



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

[1] REPORTABLE: YES
[2] OF INTEREST TO OTHER JUDGES: YES
[3] REVISED: YES

 RE

DATE: 27 February 2025

Case Number: 2020 / 29957

In the matter between:

MASHABELA: MITA AGNES

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Summary:

Procedure - Uniform Rule 19 (5) – application thereof – automatic removal from the roll with a tender for costs

Procedure - Uniform Rule 19 (5) – application thereof – should the Defendant require a postponement then such application is required notwithstanding

Notice of Intention to Defend – effect thereof - It has become a practice of litigants to delay delivery of their Notice of Intention to Defend and to deliver same at the latest moment. The assumption that Rule 19(5) creates an automatic removal from the roll with a tender of costs is incorrect.

ORDER OF COURT

The following order is made:

1. The Defendant is liable for 100% of the Plaintiffs proved or agreed damages arising from the motor vehicle collision on 25 January 2019;
2. The determination of the quantum of damages is postponed;
3. The Defendant shall pay the Plaintiffs costs of the hearing on 23 and 25 September 2024 and 1 October 2024 and the costs of preparation of plaintiff's heads and supplementary heads of argument, on Scale B.

JUDGMENT

ZUBAIR KHAN AJ

INTRODUCTION

- [1] The Gauteng High Court Rolls have become severely backlogged with trial dates currently being allocated for hearing, up to 5 years after close of pleadings and opposed motions being heard almost a year after application for a hearing date. Default Judgment hearings are suffering a similar fate with waiting periods exceeding 6 months.
- [2] These delays are in no small part attributable to the vast number of 'Road Accident Fund' cases occupying places on the Court Rolls and consuming limited judicial resources, where the vast majority ought to have settled at a very early stage and the public purse protected from excessive legal costs. As will be demonstrated, this matter ought never to have proceeded to this stage of litigation and is no more than a stoic illustrate of the rot.
- [3] In order to alleviate the backlogs, the Judiciary embarked on a project of entertaining RAF default judgement hearings during the September 2024 recess, with the assistance of Acting Judges from the profession. The present matter features as one such illustration of default judgment being sought during the September 2024 recess.

BACKGROUND TO THE LITIGATION

- [4] The Plaintiff (a member of the South African Police Service in a police vehicle and on her way to the local shopping centre) was the driver of a motor vehicle involved in a collision on 25 January 2019 in Protea Glen, Soweto, Gauteng. Her previous attorneys lodged her claim with the Defendant on an unknown date. Thereafter, section 24(6) of the RAF Act afforded the Defendant a 120 days moratorium, before a summons may be issued. This hiatus period is valuable for purposes of properly process Claimants' claims, investigate the claims, securing evidence and to engage with Claimants in settlement.
- [5] Like most all other RAF cases before the Court, it does not appear that the RAF converted this 120-day interest free holiday to value. There are no indications that any investigations, subpoenas, inspections in loco and witnesses were actioned to benefit the RAF. The inescapable view appears that these claims lodged by victims of motor vehicle accidents, are simply filed away by the RAF until the very last moment when there is no alternative other than to confront the reality of an impending payout.
- [6] The Plaintiff subsequently issued her summons on 8 October 2020 and service by Sheriff was carried out on 3 November 2020. The RAF did not deliver a notice of Intention to Defend within the 'allowed 10 days', in accordance with Rule 19(1) of the Uniform Rules of Court. No explanation was ever forthcoming for this lapse.

[7] The matter limped along, apparently under the auspices of a different firm of attorneys, until the present attorneys took over and quickly brought the matter to life by seeking a default judgment. An application for separation of issues was filed on 15 March 2024. The matter was initially set down for default judgment on 3 December 2024 and notice of this date was served on the Defendant on 5 July 2024.

[8] Subsequent to expedited dates being allocated, the matter was then again set down for default judgment on 18 July 2024 for hearing on 23 September 2024. A further Notice of Setdown was delivered on the Defendant on 19 July 2024 and also by email on a plethora of email addresses belonging to the Defendant. It is beyond any doubt that the Defendant (through its institutional knowledge) was aware of this matter proceeding to Court.

THE QUESTION OF LIABILITY

[9] This matter appeared on 3 different days before Court for default judgment but more on the lengthy process below.

