



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO 84985/17

(1) REPORTABLE: YES.

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

DATE: 1 JULY 2025

SIGNATURE

In the matter between:

ZUNGANE, YOLISWA ZINHLE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CASE NO 80916/15

In the matter between:

MONEGI, LEHUMO RICHARD

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CASE NO 63951/21

In the matter between:

MBELE, NTLAKANIPHO

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CASE NO 18482/22

In the matter between:

MKHABELA, NURSE LEKINAH

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CASE NO 9321/22

In the matter between:

HLONGWANA, MARGARET SIBONGILE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CASE NO 33973/22

In the matter between:

DUBE, NAMUKHONO JOHANNA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CASE NO 39494/21

In the matter between:

KGATLE MXOLISI BENSON

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Summary: *Until recently, the result of the extraordinary large demand for trial dates without actual triable issues being identified resulted in trial dates extending for some years into the future. A consequence of this is that, in order to attempt to obtain earlier finality of matters in which there was no real defence offered by the RAF, practitioners who represent plaintiffs resort to measures to “convert” their trials to default judgment applications. This objective is generally achieved by obtaining the striking out of the RAF's defence in those matters in which notices of intention to defend and pleas have been delivered. This judgment concerns a number of applications in which attempts have been made to contrive a default judgment situation, often by impermissible means.*

ORDERS

1. In the matter of *Zungane v the RAF* (Case No 84985/2017) the applications to compel the making of discovery and the furnishing of further particulars are dismissed with costs.
2. In the matter of *Monegi v the RAF* (Case No 80916/2015) the applications to compel the making of discovery and the furnishing of further particulars are dismissed with costs.
3. In the matter of *Mbele v RAF* (Case No 63951/2022) the application to compel the furnishing of further and better discovery is dismissed with costs.
4. In the matter of *Mkhabela v RAF* (Case No 18482/2022) the application to compel the furnishing of further and better discovery is dismissed with costs.
5. In the matter of *Hlongwana v RAF* (Case No 9321/2022) the application to strike out the defence is dismissed with costs.
6. In the matter of *Dube v RAF* (Case No 33973/2022) the application to strike out the defence is dismissed with costs.
7. In the matter of *Kgatlhe v RAF* (Case No 39494/2021) the application to strike out the defence is dismissed with costs.

JUDGMENT

DAVIS, ADJP

Introduction

[1] It is by now well documented in this Division that the number of cases in which the Road Accident Fund (the RAF) features as a litigant, has reached such proportions that it causes a congestion which threatens the effective operation of the civil trial rolls in the Division.

[2] Until recently, the result of the extraordinary large demand for trial dates without actual triable issues being identified resulted in trial dates extending for some years into the future. A consequence of this is that, in order to attempt to obtain earlier finality of matters in which there was no real defence offered by the RAF, practitioners who represent plaintiffs resort to measures to “convert” their trials to default judgment applications. This objective is generally achieved by obtaining the striking out of the RAF's defence in those matters in which notices of intention to defend and pleas have been delivered.

[3] This judgment concerns a number of applications in which attempts have been made to contrive a default judgment situation, often by impermissible means.

The applications in question

[4] In order to manage the number of interlocutory applications which have been spawned by the RAF litigation scenario set out above and to cater for genuine interlocutory trial procedures, the Division operates a trials interlocutory court (TIC), interchangeably also referred to as the special interlocutory court (SIC) in each of its seats. In Pretoria on average 35 such applications are heard per day for each trial day in a term. During the course of a week in which I presided in one of these courts, a number of matters caused such debates with the practitioners who moved them, that those matters needed to be made examples of and which necessitated a judgment which may assist in the future running of the interlocutory court.

[5] The matters in question are *Zungane v RAF* (Case No 84985/2017) (*Zungane*); *Monegi v RAF* (Case No 80916/2015) (*Monegi*); *Mbhele v RAF* (Case No 6395/2021) (*Mbele*); *Mkhabela v RAF* (Case No 18482/2022) (*Mkhabela*); *Hlongwana v RAF* (Case No 9321/2022) (*Hlongwana*); *Dube v RAF* (Case No 33973/2022) (*Dube*) and *Kgatlhe v RAF* (Case No 39494/2021) (*Kgatlhe*).

[6] In the first four of these matters, compelling orders were sought against the RAF. In *Hlongwane*, *Dube* and *Kgatlhe* actual striking out of the defences were sought, based on the RAF's non-compliance with previously granted compelling orders.

