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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 26025/20

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

Date

Signature

In the matter between:

**IRANA SINGH N.O.
obo TLAPU: STOFFEL**

PLAINTIFF

**AND
ROAD ACCIDENT FUND**

DEFENDANT

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY/ELECTRONICALLY
AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL/
UPLOADING ON CASELINES AND/OR COURT ONLINE. ITS DATE OF HAND
DOWN SHALL BE DEEMED TO BE DECEMBER 3, 2024**

NTANGA AJ:

Introduction

[1] Plaintiff instituted an action against the Road Accident Fund (“the Defendant”) for damages suffered as a result of injuries he sustained in a motor vehicle accident which occurred on August 2, 2019, along Hebron Road near Soshanguvhe, Pretoria. At the time of the accident, Plaintiff was a passenger in a motor vehicle bearing registration number 0[...] which collided with motor vehicle bearing registration number H[...].

[2] During the trial, no evidence was adduced regarding merits as Plaintiff and Defendant advised the court that parties have reached a settlement regarding Past and Future Loss of Income as well as General Damages in respect of plaintiff’s claim. A draft order which incorporates the parties’ agreement was presented to the court. The court is satisfied with the terms of the draft order regarding the Plaintiff’s claim for Past and Future Loss of Income as well as General Damages.

Issues in dispute

[3] The court was called upon to determine the issue of costs. The essence of the dispute between the parties is the scale on which costs should be awarded.

[4] Plaintiff seeks costs against Defendant on an attorney and own client scale. The costs requested are in respect of November 13, 2024, November 14, 2024, November 15, 2024, November 18, 2024, and November 19, 2024.

[5] Defendant tendered costs on a party-to-party scale in respect of November 13, 2024, November 14, 2024, and November 15, 2024. No costs were tendered for November 18, 2024, and November 19, 2024.

Submissions

[6] Plaintiff’s Counsel provided a brief background as a basis for the claim of costs on an attorney and own client scale. He argued that the costs should be for

five days. He submitted that the matter was allocated for hearing on November 13, 2024. He attended Court on the day and was advised that the matter would not proceed as Defendant's legal representative was booked off sick.

[7] After making enquiries at the Defendant's offices a claims handler replied in an email expressing surprise that the matter was set down for hearing on that day. In the email the claims handler indicated that she had just realized that the matter was set down for hearing on the date of trial.

[8] The matter was allocated the following day on November 14, 2024 before a different judge. Again, there was no appearance on behalf of the Defendant as its legal representative was still booked off sick.

[9] On November 15, 2024 the matter was allocated for hearing before a third Judge. On the day there was no appearance on behalf of Defendant. He then looked for the Defendant's legal representative and found him running a full three-day trial for a different matter. He argued that this justifies punitive costs. The matter was then returned for further allocation.

[10] Ms Ameersingh made herself available to take over the matter on November 15, 2024. The Defendant made an offer for Past and Future Loss of Income of November 15, 2024. There was no offer or rejection of general damages on November 15, 2024. Plaintiff's Counsel argued that Defendant's failure to reject or admit General Damages kept the matter alive. According to him, Plaintiff was justified to attend Court to prove his case for General Damages. Defendant seeks costs on an attorney and own client scale as a punitive costs order against Defendant.

[11] The basis of Plaintiff's argument was that the legal representatives who represent the Defendant are employees of the Defendant, and their salaries are paid by the Defendant. He argued that the Defendant should take responsibility for its employees' failure to appear in Court on trial day. Hence his argument for punitive costs against Defendant.

[12] On November 18, 2024 there was no allocation for the matter and there were no appearances by either of the parties.

[13] The matter was then allocated for hearing before me on November 19, 2024.

[14] Defendant submitted that the claim was lodged in 2020 and in 2021 there was a widespread COVID-19 pandemic. This affected the speed that the Defendant could process the claim. The Road Accident Fund Act¹ requires that supplementary documents must be submitted to enable Defendant to make an assessment of the claim that has been lodged.