[10] On the final date, being 1 October 2024, when the matter did eventually proceed, Mr Serfontein for the Plaintiff moved an application in terms of Uniform Rule 38 for the admission of the Plaintiffs statutory affidavit, relating to how the accident occurred and also for the admission of the witness statements of two witnesses. This application was granted without opposition.

- [11] The Plaintiffs evidence then before the Court was that she was the driver of a motor vehicle on the evening of 25 January 2019 along Protea Glen, Soweto, Gauteng. As she approached a set of traffic lights at the intersection adjacent to the entrance to Protea Mall, she used the vehicles indicator to advise other road users of her intention to execute a right turn of her vehicle. The traffic right indicated a green turning arrow for her and after making sure it was safe to turn, she began executing a right turn.
- [12] Plaintiff goes on to explain that suddenly, a vehicle travelling in the opposite direction, skipped the traffic light and collided with the passenger side of her motor vehicle. The Plaintiffs statutory affidavit goes on to state that the road was dry and visibility was good.
- [13] The two witness statements admitted into evidence and simultaneously commissioned at Jabulani Police Station (where Plaintiff is stationed as a Police Officer) on 4 September 2024, confirm what the Plaintiff says in her statement. The Plaintiff closed her case without any resistance from the Defendant.
- [14] The Defendant was afforded the opportunity to make submissions in these default proceedings. A defendant who is without a pleaded defence may, notwithstanding, still participate in the proceedings and challenge the plaintiffs version within the confines of the Plaintiffs case before a Court¹. This has the potential to prove valuable as a Presiding Officer may not cross examine the Plaintiffs version of event.

- [15] In rebuttal, Ms Tivana, for the Defendant attempted to draw my attention to the Police Accident Report Form, presumably completed by a member of the South African Police Service and made available by the Plaintiff as part of the lodgement of the claim with the RAF. Mr Serfontein, wasted no time, objected to this document being placed before the Court without the appropriate application being made to adduce this document as evidence, or in the absence of the testimony of the Police Officer who presumably completed this document.
- [16] Ms Tivana complained that the Plaintiff was being 'unfair' as she had allowed their documentation to be received by the Court unchallenged and the Plaintiff was not reciprocating her kindness. After much protestation from Ms Tivana, I ruled in favour of the Plaintiff and the photocopied documents were not received into evidence, as it was not properly before Court and its probative value questionable.
- [17] Notwithstanding disallowing the documents and not placing any reliance on its contents as I disabused my mind thereof², I note the following salient aspects of these documents, which were before me during preparation for the hearing. One can speculate as to their bearing on the outcome of this litigation if the documentation were properly before me. I mention this mode of litigation by the RAF merely to tie same into the punitive cost order later sought by the Plaintiff, who submits that this liability aspect of the litigation ought to have been long ago settled by the RAF without a waste of legal costs.

- [18] The document appears to indicate that the Plaintiff was a member of the South African Police Force, driving a police vehicle, stationed at the same Jabulani Police Station where the witness statements were commissioned during 2024, was carrying passengers for reward, was on her way to a shopping mall in the said Police Vehicle, and that the weather condition was rainy and wet, despite Plaintiff saying there was no rain.
- [19] Further for purposes of observation, a further document uploaded and described as a Police Docket also contained documents purporting to be affidavits. One such purported affidavit (again not admitted nor any witnesses led) claiming to be that of an occupant of the insured vehicle, who claims that the robot was green for the insured driver and the Plaintiff was not entitled to proceed to cross the insured driver's path of travel. This person's complete contact details including his address, were recorded in the document. There is no explanation before me as to why this person was not called to testify.
- [20] Another document that was available appears to be a further affidavit by the Plaintiff in which she states that she is a Detective Constable at Jabulani Police Station and was in a Police Vehicle when she decided to visit the Protea Glen Mall at the time of the accident. She appears to claim the traffic lights were red for the Insured Driver and green for her to turn.
- [21] Plaintiff does not say how she could have made this observation in relation to traffic lights facing the opposite direction to her. She also claims that the Insured Driver 'came rushing on to me' without saying more about when she observed

the insured vehicle or what evasive manoeuvres she adopted to avoid the collision. It was a straight road with no bends and I have no explanation for why the Insured Vehicle was suddenly brought into her line of sight.