[7] The various applications launched in each of these matters ranged from applications to obtain orders to compel the RAF to make a decision in respect of the seriousness of the respective plaintiffs' injuries for purposes of claiming general damages, to orders claiming compliance with procedural requests having been made upon the RAF. These included requests for the furtherance of particulars in terms of Rule 21, compliance with notices calling for discovery in terms of Rule 35(1) and the furnishing of further and better discovery as contemplated in Rule 35(3).

[8] On the face of it, all the applications appeared to be procedurally in order, but deeper scrutiny revealed that the plaintiffs were not actually interested in the compliance with the compelling orders sought or obtained, and consequently a strong suspicion emerged that the plaintiffs were actually after something else. Incidentally, they were all represented by the same attorney and many aspects of the various applications, including the affidavits delivered in support thereof, bore a striking resemblance to each other. In fact, they displayed a proverbial "cut-and-paste" exercise. In addition to individual supplementary affidavits and initial heads of argument, a composite set of supplementary heads of argument was delivered in respect of all seven matters jointly on 14 April 2025.

Abuse of process

[9] It is trite that when a procedural rule of court is used for a purpose other than its intended use, that amounts to an abuse of process. In *Nathram v RAF*¹ (*Nathram*), this court referred to the following extracts from *Beinash v Wixley*² and *De Klerk v Scheepers*³ respectively: *an abuse occurs where the procedures permitted by the rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that object* or *"when an attempt is made to use for ulterior purposes machinery designed for the better administration of justice*

¹ (46876/2020) [2024] ZAGPPHC 440 (26 April 2024).

² 1997 (3) SA 721 (SCA) at 734F-G.

³ 2005 (5) SA 244 (T) at 246C-D.

[10] In *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others*⁴ the Constitutional Court even held that, in the exercise of its inherent jurisdiction, a High Court may refuse to hear entire proceedings which amount to an abuse of its process.

[11] In the above matter, the Constitutional Court referred to *Standard Credit Corporation Ltd v Bester*⁵ where at 820 A-B the court held that an abuse of process can occur when a court process “... is used by a litigant for a purpose for which it was not designed or intended, to the prejudice or potential prejudice to the other party to the proceedings ...”.

[12] A collection of authorities on and examples of what constitutes an abuse of process are to be found in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*.⁶

The Rules in question

[13] The first Rule which featured in the matters under consideration is Rule 21. Its material parts provide as follows: “(1) After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him or her to prepare for trial..(4) if the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence whereupon the court may make such order as to it seems meet”.

[14] The second Rule which featured prominently in these matters was Rule 35. Its relevant parts provide as follows: “(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action... which are or have at any time been in the possession or control of such other

⁴ 2023 (3) SA 36 (CC) at [31].

⁵ 1987 (1) SA 812 (W).

⁶ 2004 (6) SA 66 (SCA) at par [50] per Southwood AJA.

party...(3) If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents... which may be relevant to any matter in question in possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection...(7) If any party fails to give discovery as aforesaid... the party desiring discovery or inspection may apply to a court which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence”.

The PAJA issue

[15] Section 17 of the Road Accident Fund Act 56 of 1996 (the RAF Act) provides that, in order for a party to be entitled to claim non-patrimonial (general) damages against the RAF, that party's injuries must have been determined to be “serious”. This is done by way of an election by the RAF to either accept or reject the plaintiff's serious injury assessment submitted by way of a prescribed RAF-4 form.

[16] Depending on the RAF's election, further procedures as prescribed in regulation 3 of the Road Accident Fund Regulations 2008 (the Regulations) may follow.

[17] In the event that the RAF fails to exercise an election within the prescribed 90 day period, such failure would constitute reviewable administrative action as contemplated in section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This would entitle the innocent party to apply to court for an appropriate order.

[18] I shall hereunder refer to the most pertinent aspects of each of the applications in the matters referred to above and thereafter consider whether those applications pass muster or whether they constitute abuses of process, in which case I shall indicate the consequences thereof.

The Zungane matter

[19] As indicated in the practice note filed in this matter, it concerned two applications. The first was for an order to compel the RAF to make discovery in terms of rule 35(1) and the second was for an order to compel the RAF to answer a request for further particulars. In both instances the applications were supported by an affidavit by the plaintiff's current attorney Ms Salomè le Roux.

