

SOUTH AFRICA / JUDGMENT

Brevis v Road Accident Fund (39035/2018) [2024] ZAGPJHC 725 (12 August 2024) [2024] ZAGPJHC 725

COURT

South Gauteng High Court, Johannesburg

BEFORE

Windell

CASE / FILE NUMBER

39035/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

NO: 39035/2018

1.

REPORTABLE: YES

/ NO

2.

OF INTEREST TO OTHER JUDGES: YES

/ NO

3.

REVISED: YES / NO

12

August 2024

In

the matter between:

RUDI
GRANVILLE BREVIS
Applicant
and
ROAD
ACCIDENT FUND
Respondent
ORDER

1.
The application is dismissed.
2.
No order as to costs.

JUDGMENT

WINDELL, J

- [1] This is an interlocutory application for an order to: (1) Compel the respondent to file its Notice in terms of Rule 36(9)(b) of the Uniform Rules of Court in respect of its Neurologist, Dr M Pillay,[1] and, (2) In the event of the respondent failing to comply with the above order, the respondent's defence will ipso facto be struck out on the day of default (i.e., on day 11 after service of this order) and the applicant may then approach the registrar for a date for hearing on the Default Trial Roll.
- [2] The litigation history between the parties is common cause. During February 2019, the applicant instituted action against the respondent (RAF) for injuries sustained during a motor vehicle collision that occurred on 29 May 2017. The RAF filed a notice to defend and delivered its plea on 12 June 2019. The merits were subsequently conceded and the RAF agreed to pay 100% of the applicant's proven or agreed damages. The quantum on all heads of damages remained in dispute.
- [3] The applicant sustained, inter alia, the following injuries: A head injury with a brain injury, fractured facial and nasal bones, and soft tissue injury to the left shoulder. As a result, the applicant appointed the following experts who have compiled expert reports in preparation for trial: Clinical psychologist, Ear, Nose and Throat specialist, Orthopaedic surgeon, Occupational Therapist, Specialist Neurosurgeon, Neurologist, Industrial Psychologist, Speech Therapist, Specialist Maxillofacial and Oral Surgeon, and an Actuary.
- [4] During a pre-trial meeting held on 17 July 2023, the RAF indicated that it would also appoint several experts, amongst others a Neurologist. Subsequently, in terms of Rule 36(1) and (2) the RAF arranged for the applicant to be assessed by its Neurologist, Dr Pillay, on 8 November 2023. The applicant attended the assessment. The RAF had until 8 January 2024 to deliver Dr Pillay's report in terms of Rule 36(8)(a). It failed to deliver the report.

- [5] On 24 January 2024, the applicant served on the RAF a notice in terms of Rule 36(8)(a) and(b) due the RAF's failure to serve the report of Dr Pillay. The RAF did not respond, and the applicant launched the current proceedings to compel the RAF to file a summary of Dr Pillay's expert opinion in terms of Rule 36(9)(b).
- [6] The RAF did not file a notice of opposition to the interlocutory application or an affidavit; however, it was represented at the hearing. The RAF's counsel stated that the RAF is opposing the application because Dr Pillay had not compiled a report, and as a result, there was no summary of his opinion to provide to the applicant. Counsel also argued that the RAF, despite having indicated that it would appoint experts and having evaluated the applicant by Dr. Pillay, subsequently decided not to employ or invoke any experts during the trial. It was argued that the RAF can therefore not be compelled to file a Notice in terms of Rule 36(9)(b) in respect of the Neurologist, Dr M Pillay.
- [7] The applicant contends that there is no evidence from the RAF under oath to suggest that Dr. Pillay did not compile a report. However, if it is accepted that there is no report, the RAF should be compelled to request Dr Pillay's report. The applicant relies on Rule 36(8) of the Uniform Rules of Court that provides as follows:

“(8) Any party causing an examination to be made in terms of subrules (1) and (6) shall—