[22] Yet another document made available in this alleged Police Docket purports to be an affidavit from the passenger in the Insured Vehicle. He alleges that as the Insured Vehicle had right of way to cross at a green traffic signal and was proceeding, the Plaintiffs vehicle was driving at speed and it did not enjoy the right of way. Again, no explanation as to why this witness was not called – let alone why no appearance to defence was timeously entered or whether the RAF carried out any investigations in relation to these statements.

[23] The 'Police Docket' documentation was lodged by the Plaintiff as part of the claim lodgement process. Dare I say that the RAF merely received these documents and filed them away as there is no indication of any investigations being carried out. More on that process later.

[24] The RAF did not subpoena or call any of these witnesses to testify or attempt to properly place any of these documents before the Court. In passing, it appears that there is much more that the RAF could have done to put up a defence of the Plaintiff claim in this matter and attempt to limit the liability. It appears clear that the RAF did not prepare this matter, did not appear to have been alive to the litigation proceeding before Court at an early enough stage and did not engage in any cost saving exercise.

[25] It is also unclear as to why the RAF, either did not concede liability at a very early stage and save legal costs that will inevitably follow or present witnesses, an accident reconstruction or even seek to cross examine the Plaintiffs witnesses. The Defendants participation in this appearance did not advance its position but rather added to its legal-fees woes. I am yet to understanding what purpose the Defendants attendance at this Court served other than to create the impression that the matter was opposed.

[26] The Defendant did not plead a defence but it would appear from submissions that the Defendant contented for either contributory negligence or complete negligence of the Plaintiff. This was not borne out by the evidence before me that I accept as probable.

[27] The Plaintiffs version before this Court is uncontested and success must follow. I find the Defendant to be 100% liable for the Plaintiffs yet to be proved or agreed damages.

COSTS

[28] Pertinently, this judgment turns on the issue of costs as the question of liability was uncontroversial on the evidence before me.

[29] The Plaintiff sought a punitive cost order arising from the late filing of a notice of intention to defend by the RAF and its initial reliance on Rule 19(5) to insist on a postponement of this litigation from the default judgment Court.

[30] The Plaintiff complained of an abuse in this matter and the general conduct of the Road Accident Fund in its approach to the Courts and its legislative obligations to victims of motor vehicle collisions and the public purse in general.

[31] The Road Accident Fund had cottoned on to Uniform Rule 19 (5) as a possible avenue of tendering unopposed costs to a Plaintiff on the day of the hearing and forcing an automatic postponement of a case as same is now 'opposed' and must proceed to 'trial court'. A delay of years in having a matter before Court is met with a tender of costs by the RAF and an automatic postponement for possibly another 5 years, without interest. This is the very thesis of 'kicking the can down the road'.

THE NOTICE TO DEFEND

[32] On the first morning of the hearing of this matter, being 23 September 2024, the RAF representative arrived at Court, armed with a Notice of Intention to Defend. The Notice of Intention to Defend was uploaded to the electronic court filing system (caselines) and was addressed to the Plaintiffs erstwhile attorneys, Mssr Nyakala Attorneys and not the Plaintiffs current attorneys of record, Mssrs DeBroglia. The document was further emailed to the previous attorneys at 09h39 on the morning of the hearing of the matter, some 21 minutes before Court was due to go into session.

- [33] The Defendant appeared confused as to who the Plaintiffs attorneys of record were. Mr Serfontein assured me that the necessary substitutions had taken place timeously and this is borne out by volumes of uploaded correspondences from the Plaintiffs current attorneys to the Defendant.
- [34] The matter stood down to 25 September 2024 as the Defendants representative, Ms Tivana was not available. She was allotted further hearings during the default judgment week and was before different Courts. It is to be observed that the Defendant has deployed a limited number of representatives to move between the numerous trial and motion courts.
- [35] In a busy Division such as this, Judges are often left waiting for a representative of the Defendant to become available to attend to a matter. It remains unclear if this practice constitutes double briefing³ but it is a practice that is the direct cause of disturbances in the efficient functioning of the Court.
- [36] On 25 September 2025 and upon Ms Tivana's arrival, Mr Serfontein sought a punitive cost order against the Road Accident Fund arising from their delay in entering a Notice of Intention to Defend as well as their conduct throughout this litigation. It was argued that the conduct of the Defendant constitutes an abuse of process, a defeat of the ends of justice and was vexatious.
- [37] As Ms Tivana, the representative of the Defendant, was caught unawares and unable to explain the conduct of the RAF throughout this litigation, I directed affidavits be filed by the responsible officers entasked with the management of