[20] In the affidavit delivered in support of the application to compel discovery, the sum total of the prejudice which the attorney alleged the plaintiff was suffering as a result of the RAF having failed to make discovery was formulated as follows” *Discovery is with respect to the cornerstone of any civil suit. If discovery is not made the case can effectively not go forward. The plaintiff is accordingly, with respect, clearly prejudiced in his preparation for trial by reason of the defendant’s failure to file its discovery affidavit”.*

[21] In heads of argument delivered on behalf of the plaintiff after I had directed that the matters stand down for purposes of such argument, the plaintiff’s counsel, advocate L J Visser (who was not the counsel who had initially appeared in these matters) referred to an extensive list of authorities wherein the importance of discovery has been confirmed. These were *inter alia*, *Ferreira v Endley* 1966 (3) SA 618 (E), *Prinsloo v Simon* 1984 (2) SA 56 (O), *BST Kombuse (Edms) Bpk v Abrams* 1978 (4) SA 182 (T) and *Leapman and another v Barrow* 1971(4) SA 403 (R).

[22] In addition it was argued that the failure to make discovery would result in an unfair trial as there “would not be an equality of arms” (as referred to in *Qozeleni v Minister of Law and Order and another* 1994 (3) SA 625 (E).

[23] Despite the above lofty sentiments, counsel for the plaintiff could not indicate any real, practical or indeed actual prejudice suffered in this matter due to the RAF's non-compliance. The plaintiff had already readied its matter for trial and after pleadings have been closed the plaintiff had obtained and produced an expert report and had prepared extensive trial bundles on both merits and quantum. There was absolutely nothing indicating that the plaintiff has been unable to prepare to prove its case, both in respect of merits and in respect of quantum. The fact that both parties had previously been represented by other attorneys did not detract from this fact and

attempts made in the heads of argument to elevate the issue of prior representation to one which merited serious consideration, failed. The plaintiff's current attorneys have already been appointed as long ago as on 21 August 2023.

[24] The application to compel discovery was clearly a precursor to a subsequent application to have the RAF's defence struck out upon non-compliance with such an order. This much is evinced by the last three of the seven matters referred to above, all by the same attorney and all based on similar applications supported by similarly worded founding affidavits, which all followed the exact same route.

[25] I therefore find that the application to compel discovery was not used in order to obtain actual discovery but in order to obtain something else, namely a default judgement situation. Although the lengthy lead times for trial dates at the time that this application had been launched may have created an understandable desire to rather proceed against the RAF by way of default than by way of trial, it still means that the Rule was used for a purpose other than that for which it was designed. As such it constituted an abuse of process. A court, exercising its discretion judicially, is entitled to decline to grant an order in such circumstances.

[26] Experience in this Division, of which judicial notice may be taken, has shown that only in the rarest instances would discovery by the RAF have made any impact on the plaintiff's claim or the trial readiness thereof. The plaintiff has not indicated that this matter is one of those rare instances. When one has to weigh up the negligible benefit of discovery in these circumstances against the very real and serious consequences of striking a defence, the first pales in comparison to the latter.

[27] In a last-ditch attempt to obtain relief, the plaintiff's attorney in a supplementary affidavit referred to the practice directives in this court requiring discovery to be complete before a trial date is allocated. The attorney alleged that since the RAF has failed to make discovery, discovery is therefore not "complete" and the plaintiff suffers prejudice by not being able to apply for a trial date. I have made enquiries from the Registrar during the course of the hearing and standing down of this matter and the position stated by the plaintiff's attorney is simply

factually incorrect. Trial dates are issued by the Registrar after a plaintiff has made discovery and plaintiffs are not denied trial dates in instances where the defendant has failed to do so. This is done in accordance with par 8.1 of annexure 5.1 to the Practice Directive. I put this factual position to the plaintiff's counsel and received no adverse answer. The supplementary heads of argument delivered on 14 April 2025 ineffectually attempted to rely on historical directives of 2014 and 2019.

[28] In other heads of argument filed on behalf of the plaintiff in respect of the application to compel the furnishing of further particulars, much was made of the fact that there might be a possibility of a duplicate claim having been filed on behalf of the plaintiff and that there might be a possibility that suppliers of medical services rendered to the plaintiff might have been paid by the RAF. Particulars were requested in respect of these possibilities. Whilst such possibilities might exist, they remain no more than notional possibilities. No facts have been indicated which may have converted those possibilities to probabilities.

[29] In my view fishing expeditions such as those evinced by the request for further particulars are nothing more than that and clearly cannot satisfy the requirements of Rule 21(1) which require that only particulars which were "strictly necessary" in order to enable the plaintiff to prepare for trial, may be sought. The extent of the plaintiff's trial readiness referred to above sufficiently indicate that the plaintiff had been able to prepare for trial in the absence of such particulars.

[30] In the above premises I find that the application to compel the furnishing of the particulars requested was being used in the same manner as the application to compel discovery. In other words, the application to compel the furnishing of further particulars was not resorted to with a view to actually obtaining the particulars sought, but with a view to utilize the non-furnishing thereof as a precursor for an application to strike the RAF's defence. I therefore find, in the exercise of the court's discretion, that that application should suffer the same fate as the application to compel discovery.