[15] Defendant called Mr Ngomane as a witness who was initially appointed as its legal presentative. Mr Ngomane confirmed that he was allocated the matter as Defendant's legal representative. Unfortunately, he fell sick on November 13, 2024. When Plaintiff's attorney contacted him to enquire about his whereabouts, he indicated that he was at a medical facility. He sent an email to alert the Judge that he was unable to attend Court as he was at a medical facility.² He also communicated with Plaintiff's Counsel about his situation.

[16] He testified that he was made aware of the allocation of the matter to another Judge on November 15, 2024. At that stage there was only one outstanding issue and that being the General Damages. He then sent a message indicating that he was in another Court. He received a message from Plaintiff's attorney enquiring about General Damages. He requested a ballpark figure and Plaintiff's attorney indicated R2 Million. In his reply he asked if the Loss of Earnings was accepted, what was the reason for proceeding with the matter as there was no acceptance or rejection of General Damages. In his view the Court had no jurisdiction to determine General Damages.

[17] Under cross-examination he testified that the standard procedure is that they get allocated matters a week before the hearing date. They do not deal with claims handlers, instead, there is a person who liaises with Court officials to obtain a court

¹ Road Accident Fund Act 56 of 1996.

² See Caselines on 076-1

roll, thereafter, matters are allocated to State Attorneys. This person has an office at the State Attorney's offices. When he experienced health difficulties, he informed the person allocating the matters to them.

[18] He was summoned to come to Court on November 13, 2024, and he advised the Judge that he was heavily medicated and could not proceed with the trial. After the offer for settlement of the matter for Loss of Earnings he was allocated another matter, hence his appearance in Court for a different matter on November 15, 2024.

[19] Defendant's Counsel argued that the matter stood down to Monday at the instance of Plaintiff's Counsel. She attended at the offices of the Deputy Judge President on November 18, 2024 and was advised that the matter was not allocated to a Judge. She argued that according to *Road Accident Fund v Duma*³ the Supreme Court of Appeal stated that the Court does not have jurisdiction until the Fund has either accepted or rejected General Damages. If the Fund has accepted or rejected General Damages, the issue must be submitted to Health Professions Council of South Africa ("HPCSA").

[20] Defendant's Counsel further argued that notwithstanding her submission that the court has no jurisdiction to determine General Damages, Plaintiff is not without remedy. Plaintiff can exhaust remedies available in terms of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA").

[21] What the Supreme Court of Appeal said in *Road Accident Fund v Duma* is the following:

"...

[19] ... In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages

³ *Road Accident Fund v Duma* 2013 (6) SA 9 SCA

if the Fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious. Appreciation of this basic principle, I think, leads one to the following conclusions:

(a) Since the Fund is an organ of State as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regulations 3(3)(c)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as 'serious', constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A 'decision' is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA.

(b) If the Fund should fail to make a decision within reasonable time, the plaintiff's remedy is under PAJA.

(c) If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within a reasonable time or because no legal or medical basis is provided for the decision or because the court does not agree with the reasons given.

(d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.

(e) Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to the court. The court's control over these decisions is by means of the review proceedings under PAJA.

...

[20] To recapitulate; if the Fund rejects the RAF 4 form – with or without proper reasons – it means that the requirement that the Fund must be satisfied that the injury is serious has not been met. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection

on appeal in terms of regulation 3(4). It follows that the rejection cannot be ignored merely because it was not raised within a reasonable time. This does not mean, as was suggested, for instance in Louw v Road Accident Fund... that the Fund can avoid and frustrate every claim against it indefinitely by simply not taking a decision either way. The solution is to be found in s 6(2)(g) read with s 6(3) of PAJA. These sections provide that if an administrative authority unreasonably delays to take a decision in circumstances where there is no period prescribed for that decision, an application can be brought for judicial review of the failure to take the decision".⁴

[22] To further substantiate her argument Defendant's Counsel relied on the Supreme Court of Appeal judgment of Road Accident Fund v Faria⁵ which followed the RAF V Duma⁶ decision on the procedure and the law that obtains regarding General Damages claims. She argued that the case ended on November 15, 2024 when the offer for Loss of Income was made and accepted. The matter should have been removed from the trial court roll.

