

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A122/2022

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

In the matter between:

PETER SEMONO

Appellant

and

MUNICIPAL MANAGER RAND WEST

LOCAL MUNICIPALITY

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 30 April 2025.

Summary: An appeal against an order dismissing an action for damages suffered after the plaintiff fell into an uncovered storm water drainage. In the

absence of a proper stated case, a court is incapable of determining a matter and sustained injuries. The court below failed to conduct a proper trial of the action. An agreement between the parties not to lead evidence and accept medico-legal reports as evidence, does not absolve a judge from conducting a trial of issues in accordance with the Rules of this court. A court of appeal derives its powers from section 19 of the Superior Courts Act. Where a hearing of further evidence is required, remitting the case to the court of first instance is appropriate instead of a court of appeal performing the duties of a court of first instance. In view of the fact that the court of first instance did not conduct a proper trial of issues, it is appropriate to remit the matter back to the court of first instance for a proper trial. The decision whether a stated case should be presented is the decision of the litigating parties and not that of a trial judge. Once a case reaches a trial stage, the rule 39 procedure must apply. Held: (1) The appeal is upheld and the order of the Court below is set aside. Held: (2) The case is remitted back to the court of first instance for a proper trial of the action. Held: (3) The respondent is to pay the costs of this appeal on a party and party scale, to be settled or taxed at scale B. Held: (4) The issue of the costs of the aborted trial are costs in the cause to be determined by the court of first instance.

JUDGMENT

CORAM: MOSHOANA, J, VAN DER SCHYFF J and BAM J (concurring)

Introduction

- [1] Rule 33(1) of the Uniform Rules of this Court affords the parties to any dispute, after institution of proceedings, an opportunity to agree upon a written statement of facts in the form of a special case for the adjudication of the Court. When the parties choose not to make use of this opportunity and the case is allocated for a trial, the allocated trial judge should be navigated by the provisions of rule 39. Of pertinence in the present appeal, rule 39(5) directs that where the burden of proof is on the plaintiff, he or one advocate for the plaintiff

may briefly outline the facts intended to be proven and the plaintiff may proceed to the proof thereof. At the close of the plaintiff's case, an absolution from the instance may be applied for by the defendant. If granted, the trial proceedings will terminate. If not granted, the defendant may either close or open its case.

[2] The trial of the present action commenced before the court of first instance beaoned by the learned Mr Acting Justice Nthambeleni. The appellant tendered full evidence of two witnesses. His case was not closed. The peculiarity of this case is that on the second day of the commenced trial, the plaintiff was supposed to proceed with his case dealing with the quantum aspect of his claim, however for reasons that are not apparent anywhere in the transcript, the trial did not proceed. Both representatives before us contended that the Acting Justice, imposed, as it were, to them a stated case process. Allegedly, they both agreed that the expert reports would constitute evidence. I pause to mention that there is no evidence of the alleged agreement being recorded anywhere, other than the *ipse dixit* of the legal representatives. It is apparent that both parties submitted to the Acting Justice what was labelled as stated cases. After adoption of that strange procedure, the Acting Justice handed down the impugned written judgment on 18 August 2021.

[3] It bears mentioning at this stage that the Acting Justice recorded in the written judgment, the following:

“[3] Due to the fact that there were no witnesses for the defendant on both merits and the quantum of the claim, a stated case was commissioned and prepared by both parties in order to narrow the issues that were in dispute and what was agreed between the parties during pre-trial conference.”

[4] ... All expert witnesses of the plaintiff were uncontested.”

[4] Having outlined the features of the present appeal, it reaches us as a sequel of leave to appeal being granted by the Supreme Court of Appeal on 10 February 2022. This after the Acting Justice refused leave to appeal. It suffices to mention at this embryonic stage that we take a view that a proper trial was not

conducted by the Court of first instance. Regard being had to the transcript availed, the appellant had not closed his case, neither did the defendant open or close his case. More importantly, the parties never sought and obtained an order contemplated in rule 33(4) separating the merits from the quantum. It is common cause that the disputed issues of quantum were not adjudicated upon by the Court of first instance. Apparently, such lack of adjudication was occasioned by the presence of a stated case. As it shall be demonstrated later in this judgment, absent a proper stated case, the Acting Justice was not empowered to, as he did, adjudicate this case.