The *Monegi* matter

[31] In this matter similar applications were made for the furnishing of particulars and the making of discovery as in the *Zungane* matter. In fact the affidavits and the nature of relief are so similar that, joint heads of argument had been filed in respect of both these applications in both matters (in addition to the supplementary heads of argument referred to earlier). Again, the arguments relating to discovery were very little more than a generic treatise of general principles regarding discovery.

[32] In respect of the application for the furnishing of particulars, similar speculative issues have been raised as in the previous matter. The possibilities of a suppliers claim, a duplicate claim and the possibility of the appointment of an assessor by the RAF again feature. These are not particulars strictly necessary in order to enable the plaintiff to prepare for trial and can at best be interrogatories which could have been and should have been addressed at a pretrial conference, had they really been necessary.

[33] One should also bear in mind that the plaintiff had already on 2 May 2017 obtained an order by agreement for the payment of loss of earnings and the furnishing of the customary undertaking for future medical treatment. The fates of the applications to compel the furnishing of further particulars and making discovery should therefore be the same as in the previous matter.

[34] The only feature which distinguished this matter from the previous one, was an application to demand an election from the RAF in respect of the acceptance or rejection of the report indicating the seriousness of the plaintiff's injuries. That application was, however not proceeded with as the RAF has indeed made an election after service of the application. I therefore proceeded to remove that application and made a costs order in terms of a draft order presented at the hearing of the matters.

The *Mbele* matter

[35] The only difference in the discovery sought in this matter and the discovery sought in the previous two matters is that the RAF had indeed made discovery. The plaintiff then, in terms of rule 35(3) sought further and better discovery. It is clear

from the wording of the applicable sub-rule that the documents requested in terms of this sub-rule must be described in the notice with sufficient accuracy to enable them to be identified.

[36] In her affidavit delivered in support of this application, the plaintiff's attorney explained that the RAF allocates claim numbers to claims lodged with it. Claims that relate to one accident are usually grouped together and at the end of the claim number the RAF, almost as a suffix, indicate by way of a number the sequence wherein claims relevant to one accident had been lodged, starting from zero upwards. The attorney used this proposition to indicate that there might be related or duplicate claims and submitted that the only effective way to commit the RAF to whether there are such claims was to request further documents.

[37] The contentions relating to related claims did not feature in the Rule 35(3) notice and is therefore nothing more than a red herring. In any event, to the knowledge of the plaintiff and her attorney, related claims indeed existed as the attorney had uploaded court orders in no less than four related matters where the RAF had agreed to 100% liability orders, these were in Case Nos 6397/21 on 17 May 2022, 27165/21 on 13 March 2023, 6396/21 on 17 May 2023 and 6394/21 on 18 May 2023.

[38] In addition, the speculative argument regarding the possibility of suppliers' claims was again mooted. The plaintiff's attorney, however could not and did not allege that specific documents existed or that suppliers' claims existed. The speculative nature of the interrogatory directed by way of the Rule 35(3) notice is apparent from the formulation of the documents requested. The notice simply requests the following: *"the complete file contents of the Road Accident Fund kept in respect of the suppliers claims handed in with the road accident fund and which has bearing on any hospital treatment that the plaintiff received in pursuance to the accident in question and the cost thereof and which pertains to the accident which is the subject of the above mentioned action and instituted under the above mentioned case number"*. The date indicated for these documents is similarly described as *"unknown"*.

[39] I find it an abuse that a fishing expedition in this fashion should be elevated to a step which is to be used as a precursor to the striking out of a defence upon non-compliance. There is nothing preventing the plaintiff from proceeding with her claim and the contents of the file indicated that she had been able to do so without any such discovery.

[40] In the similar fashion as in the *Monegi* matter, the plaintiff has previously launched a PAJA application, but the RAF has made an election before the hearing thereof. That application had then been removed on 5 August 2024 already, together with a costs order. The plaintiff had also already obtained a merits order in her favour, by agreement, on 25 October 2023.

The *Mkhabela* matter

[41] In this matter the plaintiff similarly sought an application to compel the making of further and better discovery. Again, apart from generalized and generic allegations and speculations, no case specific facts have been disclosed. The application in this matter should suffer the same fate as those referred to above. In similar fashion as above, the plaintiff had already obtained a merits order in its favour, on 23 May 2023.

The *Hlongwana* matter

[42] In this matter the plaintiff has, in similar circumstances as those above, applied for a mandamus in respect of her PAJA application. The RAF has, as before, made the required election and that application had been removed on 24 April 2024 already. The plaintiff had also obtained a merits order in her favour as long ago as 12 October 2023.