[23] Upon reading the papers that were filed, I noted that an email from Defendant's Counsel indicates an offer for settlement of Loss of Earnings and concludes by stating that "*GENERAL DAMAGES to follow*".

[24] On acceptance of this offer by the Plaintiff what then remained to be resolved was the issue of General Damages. Plaintiff's Counsel argued that the RAF V Duma⁷ decision does not say that the Court does not have jurisdiction to determine General Damages. He argued that Plaintiff was entitled to refer the matter to Court for resolution of General Damages. I do not agree with this submission. As indicated above, the Supreme Court of Appeal has clearly settled this area of the law.

[25] Applying the decision of the RAF v Duma, this Court would have no jurisdiction to determine General Damages. Once the issue of Past and Future Loss of Income was settled, what remained was for the parties to refer the settlement

⁴ See note 3 supra.

⁵ RAF v Faria 2014 (6) SA 19 (SCA).

⁶ See note 3 supra.

⁷ See note 3 supra.

agreement to be made an order of the Court. Regarding General Damages, the matter ought not to have been referred to trial Court as the Court would not have jurisdiction to determine General Damages. Plaintiff had at his disposal the remedies set out in the *RAF v Duma* decision, including PAJA remedies as well as referral to HPCSA.

[26] This Court's finding is that once the matter was settled on Loss of Past and Future Income, it was not competent for Plaintiff to still refer the matter to trial court for determination of General Damages.

[27] On the issue of costs on an attorney and own client scale, there are various factors which guide the court on whether such a punitive costs order is justified. The unreasonable manner in which a litigant conduct itself is one of the factors to be considered.⁸ In *Boost Sports v SA Breweries* the Supreme Court of Appeal stated the following:

“ ...

[27] In the language of Lombard (at 877), when a company has everything to gain and nothing to lose, it would be putting a premium upon vexatious and speculative actions if such practice (namely compelling security) were not adopted. In re Alluvial Creek Ltd 1929 CPD 532 at 535 Gardiner J said in the context of punitive costs order:

‘Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be

⁸ See *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) .

*regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear’.*⁹

[28] Regarding the grounds upon which the punitive costs order on an attorney and own client scale may be awarded the court in *Machett v Pretorious and Others*¹⁰ stated that:

“ ...

[8] *Costs on an attorney and client scale is not to be awarded lightly and should be considered in the light that a person who exercised a right to obtain a judicial decision not be penalized for doing so. The grounds upon which such an order may be granted is where a party has been guilty of dishonesty or fraud or was vexatious or malicious or for frivolous motives brought the said application or action’.*¹¹

[29] In *Public Protector v South African Reserve Bank*¹² the Constitutional Court stated the following:

“... Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court-

‘(t)he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium’.

...”

[30] In *Mkhatshwa and Others v Mkhatshwa*¹³ the Constitutional Court stated that: “*Generally speaking, punitive costs are not frequently made, and exceptional circumstances must exist before they are warranted’.*¹⁴

⁹ See note 8 supra.

¹⁰ *Matchett v Pretorious and Others* (3119/2022) [2022] ZAKZPHC 60 (12 October 2022).

¹¹ See note 10 supra.

¹² *Public Protector v South African Reserve Bank* 2019 (6) SA 253 CC.

¹³ *Mkhatshwa and Others v Mkhatshwa and Others* [2021] (10) BCLR 1191 (CC).