- (a) cause the person making the examination to give a full report in writing, within two months of the date of the examination or within such other period as may be directed by a judge in terms of rule 37(8) or in terms of rule 37A, of the results of the examination and the opinions that such person formed as a result thereof on any relevant matter;
 - (b) within five days after receipt of such report, inform all other parties in writing of the existence of the report, and upon request immediately furnish any other party with a complete copy thereof; and
 - (c) bear the expense of the carrying out of any such examination: Provided that such expense shall form part of such party's costs.”
- [8] Firstly, in *Durban City Council v Mndovu*,^[2] the court held that Rule 36 is designed to avoid a litigant being taken by surprise in relation to matters in respect of which he would in the normal course of events be unable, before trial, to prepare his case effectively so as to meet that of his opponent. It is for this reason that a party (in this instance the RAF) had the right to require the applicant to submit to a medical examination.
- [9] Secondly, the RAF cannot be compelled to appoint experts and file reports in terms of Rule 36(9). In *Legoale and Others vs Road Accident Fund*,^[3] Adams J held as follows:

"..., it cannot be said that a defendant who fails to give notice of his intention to call an expert witness does not comply with Uniform rule

36. There is no obligation on a defendant to call expert witnesses. All that the Uniform rule provides is that, in the event of the defendant opting to call an expert witness, the procedure outlined in that Uniform rule 36(9) should be followed.”
- [10] Thirdly, if the court accepts the ipse dixit of counsel for the RAF and accept that there is no report from Dr Pillay, the interlocutory application is not brought in terms of Rule 36(8) which places a positive obligation on the “party causing an examination”, in this instance the RAF, to “cause the person making the examination”, in this instance Dr Pillay, to give a full report in writing. The interlocutory application is brought in terms of Rule 36(9) which deals with notices and summaries of experts in cases where witnesses are called to testify. Therefore, it would be unwise for this court to evaluate the purpose of Rule 36(8) and determine whether the RAF should be obligated to fulfil its obligation under the same rule, without the benefit of proper argument, and in light of the fact that the application was brought under Rule 36(9).
- [11] As a result, the relief sought in terms of the application cannot be granted. As far as costs is concerned, the general rule is that the successful party should be granted costs. The RAF did not formally oppose the application and filed no affidavit as it is obliged to do. I can find no reason why the applicant should be mulcted with

costs.

[12] The following order is granted

1. Application is dismissed.
2. No order as to costs.

L. WINDELL

JUDGE OF THE HIGH COURT

Delivered: This judgement 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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 August 2024.

APPEARANCES

Counsel for the applicant: Mr G.J. Rossouw Instructed by: Levin Tatanis Inc. Counsel for the respondent: Unknown Instructed by: The State Attorneys Date of hearing: 23 May 2024 Date of judgment: 12 August 2024

- [1] Rule 36 (9)(b): The summary of the expert’s opinion and reasons therefor referred to in subparagraph (a)(ii) shall be compiled by the expert himself or herself and shall contain a statement by the expert confirming that the report is — (i) in such expert’s own words; (ii) for the assistance of the court; and (iii) a statement of truth.

- [1] Rule 36 (9)(b): The summary of the expert's opinion and reasons therefor referred to in subparagraph (a)(ii) shall be compiled by the expert himself or herself and shall contain a statement by the expert confirming that the report is —
- (i) in such expert's own words;
 - (ii) for the assistance of the court; and
 - (iii) a statement of truth.
- [2] 1966
- (2) SA 319 (D) at 325A-C.
- [3] 2019/31546; 2019/22794; 2019/31545; 2019/37216; 2019/29804) (202) ZAGP JHC 366 (3 June 2020) unreported, Adams J. See also Moyo v RAF Case number 12280/2019. Unreported case delivered on 25 August 2023 Gauteng Division, Johannesburg by Pienaar AJ; Johester and Others v Road Accident Fund (2020/23383) ZAGPJHC (12 June 2024).

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