Factual matrix appertaining the present appeal

- [5] In light of the views already expressed above, and given the approach this Court takes at the end, it shall be obsolete to, in this judgment, punctiliously narrate all the facts appertaining the present appeal. The salient facts are that, on one evening of 15 November 2015, the appellant, Mr Peter Semono, took a walk to visit his friend. At the corner of Lembede and Nhlapo streets, Mohlakeng Township, Randfontein, the appellant tripped and fell into an uncovered, unprotected and unmarked storm water drainage. As a result, he sustained serious injuries and received medical treatment at Leratong Hospital.
- [6] He was hospitalised for a period of about nine days. In due course, the appellant instituted a civil action against the Municipal Manager of the Rand West Local Municipality. The action was defended by the Municipal Manager. Pleadings were exchanged and ultimately, the action was enrolled for trial on several occasions. Ultimately, the trial of the action commenced before the Acting Justice on 20 April 2021. On this day, the learned Acting Justice received testimony from two witnesses, which testimony was aimed at proving the merits of the action. Although, the transcript of the proceedings does not bear this out, before us the appellant, in his heads of argument, submitted the following:

“[10] At **the start of the trial** His Lordship Nthambeleni AJ, after having been informed by Counsel for the Appellant that various issues had become settled between the parties at a pre-trial held on 13 April

2021, **directed the parties to submit a stated case**. Counsel for the respective parties were provided until the 21 April 2021 to upload their stated cases, **which was complied with** for Plaintiff/Appellant and Defendant/Respondent respectively.”

- [7] The transcript of the trial proceedings on 20 April 2021 records the following:

“COURT: In that case then, under the circumstances we will have to adjourn this matter until tomorrow for us to be able to proceed with the matter and hear the quantum of the plaintiff in this matter. Under the circumstances the Court is adjourning.

CASE POSTPONED UNTIL 21 APRIL 2021

COURT ADJOURNS

- [8] After the above stated adjournment, there is no shred of evidence demonstrating that the Court resumed on 21 April 2021, in order to proceed and hear the quantum claim of the appellant. As stated at the dawn of this judgment, both counsel submitted that on 21 April 2021, an agreement was reached that the reports of the experts, which were lined up to prove the quantum claim, were admitted as evidence. I interpose to state that this alleged agreement is not mentioned in the written judgment of the learned Acting Justice. It is unclear as to whether it was sanctioned by the learned judge. The judgment vaguely mentions that certain medical experts were employed on the quantum claim and that expert witnesses of the appellant were uncontested. These type of throw away and incoherent statements are with respect disconcerting, to say the least.

- [9] The trial Court having not resumed since the adjournment, the next thing that happened on 18 August 2021 was the handing down of the impugned judgment. Regard being had to the transcript at hand, rendering of a judgment was clearly premature. Chagrined by the dismissal of his action, with an order to pay costs on a party and party scale, the appellant sought leave to appeal from the Acting Justice. As indicated above, leave was refused and only to be granted by the Supreme Court of Appeal.

Analysis

[10] Based on the above stated facts, it is crystal clear to this Court that the learned Acting Justice failed to fully adjudicate the action of the appellant. The appellant had not closed his case, as contemplated in rule 39. The respondent had not opened nor closed his case. Rule 39(6) expressly provides that at the close of the case for the plaintiff, the defendant may apply for absolution from the instance. Although the respondent declared at the commencement of the trial that he shall not be presenting any evidence, such did not debar the respondent to have applied for the absolution from the instance, once the appellant closed his case.

[11] Veritably, having not fully adjudicated the trial action, it was incompetent for the learned Acting Justice to have rendered a judgment dismissing the action. There is simply no legal basis for the Acting Justice to have dismissed the action without hearing the case in full (on the merits and quantum). It is apparent that the Acting Justice was under a misapprehension that he was adjudicating a stated case as he had directed or “commissioned” one. In a stated case proper, no evidence is required because a decision is predicated on agreed facts. Inexplicably, the judgment of the trial Court does not reference any agreed facts or legal contentions of the parties on any legal questions raised with it. Instead, with respect, in a rather tangential fashion, verbosely dealt with the principles applicable to the evidence of a single witness, in the circumstances where the appellant had not even closed his case. On the assumption that the parties made a *volte face* and resorted to a stated case procedure, the *viva voce* evidence of the two witnesses would of necessity be rendered nugatory thereby.

Was there a stated case placed before the Acting Justice?

