order of 29 November 2017. It, therefore, remains that the defendant's defence on the merits and quantum was struck out.

[16] The defendant's reliance on a written agreement that the plaintiff's claim will be determined in a trial is without merit. In this regard, the defendant relies on the minutes of the pre-trial conference held on 7 February 2019. As indicated above, the minutes incorrectly record that judgment had been granted in favour of the plaintiff in respect of the merits and that the matter would proceed for the determination of quantum only. The defendant suggests in her founding affidavit that the written agreement also provided for an undertaking by the plaintiff that he would not bring an application for default judgment. However, no such undertaking is apparent from the pre-trial minutes. The plaintiff clarifies the position in his answering affidavit and indicates that judgment has not been obtained in respect of the merits as the defendant has conceded the issue of liability.

[17] The plaintiff further points out, correctly, in his answering affidavit that the alleged agreement, as relied on by the defendant, was not expressly recorded in the pre-trial minutes.

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[2] *Langley v Williams* 1907 TH 197.

[18] In the circumstances, I am unable to find that a written agreement exists where the parties agreed that the plaintiff's claim would be determined in a trial.

[19] The defendant further submitted that the plaintiff waived his right to proceed by way of default judgment in respect of the issue of quantum. In support of this argument, the defendant submitted that the plaintiff proceeded to convene two pre-trial conferences and that the parties exchanged expert medico legal reports, whereafter the matter was set down on two occasions for trial on the issue of quantum. The defendant concluded that the plaintiff's conduct constitutes a tacit abandonment of the court order.

[20] It has been held in *Borstlap v Spangenberg*[3] that the tacit abandonment of rights by a party would involve conduct plainly inconsistent with an intention to enforce the right now relied on. It has further been held in *Traub v Barclays National Bank Ltd*[4] that it is necessary for the decision to abandon to have been conveyed to the other party for it to become effective.

[21] It is common cause on the papers before me that there has been no express abandonment of the court order by the plaintiff. The plaintiff has also at no stage communicated a decision to abandon the court order to the defendant.

[22] The plaintiff's participation in two pre-trial conferences and his acceptance of the defendant's expert medico legal reports do not constitute sufficient grounds for finding that the plaintiff has abandoned his rights in terms of the court order. On the contrary, the plaintiff's conduct is consistent with his evidence that the defendant was involved in the proceedings for purposes of exploring the settlement of the plaintiff's quantum, which would avoid the need to present evidence by the plaintiff in order to prove the quantum of his claim.

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[3] *Borstlap v Spangenberg en andere* 1974 (3) SA 695 (A).
[4] *Traub v Barclays National Bank Lt; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634G-635D.

[23] The defendant further relied on estoppel and argued that the plaintiff represented to her on several occasions that the determination of the quantum of his damages would be in a trial in which both parties would lead evidence. The defendant submits that she proceeded to prepare for trial, only to learn at the doorsteps of the court that the plaintiff intends to rely on the court order and that the defendant is therefore non-suited. The defendant contends that she accordingly acted to her own detriment.

[24] It has been held in *Universal Stores Ltd v OK Bazaars*[5] that in order to rely on estoppel, the relevant party must show a representation by words or conduct by the other party of a certain factual position. Further, the representee must have acted on the correctness of the facts as represented to his or her detriment.[6]

[25] On the facts before me, both parties proceeded to participate in, inter alia, pre-trial conferences and the exchange of medico legal expert reports. It is the plaintiff's case that the defendant's representatives were engaged for purposes of exploring settlement of the quantum. This is confirmed by the recordal in the pre-trial minutes from which it is clear that the plaintiff still needed to prove his damages in the absence of an agreement between the parties. Both parties participated in the various pre-trial procedures and I am unable to find that any representations were made by the plaintiff to the defendant that the determination of the plaintiff's quantum of his damages would be in a trial in which both parties would lead evidence. Further, even if it is found that the conduct of the plaintiff constituted such representation, it cannot be said that the defendant acted on such representations to her detriment.

[26] It remains that the defendant did not proceed with her application for leave to appeal against the striking out order, and as this order still exists, she accordingly remains precluded from participating in the trial.

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[5] *Universal Stores Ltd v OK Bazaars* 1973 (4) SA 747 (A) at 761B-C.
[6] *Absa Bank Limited v De Klerk* 1999 (1) SA 861 (W) at 865G-H.

[27] The general rule is that the successful party is entitled to his costs. I find no reason to deviate from this rule.

[28] I make the following order:

1. The application is dismissed with costs.

PIETERSEN AJ

Date of hearing:	18 October 2023
Date of judgment:	26 April 2024

APPEARANCES

Applicant/Defendant:	Mr Ramdass
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