this matter, to explain the belated notice of intention to defend. The affidavits later filed by persons employed at the Defendants offices are, to put it kindly, unhelpful. The documents do not talk to the delay but merely serves to obfuscate and avoid personal blame to the respective authors. No cogent explanation is put up for why the Defendant did not defend the matter for 4 years or what steps were taken to properly investigate the matter, secure witnesses or make an offer of settlement at an early stage, if so advised.

[38] This matter then proceeded in all earnest on 1 October 2024 for a determination of the separated issue of liability and the outcome of the liability trial is set out above. Noteworthy is that the Defendants tact changed with the passage of time in that the Defendant did not wish to pursue the argument of an automatic postponement of the matter on its reading of Uniform Rule 19(5), but the Defendant now wanted to 'defend' the matter at Court.

[39] It would appear that the passage of time afforded the representatives of the Defendant an opportunity to get their house in order, either to settle matters or to achieve some semblance of readiness before a Court. This observation is founded on the basis of the totality of the matters appearing at default judgment Court in the given week.

LEGAL PRACTICE ACT

[40] At the commencement of proceedings, Mr Serfontein objected to the appearance of the representative for the Defendant, Ms Tivana. The various persons representing the Defendant at this Division describe themselves as 'State Attorneys'. The Plaintiff objected to this representation as falling foul of section 34(5) of the Legal Practice Act⁴. The submission was that the legislation afforded a closed list of persons the consent to act as an attorney. These include practitioners for their own account or as part of a commercial juristic entity, at a law clinic, at Legal Aid South Africa, at the South African Human Rights Commission or an attorney 'in the full-time employment of the State as a State Attorney'.

[41] Mr Serfontein submitted that the various representatives of the Defendant are not 'in the full time employ of the State as a State Attorney', as required by the Legislation. He posits that the representatives are employees of the Road Accident Fund and answer to the Road Accident Fund, with a notional title of 'State Attorney'.

[42] I preliminarily enquired from Ms Tivana if she enjoyed a contract of employment with the Department of Justice in the designation of State Attorney. She advised that she was a full-time employee of the Defendant and received her salary from the Road Accident Fund, but that she was 'seconded to the office of the State Attorney' in terms of a memorandum of agreement between the two offices. She also informed that neither her colleagues nor she held physical offices at the State Attorneys premises. She worked from home and reported to the Defendant. It further emerged that there was no reporting structure within

the offices of the State Attorney for these employees of the Road Accident Fund.

- [43] On the basis of this preliminary enquiry, I enquired from Mr Serfontein if he desired to pursue this line of argument for which I would require properly presented written submissions from both parties before me. After taking instructions, the Plaintiff abandoned the submission. Accordingly, this line of complaint died a natural death and Ms Tivana proceeded to represent the Defendant. I mention this aspect only in relation to the extended duration of this matter before me.

UNIFORM RULE 19(5)

- [44] As a motivator for a punitive cost order, the Plaintiff argues that the Defendant in this and a number of other matters before the Courts, customarily arrive on the morning of the default judgment hearing armed with a notice of intention to defend and demanding that the matter be removed from the default judgment roll, as the matter is now defended. This is often years after the 10-day period allowed to the Defendant to deliver an appearance to defend.

- [45] The present Notice of Appearance to Defend is some 46 months late and I pause to mention that a number of other matters before me in this particular court week were more than 3 years late and all suffering the same malady of the Road Accident Fund arriving on the morning of the default judgment with a

Notice of Intention to Defend and invoking Uniform Rule 19(5) for an automatic postponement of the matter.

