

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 16980/2021

In the matter between

THE ROAD ACCIDENT FUND

APPLICANT

AND

KRUGER & CO

1st RESPONDENT

SHERIFF OF THE HIGH COURT, CAPE TOWN WEST

2nd RESPONDENT

FORTUNATE DVZONGO

3rd RESPONDENT

In re

FORTUNATE DVZONGO

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

Date of Hearing: 21 August 2024

Date of Judgment: 03 September 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] On Thursday 15 August 2024 this court issued a directive in the following terms:

“Practice Directive 45A of the Western Cape Division of the High Court reads:

“45. Reasons for Orders and Leave to Appeal

45A. Whenever reasons for a court’s order are required (whether in a Third Division matter, in terms of Rule 49(1)(c) or otherwise) the legal representative or in person litigant concerned shall file such request for reasons with the registrar and thereupon deliver same together with the court file to the Judge from whom the reasons are required.”

Communication with the Secretary since April suggests that there was a request for reasons filed sometime in December 2023. Despite the earnest attempts of the Judge’s Secretary, including reminders, the party requesting reasons has failed to comply with the Practice Directive, to enable the Judge to consider the application. Against this background, it has become necessary for the Judge to address the problems which cause the delay in the finalization of the request for reasons. To that end the parties are invited to a case management conference calculated:

1. To put the party(ies) on such terms as are appropriate to achieve readiness to provide reasons.
2. If deemed meet, to make an order as to costs, including an order de bonis propriis against the party(ies) legal representatives or any other person whose conduct has conducted unreasonably to frustrate the objectives of Rule 49 of the Uniform Rules of Court.

The details of the conference are as follows:

Date: Wednesday 21 August 2024.

Time: 9:30

Place: Judge Thulare's chambers."

On Monday 19 August 2024, the Judge's secretary received the file together with a notice requesting written reasons for judgment, which bore a stamp dated the same day, to wit, 19 August 2024.

[2] The Judge was placed in this position where it had to assert the court's authority through issuing directives against the following background. The Judge's Secretary and the Judge, until that 19 August 2024, did not receive the notice requesting written reasons for judgment or the file from the applicant (RAF) or their representatives. The Secretary and the Judge first became aware that RAF had allegedly filed the notice, from the third respondent's (Dzvongo) attorneys (Kruger), when they complained about the delay in furnishing the reasons in a letter dated 23 April 2024. The Secretary immediately advised the parties that the notice and the reasons were never delivered to her and the Judge, and requested that same be done. By 8 May 2024 RAF had not delivered the notice and the file, and had been aware that this was still not delivered. The reminders notwithstanding, RAF's attorneys did not lift a finger. Even the obvious frustrations which led to Dzvongo's Senior Counsel, Salie SC, enquiring why the file had not been delivered to the Judge by 8 August 2024, when the secretary once more indicated that the notice and the file had not been received, and alerting the parties to the prejudice which such behaviour brought about to Dzvongo, RAF's attorneys did not move. This was enough for the court to issue the directives. As it showed out after the directive, it took 8 months for RAF's notice and file to reach the Judge, something which was achieved in less than 2 working days.

[3] If this conduct of RAF's attorneys of record was worrisome, the worse was still to come. In trying to explain themselves at the directives hearing, a senior associate of

RAF's attorneys deposed to an affidavit in which the following was said in paragraphs 5, 6 as well as 14 and 15:

"5. To this end, and on 4 December 2023, I made arrangements with a messenger of our firm to file the notice to court. The messenger was further instructed to ascertain whether the court file was still with the Honourable Thulare J, failing which, arrangements were to be made to obtain the file and deliver the file together with the notice to the Honourable Thulare J's Registrar. A copy of the request to the messenger is annexed hereto as "A".

6. During the afternoon of 4 December 2023, the messenger advised that the task had been completed, Accordingly, at this stage, we operated on the belief that our duty to deliver the file had been discharged and that the Honourable Thulare J would deliver his judgment in due course.

...

15. It has become apparent that the task was not completed, however, we submit that the failure to deliver the file was as a result of miscommunication between the parties.

16. We submit further that the failure to deliver the file and the notice was not intended to prejudice the plaintiff or to cause frustration and/or delay of the judicial process."

Ordinarily this may make sense. However, during the directives hearing I drew to the parties' attention the conspicuous absence of any evidence of the alleged filing of the notice on 4 December 2023. RAF did not have the notice on hand but promised to cause it to be delivered to my chambers without delay, and indeed the next day I received a copy of the notice. Instead of helping RAF, the notice adds more problems to RAF's attorney. The date stamp on the document delivered to my office is 5 December 2023. The inescapable conclusion is that RAF's attorneys did not investigate, since 4 December 2023 when the instruction was given to the messenger, as to whether the

notice was in fact filed and delivered to the Judge. If they can be pardoned for harbouring under a false belief from 4 December 2023 to 23 April 2024 that that was in fact done, the correspondence from Kruger and the Judge's Secretary since April 2024 should have alerted them to the mistaken belief. In my view, the failure to ensure that the notice and the file reached the Judge in terms of the practice directive, can only be ascribed to the attorney being carelessly lazy. Simple attention to detail, after the 23 April 2024 correspondence, would have alerted a determined and enthusiastic lawyer to check, and it would have been noted that the instruction given on 4 December, at least as regards filing, was only done the next day. It would have been impossible to then rely on the word of the messenger, which was given on 4 December 2023 that the Judge already had the file by 4 December 2023, if the notice was only filed on 5 December 2023. It would have been difficult if not impossible, under the circumstances, to say what was said in the paragraphs cited above, under oath, to the directives hearing. In my view, the frustrations of Kruger to also intervene and to commit to also ensure delivery of the notice and the file to the Judge's Secretary did not absolve RAF's attorneys of their responsibilities as envisaged in the practice directive. It was RAF's attorneys who were obliged to deliver the notice and the file to the Judge. These serve as my reasons for the relevant part of the cost order.