[43] Despite this however, the plaintiff sought an order for the striking out of the RAF's defence. This was claimed on the following basis: on 24 April 2024 an order was obtained compelling the RAF to make discovery. The discovery contemplated in that order was the general discovery referred to above and claimed by the plaintiff in terms of Rule 35(1). Upon non-compliance, the plaintiff's attorney in the affidavit

delivered in support of the application for striking out simply stated that *“The defendant’s conduct leaves the applicant with no other option to apply for the relief set out in the accompanying notice of motion....the respondent’s non-compliance makes it impossible for the applicant to litigate against it ...”*. Punitive costs were then also sought.

[44] It is settled law that Rules 35(7) and rule 30A(2) of the Rules, providing for circumstances in which a defence may be struck out, confers a discretion on the court which must be exercised judicially on a proper consideration of all the relevant circumstances. Striking out a defence is a drastic remedy which should normally only be resorted to as a last resort. This is because it deprives a litigant of an entrenched right to a fair trial and a Constitutional right to access to a court where its defence can be heard⁷.

[45] Despite the fact that the plaintiff in this matter may, upon a pure formalistic application of the Rules, be entitled to a striking out order, I find there to be a disparity between the negligible alleged prejudice to the plaintiff following upon non-compliance with an order compelling discovery against the RAF and the serious consequences that follow upon a striking out order. Accordingly, and in the exercise of this court's discretion, I decline to grant such an order.

[46] The further factors that I took into account were that the plaintiff had already obtained a merits order in her favour on 12 October 2023 and, at the time that the compelling order had been granted, her PAJA application had been removed due to the RAF’s compliance with that application, allowing her to proceed with her claim for non-patrimonial damages. It was not alleged that, without discovery being made, she was unable to do so.

The *Dube* matter

⁷ *MEC, Department of Public Works and others v Ikama Architects and others* 2022 (6) SA 276 (ECB) at paras [18] to [19]; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para [79]; *SA Scottish Finance Corporation Ltd v Smith* 1966 (3) SA 629 (T) at 634; *Evander caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T) at 317; *Thornhill v Gerhardt* 1979 (2) SA 1092 (T) at 096-7; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 357 and *Putco Ltd v TV & Radio Guarantee Company (Pty) Ltd* 1984 (1) SA 443 (W).

[47] In similar fashion as in the matter of *Hlongwana* the plaintiff sought the striking out of the RAF's defence on the basis of its non-compliance to make discovery as ordered on 10 March 2024. I hold the same view as above and decline to grant such an order.

The *Kgatle* matter

[48] In this matter, yet again, the plaintiff sought a striking of the RAF's defence for non-compliance with a previous compelling order issued on 27 May 2024. The only difference between this matter and the preceding two matters is that the compelling order was for one making further and better discovery as contemplated in Rule 35(3). The documents contemplated in that order, were however again the speculative generic documents relating to possible suppliers' claims. In the exercise of the court's discretion, I again decline to grant a striking out order.

Costs

Generally, costs should follow the event and there are no reasons why that should not be the position, despite the RAF having not formally opposed any of these applications.

Orders

[49] In the premises, orders are granted in the following terms:

1. In the matter of *Zungane v the RAF* (Case No 84985/2017) the applications to compel the making of discovery and the furnishing of further particulars are dismissed with costs.
2. In the matter of *Monegi v the RAF* (Case No 80916/2015) the applications to compel the making of discovery and the furnishing of further particulars are dismissed with costs.
3. In the matter of *Mbele v RAF* (Case No 63951/21) the application to compel the furnishing of further and better discovery is dismissed with costs.

4. In the matter of *Mkhabela v RAF* (Case No 18482/22) the application to compel the furnishing of further and better discovery is dismissed with costs.
5. In the matter of *Hlongwana v RAF* (Case No 9321/22) the application to strike out the defence is dismissed with costs.
6. In the matter of *Dube v RAF* (Case No 33973/2022) the application to strike out the defence is dismissed with costs.
7. In the matter of *Kgatle v RAF* (Case No 39494/2021) the application to strike out the defence is dismissed with costs.

N DAVIS

Acting Deputy Judge president
of the High Court Gauteng Division,
Pretoria

Date of Hearing: 11 & 12 February 2025

Supplementary Heads of Argument: 14 April 2025

Judgment delivered: 1 July 2025

APPEARANCES:

For the Plaintiffs: Adv H Marais (Supplementary Heads of Argument
by Adv L J Visser)

Attorney for the Plaintiffs: Salomè le Roux Attorneys, Pretoria

For the Defendants: No appearance.