- [46] No explanation is forthcoming for why claims are being processed and settled at the pace of an arthritic snail or why the RAF wakes up on the morning of the hearing to action a postponement. Once the threat of a postponement looms large against a Plaintiff, then the real engagements begin and the Plaintiffs and Defendants quickly settled in almost all of these Road Accident Fund cases. The consequences of this conduct are self-evident as the court rolls grow longer by the day. There is no explanation for why the claims are only being assessed on the day of the hearing or just shortly before. There is no indication of when the RAF seriously begins applying its institutional mind to these claims.
- [47] One must question if the Plaintiffs are occupying slots on the roll as a last attempt to force the RAF to make a settlement offer or if these matters are genuinely ripe to proceed on the basis that there is some triable issue. The invariable outcome is that Judges read hundreds of pages of documentation in these matters, only to have these matters removed from the roll, on tender of costs in terms of Rule 19(5) or for the matter to settle at the corridors of the Court. Judges are being assigned away from the normal civil and criminal trial rolls to attend to these matters where the Plaintiff wants a settlement offer and the Defendant will only make a settlement offer on the day of hearing at Court or just before. The Judiciary is an unwilling partner to this 'horse trading' process and the lay litigant is a victim waiting up to 5 years to have their day before Court.

[48] The Plaintiff argues that this abusive conduct warrants a punitive cost order as the Defendant has no serious desire to oppose the proceedings but merely seeks to use the rules of Court as a sword of Damocles to force a settlement at risk that Plaintiff might face an automatic postponement of the matter now ripe before Court. The Rules of Court are being abused for an ulterior purpose.

[49] In order to obtain clarity as to who instructed the late filing of the Notice to Defend, I was informed in open Court by the various State Attorneys appearing before me that there was a standard longstanding practice that already existed prior to each of these State Attorneys taking up employment, that they should enter an appearance to defend in every matter where no Notice to Defend had been filed. The practice, if it does exist, has been inherited with no understanding of its initial purpose, if any did exist.

[50] It also emerges that these State Attorney are only informed by the Road Accident Fund of cases allocated to them late in the week before the hearing, if they are fortunate, and they must enter an appearance to defend. They inform me that they sometimes do not hear from the RAF and establish from the published court rolls, of what cases are coming up for hearing in the next week and then enter a Notice of Appearance to Defend. There is no explanation for why this is not detected or actioned at the stage when the Notice of Setdown is served on the Road Accident Fund or who assesses the legal and cost repercussions of entering an appearance to defend. It is all mechanical.

- [51] One is left questioning if these State Attorneys are acting without instructions from a client or a directing mind at the Road Accident Fund and what is their personal liability and the implication for the Road Accident Fund, that might not want to enter an appearance to defend a particular matter but now finds itself exposed to punitive cost orders. There is a growing call for personal liability of State Officials⁵.
- [52] What then remains is the Plaintiffs complaint that the Road Accident Fund had delivered the appearance to defend only to force a postponement and that was an abuse of the Rules of Court. There is merit in this complaint.
- [53] The mechanism creating the environment for this potential abuse is Uniform Rule 19(5). It affords a Defendant an opportunity to deliver a Notice of Intention to Defend at any late stage prior to default judgment being granted.
- [54] In *Nathram*⁶, the resolution of the complaint took the form of an opposed interlocutory application in terms of Uniform Rule 30, with sets of affidavits being filed and a stand down of the trial, to declare the Notice of Intention to Defend as an irregular step and set aside. This invariably implicates more judicial resources and matters remaining on the roll for a period longer than necessary. Davis J, in labelling the Defendant a 'delinquent litigant', sought that the relief to set aside the Notice to Defend be done sparingly and case specific and only after the Defendant is afforded its rights to be heard.

- [55] In a similarly crafted application⁷, the Court refused to set aside the Notice to Defend but I am unable to discern the contents of the opposition or the full reasons of the Court. This approach of employing Rule 30 has Plaintiffs scurrying off to settle applications to set aside the Notice to Defend, all while the presiding Judge waits for this application to become ripe. Alternatively, the matter is removed from the trial roll, later enrolled before a Court hearing applications and then finding its way back before a default judgment court, with the consequence that the matter is postponed. Clearly, this approach burdens the administration of justice further.
- [56] This process also requires a Plaintiff proactively taking steps to fend off the Road Accident Fund by launching an application in terms of Rule 30, all whilst the Road Accident Fund need only deliver a Notice of Intention to Defend and some semblance of an opposing affidavit. The Court is then left to sift through the Road Accident Funds intentions of whether it has an actual genuine intention to defend a matter, sparingly and on a case-by-case basis.
- [57] I am unable to agree that a Notice of Intention to Defend is an irregular step. The Uniform Rules of Court make provision for such a process, even at a late stage. I therefore disagree with the *Nathram* approach of setting the Notice of Intention to Defend aside as an irregular step.
- [58] In *Hugo*^{8 9}, Holland- Muter J was faced with the Road Accident Fund delivering a Notice to Defend on the eve of the hearing. The Court stood the matter down in the interest of justice to afford the Road Accident Fund an opportunity to