[4] RAF brought an urgent application to stay the operation of an order granted in favour of Dzvongo, interdicting and restraining the sheriff from removing its movable property in terms of a writ, directing the sheriff to return movable property that was attached and removed from its premises and directing that these terms operate as interim relief pending the confirmation and verification of Dzvongo's legal entry and continued presence in the country alternatively pending the final determination of the matter *Mudawo v RAF and Another* issued in the Gauteng Division of the High Court. Kruger and Dzvongo opposed the application. Dzvongo sustained injuries arising out of motor vehicle crash on 8 June 2018. RAF had been unable to determine whether Dzvongo was legal in the country at the time of the crash. Dzvongo lodged a claim with RAF and issued summons in 2019. The parties settled the matter on 20 December 2022, which was made an order of court on 22 December 2022. RAF did not pay in accordance with

the order, which led to a writ being issued on 24 August 2023. It needs to be noted that it was on 21 June 2022 that RAF issued a directive around its new approach and there was promulgation of a new RAF 1 claim form on 4 July 2022 that introduced a requirement that foreigner claimants had to provide proof that they were in the Republic legally at the time of the injuries sustained arising out of the driving of a motor vehicle. The requirements were not in existence at the time that Dzvongo sustained injuries. Moreover, RAF only raised these issues in relation to Dzvongo's claim when it had to pay, long after the settlement agreement was made a court order. On 18 September 2023 the sheriff attached and removed from RAF premises movable property to the value of the judgment debt. On 17 November 2023 RAF indicated that it attempted to process payment but that it was unable to do so as Dzvongo failed to produce a passport showing entry/exit stamps which would serve as proof that he was legal in the country at the time of the crash and that RAF required this to comply with the provisions of the Immigration Act 13 of 2002 (the IA). RAF indicated that the provisions of the IA were not previously applied but that the new administration complied hence the change in approach from previous matters. RAF indicated that *Mudawo* was a matter in which it litigated the issue whether a foreigner who was in the country illegally at the time of a crash was entitled to compensation. It was for that reason that RAF requested the stay of the sale until there was judicial clarity. KCO's position was that RAF's sudden decision to apply the IA was not a ground to stay the execution of a properly obtained court order nor a ground to withdraw from a compromise reached.

[5] Rule 45A of the Uniform Rules of Court read as follows:

“45 Suspension of orders of court

The court may suspend the execution of any order for such period as it may deem fit.”

As a general rule, a court will order suspension of execution of its order where injustice will otherwise result [*Van Rensburg and Another NNO v Naidoo and Others NNO*;

Naidoo and Others NNO v Van Rensburg NO and Others 2011 (4) SA 149 (SCA) at para 52

[6] RAF in essence requested the court to suspend execution of an order so as to give it time to construct a defence to a matter already settled and where there was already a court order made on the terms of such settlement. This seems to me to be a flagrant disregard of the sanctity of judicial processes and the sacred nature of court orders as a final word on the legitimate interests of litigants. A suspension of a court order was not meant to meet the exigencies of the situation where a party realized, after settlement and a court order, that it may have made a mistake when settling and having the terms of settlement made a court order, and such party holds a view that it may have a defence to the merits. RAF seeks to unscramble eggs not only already whisked, but which have also gone through a non-stick pan over low heat and were already big and fluffy. RAF lagged behind the law. It sought to re-engage on issues on which there was a final decision. RAF indirectly sought an advantage to which it was not entitled, to wit, having this court for all intents and purposes declaring in final terms, an order of court made by a court of equal status, to be of no force and effect. I understand 'where the underlying *causa* of a judgment debt is being disputed' in *Van Rensburg* at para 52 to be a dispute raised at the appropriate time of legal proceedings. I do not understand the statement to mean what RAF wants it to mean, to say, after settling a dispute and having the terms made an order of court, one party to the settlement can resuscitate the dispute through the use of Rule 45A. RAF failed to show that real and substantial justice required a Rule 45A intervention. I was not persuaded that RAF was entitled to the relief it sought.

[7] For these reasons the order was made on 30 November 2023. For the reasons at the introductory stage of this judgment, I make the following order:

1. RAF is exempted from paying the fees related to the delivery of the notice requesting reasons for judgment and the file to the Judge's chambers.

2. The costs of, and those occasioned by, the delay in the timeous delivery of the file to the Judge's chambers, including those of preparations related to and of the Directives hearing, are to be paid by RAF's attorneys of record.

DM THULARE
JUDGE OF THE HIGH COURT