

SOUTH AFRICA / JUDGMENT

Friedemann v Road Accident Fund (2459/12) [2017] ZAKZDHC 44 (13 December 2017)

[2017] ZAKZDHC 44

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Henriques

CASE / FILE NUMBER

2459/12

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 2459/12

In

the matter between:

COLIN

MICHAEL

FRIEDEMANN Plaintiff

and

THE

ROAD ACCIDENT

FUND Defendant

ORDER

The

rule nisi issued on 14 May 2015 is discharged.

JUDGMENT

HENRIQUES J

Introduction

- [1] This is the return day of a rule nisi issued on 14 May 2015 at the conclusion of a quantum trial.
- [2] After the trial proceeded for two days, I delivered an ex tempore judgment in which I issued orders granting a money judgment in respect of the plaintiff's future medical expenses, loss of

earnings and general damages, together with costs on an attorney and client scale in favour of the plaintiff. Given the manner in which the defendant conducted its defence in the matter, I issued a rule nisi calling upon the claims handler, Ms Hajra Mahomed and her senior, to show cause why she and/or her senior should not be held personally liable to pay costs de bonis propriis on an attorney and client scale for the plaintiff's costs of suit jointly and severally with the defendant.

- [3] Dates were agreed with the defendant's legal representative for the filing of affidavits. These were to be served and filed by midday on Monday 18 May 2015, and the matter was adjourned to 19 May 2015 for argument. On 19 May 2015 at the instance of the defendant, the matter was adjourned to a date to be arranged for argument and further directives were issued specifically for the filing of supplementary affidavits by the defendant. In the interim on 28 May 2015, the defendant filed a notice of appeal in respect of the ex tempore money judgment delivered on 14 May 2015. A notice containing its supplementary grounds of appeal was delivered on 3 June 2015. The rule nisi was finally argued on 21 August 2015.
- [4] It is necessary to set out a brief chronology relevant to the circumstances resulting in the issuing of the rule nisi. In doing so reference will be had to the documents filed of record in the court file as well as to the affidavits filed in response to the rule nisi by the respective parties.
- [5] On 30 June 2011, the plaintiff's attorneys submitted the plaintiff's claim to the defendant. On 5 August 2011, the claims

handler, Ms Mahomed responded to the claim. On 30 May 2012, documents in respect of quantum were lodged with the defendant's first attorney of record Luthuli Sithole. It must be mentioned that the defendant has had three attorneys of record in this particular

matter. On 9 September 2014, the claims handler indicated that she engaged with the plaintiff's attorney to discuss possible settlement of the matter. The plaintiff's attorney, however, denies this.[1]

[6] On 1 December 2014, the defendant appointed new attorneys of record to investigate and defend the claim being Kessie Moodley and Associates. In the interim, liability was settled by way of the tender on 28 May 2012. On 11 December 2014, the plaintiff's

attorney dispatched an email to the defendant's attorney, Mr Moodley advising him of the trial dates. On 18 December 2014, Sonia Hill the industrial psychologist's expert report was served on the defendant's attorney Kessie Moodley as well as a notice of set down in respect of the trial.

[7] On 12 February 2015, the plaintiff's first actuarial calculation and report was served on Kessie Moodley. The plaintiff's

attorneys also served and filed a notice in terms of rule 37(4) of matters to be raised at a pre-trial conference in terms of rule 37. Paragraph 2 of such request invited the defendant to indicate whether or not it intended furnishing the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 in relation to the claim for future medical and hospital expenses. In addition, paragraph 3 recorded that it would invite the defendant to discuss whether the contents of the plaintiff's expert reports could be admitted.

[8] On 18 February 2015, a pre-trial conference was convened. The defendant's attorney Kessie Moodley, was not present. On 16 March 2015, a block booking was arranged with the defendant in respect of this matter. In the interim the plaintiff's attorney took further steps in the preparation for trial. The plaintiff's attorney in addition brought it to the attention of the defendant that this matter had been enrolled for hearing and no attorney had been appointed for them to liase with. Sometime in April 2015 the defendant then terminated the mandate of Kessie Moodley and on 29 April 2015 the defendant appointed its current attorneys of record TKN Incorporated. The defendant's file which had previously been with Kessie Moodley Attorneys and all its contents were handed to TKN Incorporated at that time.

[9] On 7 May 2015, TKN Attorneys requested the orthopaedic surgeon, Mr Domingo's report. This was sent to TKN on the same day it was requested. According to the claims handler, Miss Mahomed, an executive summary was prepared by the defendant's attorney, TKN Incorporated, on 7 May 2015. On 12 May 2015, Mr Tembe of TKN Incorporated, the responsible attorney, made a telephonic request to the plaintiff's attorneys for the plaintiff's tax returns. This was the day before the trial was to commence.

[10] The trial was enrolled for hearing on 13 to 15 May and proceeded. On 14 May 2015 judgment was delivered and the rule nisi issued. When the matter was called in trial roll call, I am informed that the defendant's counsel requested that the matter stand down for approximately two hours as it had not been furnished with instructions in respect of the trial, and it was possible that a settlement offer was on its way to court.