explain itself. The Court assessed whether it could strike out the Notice to Defend in terms of section 173 of the Constitution and in keeping with the Courts inherent jurisdiction to protect its processes.

[59] The Court aligned itself with the matter of *Mabaso*¹⁰ in a reading of Uniform Rule 27(1) that calls on the dilatory party to seek an extension of time on application. The manner of seeking such extension would be to give an explanation for the late delivery of the notice of intention to defend. In contrast, Rule 27(1) refers to an 'application on notice'.

[60] The Court went on to disagreed with the dicta of *Buthelezi*¹¹ that

'This Court is of the opinion that it is not a legal requirement in terms of rule 19(5) that a defendant explain their late filing of such notice or to seek condonation for same'.

[61] *Buthelezi* related to a rescission of a default judgment where the notice to defend had not come to the attention of the Registrar prior to default judgment being granted and it was argued that judgment was erroneously granted.

[62] I also disagree with the *Hugo* approach. A litigant may deliver a Notice of Intention to Oppose at any time before judgment. The Rules provide for this Notice. A litigant cannot be barred from being before a Court unless he registers an explanation for his lateness. The Rules also provide for an 'Application on

Notice' to extend time periods and not an explanation. It is unclear from the judgment what form this explanation must take.

- [63] As a starting point, the Notice of Intention to Defend is simplistically what is refers to itself as – a notice. It sets out details¹² relating to the Defendant who wishes to enjoy audience before the Court. The mere delivering of the Notice to Defend does not dispose of any rights that a Defendant has¹³. The problematic Rule 19(5) states

(5) Notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after expiration of the period specified in the summons or the period specified in subrule (2), before default judgment has been granted: Provided that the plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the plaintiff had lodged the application for judgment by default.

- [64] There appears to be an assumption of a foregone conclusion that the matter merely postpones and a cost order follows. This Rule says nothing of an automatic postponement. It merely brings into sharp focus the impending risk of a cost order being granted for the late delivery of the notice.
- [65] The Road Accident Fund appears to take the view that the mere payment of the costs is sufficient for a postponement. The costs are tied to the late notice,

and not to a postponement. Once the Court is seized with the matter, it falls within the purview of the Judges discretion and further handling.

[66] The problem appears to arise where one is before a 'default judgment court' and the matter needs to be removed to a 'trial court' or a 'motion court'. These are merely administrative centres to manage court rolls. The Courts are as defined and titled in the relevant legislation and no more¹⁴. These labels of a 'civil court' and a 'criminal court', 'Default RAF Court' etc. must be approached with caution¹⁵.

[67] There are Divisional practices that provide for the 'motion court' to simultaneously sit as the 'urgent court' and a Judge is likewise entitled to conduct his Urgent Court by immediately hearing *viva voca* evidence. Rules are made for the Courts – Courts are not made for the Rules¹⁶.

[68] A party may enjoy the full processes set out in the Uniform Rules of Court by delivering a Notice of Intention to Defend timeously. Where a litigant delivers such a Notice to Defend late, they are not compelled to provide an explanation before the Notice is received. They may receive audience before the Presiding Judge. This often occurs where a litigant arrives at Unopposed Motion Court in 'PIE Eviction' applications (and not 'default RAF judgment Court'), only to seek an indulgence of extra time to vacate the property. It would be counter-intuitive to automatically postpone that matter to an Opposed Motion Court rather than to dispose of the matter instantaneously.