[12] Absent a proper stated case, there was nothing for the learned Acting Justice to adjudicate, in the circumstances where none of the parties closed their respective cases. Similarly, this Court is unable to place itself in the stead of the

Court of the first instance and adjudicate an incomplete or improperly stated case. The Supreme Court of Appeal in *Minister of Police v Mzingeli and others (Mzingeli)*¹, expressed itself in the following terms:

“[8] It is important to restate the approach to be adopted whenever litigants request a court to invoke rule 33 and determine issues by way of a stated case. It is incumbent upon the parties to ensure that the stated case contains adequate facts as agreed upon between them. Further, the statement ought to also contain the question of law in dispute between the parties and their contentions regarding these questions of law. Wallis JA reaffirmed this in *Minister of Police v Mboweni and Another*:

“It is clear therefore that a special case must set out agreed facts, not assumptions...A judge faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request.

[13] *Mzingeli*, makes it abundantly clear that the procedure in rule 33 has to be invoked by the parties and not to be “commissioned” or directed by a judge. To the extent that the judge below did exactly that, he misdirected himself. It is also abundantly clear that where the facts are inadequately stated, the request for a stated case adjudication should be declined. Before reaching its conclusion and an order of remitting the matter to the court a quo for determination of quantum, the SCA expressed itself in the following terms:

“[13] In this case the quantum of the unliquidated damages claimed by the respondents was hotly disputed. Evidently, damages of the kind claimed by the respondents are by their very nature indeterminate and, as such, require proper assessment by the court. The court a quo acknowledged this much. However, even in the face of such acknowledgement, no evidence was adduced to aid the assessment and quantification of these damages.”

¹ (115/2021) [2022] ZASCA 42 (5 April 2022)

[14] It was accepted by the parties during argument on appeal that determining quantum in this matter by way of a stated case – such as it was – was not the correct approach to adopt. This stance was correct as nowhere in the stated case or the pleadings had the parties agreed on the relevant facts necessary to determine and prove the quantum awarded by the court a quo

[14] With almost similar sagacity and perspicacity, the SCA in *Feedpro Animal Nutrition (Pty) Ltd v Nienaber NO and another (Feedpro)*² expressed itself in the following terms:

“[9] Where the inadequacy of the agreed facts, as recorded in the stated case, was put to counsel for Feedpro during argument of the appeal, he submitted that any such inadequacy may be balanced by drawing the necessary inferences from the agreed facts... Where, as in this case, the agreed facts are discordant, ambivalent and inadequately stated for purposes of deciding whether the Trust’s counterclaim has prescribed, the process of inferential reasoning has no place.

[15] Before reaching its conclusion and an order of remitting the matter for the determination of the special plea of prescription together with the remaining issues in light of evidence to be led, the SCA again expressed itself in the following terms:

“[15] ...The trial court erred in (a)... and (b) deciding the special plea on inadequately stated agreed facts.”

[16] That which the parties and the trial court labelled as a “stated case” is nothing but a recordal of the common cause and disputed facts. No legal question to be decided by the trial court was flashed out. A stated case proper requires agreed facts, a question of law and the contentions of the parties in respect of the identified question of law. By deciding the merits of the appellant’s case on

² (20866/2014) [2016] ZASCA 32 (23 March 2016)

palpably inadequately stated agreed facts, the trial court was perspicuously in error. Accordingly, there was no proper stated case that was placed before the trial court that would have allowed it to adjudicate the action.

Can this Court adjudicate the present action or is remittal appropriate?

[17] As a Court of Appeal, the powers of this Court are legislated and circumscribed. The role of this Court is to exercise appeal jurisdiction. Such presupposes a decision of a Court below. This Court is not possessed with the same jurisdictional powers as a Court of first instance. Section 19 of the Superior Courts Act³, importantly provides as follows:

“Powers of court on hearing appeals

19. The Supreme Court of Appeal or a Division exercising appeal jurisdiction may in addition to any power as may specifically be provided for in any other law –

- (a) Dispose of an appeal without hearing oral evidence;
- (b) Receive further evidence;
- (c) remit the case to the court of first instance or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
- (d) Confirm, amend or set aside the decision which is the subject of appeal and render any decision which the circumstances may require.”

[18] In order for this Court to exercise powers in section 19(d), it must have all the necessary evidence at its disposal. In the present matter, it is common cause that the parties involved herein did not invoke the provisions of rule 33(4). Therefore, the merits and the quantum of the action were to be determined as one *lis*. The transcript availed to this Court clearly indicates that no evidence

³ Act 10 of 2013 as amended.

was led on the quantum aspect of the case. Both representatives contended that an agreement was reached that the expert reports will serve as evidence. Clearly, there is a procedural irregularity with regard to the alleged agreement. This Court lays a blame squarely on the legal representatives of the parties. Both should have known that rule 38(2) offers a bespoke solution to the situation where oral evidence may not be tendered.