[31] Before concluding this issue, it is important to summarize the basis upon which Plaintiff claims for punitive costs on an attorney and own client scale. Plaintiff's argument is based on non-appearance by Defendant's Counsel on the dates that the matter was scheduled for hearing. Plaintiff argues that Defendant should have found a substitute legal representative upon being made aware of unavailability of the allocated legal representative. He argued that the Defendant is the employer of the legal representatives not the State Attorney. This argument was not sustained by any evidence. On the contrary, Mr Ngomane testified that they are allocated matters by someone employed by the State Attorney.

[32] As indicated above, the matter was settled between the parties on November 15, 2024 in respect of Loss of Past and Future Income. Defendant tendered costs on a party-to-party scale. Later, and before the matter appeared before me, parties had also settled on General Damages.

[33] There is no tender for costs for November 18, 2024, and November 19, 2024. It is common cause that the matter was not allocated for hearing on November 18, 2024.

[34] When the matter appeared before me on November 19, 2024, parties had settled on Loss of Past and Future Loss of Income and General Damages. What remained was to make the draft order arising from the settlement agreement an order of court and a determination on whether Plaintiff is entitled to costs on an attorney and client scale.

[35] It is trite that the award of costs is within the court's discretion. This discretion is exercised judiciously upon consideration of all relevant factors. The purpose of the cost award is to mitigate against successful litigants being out of pocket because of litigation process that they should not have been involved in but for the opponent's conduct in such litigation.¹⁵ Punitive costs are awarded to alleviate the successful

¹⁴ See note 13 supra.

¹⁵Vehicle Delivery Services a division of Onelogix (Pty) Ltd v Key Group and Another (4655/2021) [2023] ZAFSHC 141 (11 May 2023).

litigant's financial hardship endured because of the litigation. Exceptional circumstances must exist before punitive costs are awarded.¹⁶

[36] I am not persuaded that Defendant conducted itself in an unreasonable manner that justifies a punitive costs order. Defendant took steps to appoint a legal representative who fell sick on the date of hearing. This is clearly beyond control of the Defendant; I do not believe that Defendant should be mulcted with punitive costs arising from non-appearance occasioned by the ill health of its legal representative. Also, the matter was not allocated for hearing on November 18, 2024, there is therefore no party entitled to costs for November 18, 2024.

[37] What then remains is appearance before me on November 19, 2024. I have already stated that this matter was not legally competent for hearing at trial court on November 19, 2024 as the trial court has no jurisdiction to determine General Damages. At the very least, parties could appear in the settlement court to seek an order making the settlement agreement an order of the court. This is because when parties appeared before me the matter was already settled for Loss of Past and Future Income and General Damages. I see no reason for a punitive cost order in this regard.

[38] In the result I make the following order:

1. In respect of Plaintiff's claim for Past and Future Loss of Income and General Damages an order is made in terms of the amended draft order marked "X".
2. The Defendant shall pay the Plaintiff's party and party legal costs on the applicable **High Court** scale to date hereof, including the costs of Plaintiff's counsel for November 13, 2024, November 14, 2024, November 15, 2024 on a Party and Party Scale C, and the preparation and qualifying fees of the Plaintiff's experts, if any. The said costs shall be payable within 14 days of

¹⁶ See note 14 supra.

the date of taxation or agreed settlement of the party and party Bill of Costs, whereafter interest shall be payable at the rate of 7,75% p.a.

3. The Defendant shall pay the Plaintiff's party and party legal costs, including the costs of Plaintiff's counsel for November 19, 2024 on a Party and Party costs on the High Court scale. The said costs shall be payable within 14 days of the date of taxation or agreed settlement of the party and party Bill of Costs, whereafter interest shall be payable at the rate of 7,75% p.a.

M NTANGA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG LOCAL DIVISION

Date of Hearing: 19 November 2024

Date of Judgement: 3 December 2024

Appearances:

Plaintiff's Counsel: Adv Khan

Instructed by: RA Seedat Attorneys

Defendant's Counsel: Ms Ameersingh

Instructed by: State Attorney - Johannesburg