- [69] The Road Accident Fund, in delivering a Notice to Defend, obtains audience and the Court will afford it an opportunity to be heard, either in opposition to the Plaintiffs case but limited to the papers before the Court or in its application for a postponement.
- [70] The mere delivery of a Notice of Intention to Defend late affords a party an audience before the Presiding Judge seized with the matter and not an automatic postponement of the matter before the Judge. The Rules of Court do not serve to deprive a Presiding Judge of his judicial discretion. This delivery of the Notice, likewise, halts a Registrars further processing of the default judgment.
- [71] Should a Defendant then seeks a postponement of the matter, then that is a separate and distinct application to be adjudicated on its own merits and on well established grounds for a postponement. One would presume that in the face of the abuse complained of, the Presiding Judge would want a full and detailed explanation of the recalcitrance, some concrete undertakings as to time periods from a delinquent Defendant regarding what it desires to achieve during the postponement and measures to ameliorate prejudice such as appropriate cost orders.
- [72] So, what then of Uniform Rule 19(5) and allowing the delivery of a Notice of Intention to Defend at any time before default judgment. The specific provision is the Defendant must defend a case within the provided time period. Rule 19(5), in using the words 'notwithstanding', indicates that this rule is an

exception to, and deviation from the normal procedure. It was brought into effect in 1987, is a backstop to enforcing a right of access to the Courts, prior to our Constitutional dispensation and under circumstances where Registrars would grant default judgments. The Rule existed in part to prevent Court Registrars, from granting default judgment when faced with a late Notice of Intention to Defend¹⁷. The Registrars did not sit as open Courts of Law.

[73] The mention of an entitlement to costs introduces the risk to Defendant and the onus associated with the additional inconvenience to the Plaintiff, but this award (and the scale of costs) remains in the domain of the discretion of a Judge hearing the default judgment application in open court¹⁸. The cost order envisaged in Rule 19(5) is not the fee for a postponement to the 'trial roll'. It is merely a backstop to protecting a right of access to court. Allowing it to become the penalty, then withdraws a judicial discretion in respect of a matter seized before the court.

[74] The cost implication set out in this Rule is no more than a starting point for the exercise of a judicial discretion and one is often confronted by an indigent litigant arriving on the day of the default judgment hearing only to seek a postponement in order to obtain *pro bono* legal representation. Is a Judge then compelled to make an adverse cost order with no discretion? The Rules of Court are to be approached in a common-sense robust manner that gives meaning to the aspirations set out in the Constitution and to deploys the resources of the judiciary in the most efficient manner.¹⁹

[75] Turning to the issue of costs in the present application, the Defendant was entitled to hand up its Notice to Defend on the morning of the hearing of the matter and to enter the proceedings. Should it have sought a postponement of the matter then it was not for the asking and an application for a postponement would have followed.

[76] Respectfully, I am unable to agree with *Nathram* that an application in terms of Rule 30 is warranted to set aside a notice to defend as irregular and I am also in disagreement with *Hugo* that an explanation is required prior to a Notice to Defend is to be received. Rule 27(3) requires an application to extend time periods prescribed. Rule 19(5) allows for the late delivery of a Notice to Defend and the question of non-compliance or an extension of time periods do not arise.

[77] The Defendants withdrawal of its purported request for an automatic postponement put paid to the controversy in this matter. I am unable to conclude that these instructions were mala fidei or what the reasons for such postponement would be, had such an application been presented to Court. I do however agree that it is high time that the RAF be held to the standards of the Constitution.

[78] The Plaintiff sought costs on a punitive scale. In *De Sousa II*²⁰, the Court said

"[353] It is proper to award costs on an attorney and client scale where a party has deliberately failed to limit or curtail proceedings, or has abused the court's

process. In this regard I am mindful of the following dictum of Innes CJ in *Scheepers and Nolte v Pate* 1909 TS 353 at 356, where he said the following:

'I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense. If there is a legal defence which can be effectively raised, by way of exception or otherwise, at an early stage, he ought at that stage to raise it. If he only takes it later on it may still be effective, but the fact that it came late, and that considerable expense was unnecessarily incurred in consequence, seems to me an element which may well affect the mind of the court in apportioning the costs.'

[354] The object of the award of attorney and client costs has been explained by Tindall J in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607:

'The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

Nel's case was approved by the Constitutional Court in *Swartbooi and Others v Brink and Others* 2006 (1) SA 203 (CC) (2003 (5) BCLR 497; [2003] ZACC 5) para 27."