[19] The rule provides thus:

“(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.”

[20] It is perspicuous from the text of the rule that the default position is that witnesses must be examined orally. Further, adducing of evidence by way of an affidavit requires an order of the trial court. It must be emphasised that expert reports do not constitute evidence in the absence of an affidavit⁴. It is common cause in the present matter that the expert reports were not accompanied by an affidavit. Given the above legal position, it is difficult to understand the finding by the learned Acting Justice to the following effect ‘All expert witnesses of the plaintiff were uncontested’. The appellant did not present any expert witnesses. Put to its lowest ebb, the case punted for by the legal representatives is that an agreement was reached with regard to the status of the expert reports. Such an agreement is *pro non scripto*. It carries no legal weight.

[21] Regard being had to the above, this Court is effectively faced with half trial as opposed to full trial of the merits and quantum, if the presence of the alleged

⁴ See *Mafisa v Road Accident Fund* [2024] ZACC 4 (25 April 2024).

stated case is discounted. Even if this Court were to make a finding on the merits portion of the case in favour of the appellant, it has no properly tendered evidence on the quantum aspect of the case. It shall be improper for this Court to invoke rule 33(4) process at this stage. Doing so will lead this Court to falling into the pitfall that the SCA has already cautioned about. The SCA in *Feedpro* cautioned thus:

“[15] It is regrettable that the trial court, despite ample guidance from this court deemed it appropriate, in terms of rule 33(4) of the Uniform rules, to separate the special plea from the remaining issues in the trial, without first applying its mind to whether the separation of the special plea was convenient and appropriate in circumstances where, the agreed facts were wholly inadequate and, evidence needed to be led to determine the special plea of prescription... The trial court, accordingly erred in: (a) separating the determination of the special plea from the remaining issues therein, without giving proper consideration to the issues in the trial, and the need for evidence to be led by the parties on these issues...”

[22] If for any reasons, the learned Acting Justice had sanctioned the alleged agreement to admit the reports as evidence, such leaves an indelible impression that the Acting Justice had already pre-judged the merits and knew very well that the alleged agreement would be inconsequential. Impliedly, the trial Court rendered no decision on the quantum issue. It could not do so without receiving proper evidence with regard to the quantum issue. As affirmed in *Mzingeli*, determination of quantum requires proper assessment and evidence to aid the assessment and quantification. This Court is bereft of such evidence to itself conduct a proper assessment. Ineluctably, this Court must exercise its remittal powers and not attempt to determine an incomplete case. Both in *Mzingeli* and *Feedpro*, the SCA having found that no proper stated case was present ordered that the cases should be remitted for a determination after setting aside the orders of the Courts below. Accordingly, since this Court is not in a position to determine this matter due to its inchoate status, the appropriate order to make is for the case to be remitted for a proper determination.

[23] This Court makes common cause with the sentiments expressed by the learned Murphy AJA in *Arends and Others v South African Local Government Bargaining Council and Others (Arends)*⁵. He said:

“[24] The absence of any evidence; the absence of a stated case; and, the manner of its presentation make it impossible for this Court on appeal to determine whether the dispute is indeed one about the implementation of the collective agreement, and, if so, how it should be resolved. This Court cannot resolve the question of jurisdiction or the merits of whether the new grading system had been correctly implemented in terms of the applicable contracts and neither could the arbitrator.”

[24] This Court, in the absence of a proper statement of case, is not in a position to resolve the question of the negligence or otherwise of the respondent. More importantly, in the absence of proper evidence on the quantum aspect of the action, this Court cannot resolve the question of the quantum. Yes, this is melancholic state of affairs, however justice demands a proper hearing of triable issues as enjoined by section 34 of the Constitution.

Findings of the trial Court on the merits

[25] Given the approach to be taken by this Court at the end, this Court advisedly refrains from expressing any view on the correctness or otherwise of any of the findings made by the trial Court on the merits of the action. It suffices to mention that procedurally, absent an order in terms of rule 33(4), the merits issue was incapable of being determined or adjudicated separately. The trial Court beaoned by any judge other than the Acting Justice must re-determine the merits issue and also make a determination on the quantum aspect of this case, either for or against.

⁵ [2015] 1 BLLR 23 (LAC)

[26] I interpose to remark that, it is apparent that the respondents had actually conceded the quantum of the appellant. If such is correct, the quantum may advisedly be settled between the parties.