[79] In *Beinash*²¹, the Constitutional Court upheld the argument that:

"Indeed, as the respondents argued, the Court is under a constitutional duty to protect bona fide litigants, the processes of the Courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that '(n)o person or organ of State may interfere with the functioning of the courts'. The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed."

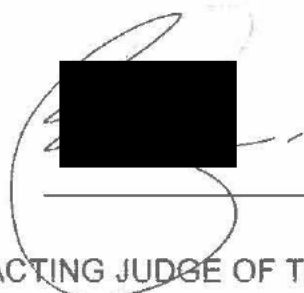
[80] I am not persuaded that the Defendant, in this matter, acted in a manner tantamount to abuse or in manipulation of the functioning of the Court. The

considerations of abuse of process and costs in a postponement application are not before me. The Defendant could not have curtailed the default judgment process, the Plaintiff had to prove its case and the RAF is fully entitled to put the Plaintiff to that proof. The Defendant did not unduly lengthen the proceedings as it was limited to the Plaintiffs papers. An appropriate cost order addresses the Plaintiffs stand down over a number of days.

[81] The Plaintiff was entitled to its day in Court for its default judgment and it was successful in that regard. In the exercise of my judicial discretion, I find no reason that normal costs not follow the Plaintiffs success.

[82] In the result the following order is made:

4. The Defendant is liable for 100% of the Plaintiffs proved or agreed damages arising from the motor vehicle collision on 25 January 2019;
5. The determination of the quantum of damages is postponed;
6. The Defendant shall pay the Plaintiffs costs of the hearing on 23 and 25 September 2024 and 1 October 2024 and the costs of preparation of Plaintiff's heads and supplementary heads of argument, on Scale B.



ZUBAIR KHAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 28 February 2025.

**DATE OF HEARING: 23 SEPTEMBER 2024, 25 SEPTEMBER 2024,
1 OCTOBER 2024**

DATE OF JUDGMENT: 27 FEBRUARY 2025

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**STATE ATTORNEY
(JOHANNESBURG)**

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- ¹ *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).
- ² *Beinash v Wixley* 1997 (3) SA 721 (SCA) at para [27]
- ³ *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA)
- ⁴ Legal Practice Act 28 of 2014
- ⁵ *Millu v City of Johannesburg Metropolitan Municipality and Another* (25039/2021) [2024] ZAGPJHC 419 (18 March 2024)
- ⁶ *Nathram v Road Accident Fund* (46876/2020) [2024] ZAGPPHC 440 (26 April 2024)
- ⁷ *Mahlangu v Road Accident Fund* (096233/2023) [2024] ZAGPPHC 994 (3 October 2024) at [24]
- ⁸ *Hugo v Road Accident Fund* (055136/2022) [2024] ZAGPPHC 791 (12 August 2024)
- ⁹ Now on appeal before the Supreme Court of Appeal
- ¹⁰ *Mabaso v Road Accident Fund* (JHC 35849/2021)
- ¹¹ *Buthelezi Emergency Medical Services (Pty) Ltd and Another v Zeda Car Leasing (Pty) Ptd t/a Avis Fleet Services and Another* (78303/19) [2020] ZAGPPHC 623 922 October 2020) at [62]
- ¹² Uniform Rule 19(3)
- ¹³ Uniform Rule 19(4)
- ¹⁴ See: Section 8 of the Superior Courts Act, 10 of 2013
- ¹⁵ *President of the Republic of South Africa v Zuma and Others* (062027/2022) [2023] ZAGPJHC 11; 2023 (1) SACR 610 (GJ) (16 January 2023)
- ¹⁶ *Mukaddam v Pioneer Foods (Pty) Ltd Mukaddam v Pioneer Foods (Pty) Ltd* **2013 (5) SA 89** (CC) at paras [28], [31], [32] and [42]
- ¹⁷ See also Magistrate Court Rules of Court
- ¹⁸ *Ferreira v Levin NO* (2) 1996 (2) SA 621 (CC)
- ¹⁹ *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) (*Pheko II*); *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2021] ZASCA 4; [2021] 2 All SA 90 (SCA) 13 January 2021)
- ²⁰ *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 557 (GJ)
- ²¹ *Beinash and Another v Ernest & Young and Others* 1999 (2) SA 116 (CC)