The instructions of the remittal

[27] Section 19(b) empowers this Court to issue instruction with regards to the taking of further evidence. In the interest of justice and expediency, it shall be inappropriate to have the evidence rehashed. A transcript has been produced of the evidence tendered before the Acting Justice. Section 15 of the Civil Proceedings Evidence Act (CPEA)⁶, with regard to the admission of a record and sufficiency of evidence, provides the following:

“Sufficiency of Evidence

15 It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.”

[28] The respondent has already stated the following:

MR BUCKSTEG... well we do not have any witnesses or expert witnesses so we will only rely on cross-examination of the witnesses...”

[29] *Ex facie* the written judgment of the Acting Justice, it is apparent that in an attempt to free the respondent from the conundrum expressed above, a stated case was commissioned. As discussed above, such was an improper approach to adopt in the trial⁷. The so-called stated cases do not in any event meet the requirements⁸ of rule 33(2)(a), which provides:

“(2)

⁶ Act 25 of 1965 as amended.

⁷ See *Arends* para 23.

⁸ The Court in *Arends* cautioned that practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case. (para 17)

(a) Such statement shall set forth the facts agreed upon, the question of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party”

[30] Without dictating to the trial Court judge, this Court, subject to the trial judge’s approval, suggests to the parties to submit the transcript as prove of the evidence already tendered. At the hearing of this appeal none of the parties contended that the transcript is deficient in any shape or manner. Certainly, since there is no evidence of any of the parties having closed their respective cases at the aborted trial, there is nothing that will prevent any party from adducing further evidence. With regard to the agreement on the status of the expert reports, this Court has already expressed a view that such was improper. If the quantum issue is not settled, although it is advisable for the respondent to seriously consider settlement thereof, the determination of the quantum issue requires a proper presentation and assessment or determination thereof, as discussed above.

The issue of costs

[31] On application of the principle of costs following the results, the respondent must pay the costs of the appellant. He succeeded in setting aside the order of the trial Court. Accordingly, an award of the costs of this appeal is warranted. What then remains for determination is the costs of the aborted trial proceedings. Such costs should be costs in the cause. Accordingly, this Court leaves the determination of such costs within the province of the trial court.

Conclusions

[32] Sadly, the parties have to be sent back to the trial Court simply because no proper trial was conducted. The Acting Learned Justice failed to appropriately determine the action. The legal representatives of the parties are complicit too. If this Court accepts that the Acting Justice commissioned a stated case, they ought to have resorted to the rules and comply with them. They ought to have known of the procedure populated in rule 38(2), yet they opted to invoke some other strange procedure of agreeing to accept the reports as testimony with no accompanying affidavits.

[33] Howbeit, it is this Court's considered view that since no proper trial was conducted, the order of the trial Court must be set aside. This Court, in the circumstances of this case, is not in a position to separate issues and determine any issue separately. The issue of quantum did not receive any determination or decision. An appeal lies against the decision of a Court and not the reasons advanced. Without the benefit of a decision for or against on the quantum issue, this Court has nothing to determine. Ironically, the Acting Justice, when the appellant sought a postponement of the trial to the following day, lamented a waste of judicial time. Regrettably, the approach he adopted has instead led to the waste of judicial time. Remittal has since become ineluctable.

[34] A caution is not necessarily out of place. No judge should entertain a case or agree to entertain a case based on a stated case, in the circumstances where the requirements of rule 33 are not complied with. It must be emphasised that the decision whether litigants wish to proceed by way of a stated case or not, is solely theirs and not that of the judicial officer. A judicial officer cannot commission a stated case under any circumstances. Once a trial is allocated to a judicial officer, it has to be conducted in accordance with rule 39.

[35] On account of all the above reasons, I propose to make the following order.

Order

1. The appeal is upheld.

2. The order of the Court below is set aside.
3. The matter is remitted to the trial Court to be properly determined by a single judge.
4. The respondent is to pay the costs of this appeal on a scale of party and party to be settled or taxed on scale B.
5. The costs of the aborted trial shall be costs in the cause to be re-determined by the trial Court.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

E VAN DER SHYFF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

(I agree and it is so ordered)

N BAM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

(I agree and it is so ordered)

APPEARANCES:

For the Appellant:

Instructed by:

Ms B Botma

Noko Phago & Associates, Pretoria

For the Respondent:

Instructed by:

Mr H Bucksteg

Fick Attorneys, Randfontein.

Date of the hearing:

16 April 2025

Date of judgment:

30 April 2025