[11] The matter was nonetheless allocated by the Deputy Judge President, as the defendant had notice of the trial since December

2014. Despite a pre-trial conference being held and the defendant undertaking to revert on matters by the end of April 2015, it had not done so. The plaintiff was concerned about the time factor in which the trial took to proceed and was of the view that should instructions be forthcoming these could be communicated between the attorneys but that the trial of the matter should not be delayed so as not to become a part heard matter.

[12] When the parties approached me in chambers reiterating this request, I indicated that the trial should commence and should a settlement offer materialise, the parties could discuss this as the trial proceeded.

[13] In his opening address, Mr Oliff placed on record, and this was not disputed by Mr Mbambo who appeared for the defendant, that the only admissions made by the defendant related to the report of the orthopaedic surgeon Mr Fraser. All issues remained in dispute

including future medical expenses. The plaintiff was required to quantify future medical expenses as no undertaking had been

tendered. Past medical expenses which had been properly vouched for had also not been admitted.

[14] Insofar as the report on Mr Fraser was concerned the admissions made by the defendant related to both the facts reported to him and his findings. Further issues in dispute were general damages and the plaintiffs past and future loss of earnings. The trial commenced with the evidence of the occupational therapist Ms Maharaj. After she had testified the parties, on resumption after the short adjournment, recorded that the claim for past medical expenses had been settled by way of the interim payment. At that stage Mr Mbambo, was once again asked as to whether there was any instructions with regard to the future medical expenses and was an undertaking tendered. His response as evident from the transcript was the following:

‘M’Lady, we will try and see whether, because at this juncture we haven’t received anything from the Fund yet’.

[15] Cross-examination of Miss Maharaj was brief. In fact the defendant’s counsel Mr Mbambo asked two questions in this

regard. The evidence of Miss Maharaj remained unchallenged both in so far as her findings and prognosis was concerned as well as her evidence in relation to the anticipated further medical treatment and the anticipated costs thereof. After Miss Maharaj testified Miss Sonia Hill, the industrial psychologist testified. At the end of the first day of trial when the matter was adjourned the plaintiff’s attorneys provided TKN Incorporated with documents referred to in Miss Hills report as per TKN’s request on the day in question. These documents had been previously supplied to the defendant’s erstwhile attorneys of record.

Similarly, the evidence of Miss Hill was not really challenged and it appeared that the only concern of the defendant was the lack of collateral information and supporting documents relating to the plaintiff's income that Sonia Hill was not able to verify. Mr Mbambo, conceded during argument that same could be dealt with by way of an appropriate contingency. During the cross-examination of Miss Hill, Mr Mbambo placed on record that he was limited insofar as his cross-examination was concerned as he did not consult with another expert.^[2] On 13 May 2015, Messrs Inkomfe Investigators emailed the defendant's attorneys details of the plaintiff's employment history.

^[16] On 14 May 2015, the trial in the matter reconvened and the plaintiff testified. Cross-examination of him likewise was limited. The defendant presented no evidence at the trial and did not instruct any experts. Once both parties had closed their case, I once again raised with Mr Mbambo the aspect as to whether or not he had any instructions. The transcript at page 89 reveals the following:

'Henriques J Mr Mbambo, do you have any instructions on the matter?

Mr Mbambo No

Henriques J Why not?

Mr Mbambo Insofar as I understand, M'Lady, I was instructed to at a very late stage to attend trial, alternatively if there is any settlement.

Henriques J Well, before this trial commenced yesterday I was told instructions on certain aspects would be forthcoming. Now why are there no instructions or an undertaking?

Mr Mbambo This morning, M'Lady, yes I was advised that there would be something in writing but ... [incomplete]

Henriques J By when?

Mr Mbambo I believe that the candidate attorney informed the handler that the matter would commence at 10:00 a.m so I believed by this time I would have instructions in writing.'

^[17] Prior to the judgment being delivered in this matter this court canvassed pertinently with Mr Mbambo whether or not the defendant was tendering an undertaking. He indicated that as at the time of the delivery of the judgment after all the evidence had been presented, no instructions had been forthcoming specifically in relation to the tendering of an undertaking. In addition, at no stage was this court informed that the handler was on the way down to court with an undertaking.

- [18] During the course of his address the plaintiff's counsel dealt with whether or not this court could order the payment of future medical expenses and or the issuing of an undertaking. Relevant argument and submissions were made based on the decisions in the Katz case. The effect of the decision was that the Fund had an election up until judgment to issue an undertaking or pay a monetary sum in respect of future medical expenses. This court invited the defendant through its representatives to make an election but the defendant's legal representatives did not have instructions to do so.
- [19] After closing argument and before judgment was delivered, I was informed that no undertaking in terms of the provisions of s 17(4) of the Act would be forthcoming. Judgment was consequently granted in favour of the plaintiff with a monetary amount being awarded for future medical expenses as no undertaking had been tendered.
- [20] After issuing the rule nisi, and on 18 May 2015, the defendant's attorneys of record indicated that the defendant would not meet the 12h00 pm deadline for the filing of the affidavits and sought an extension of time until 14h00 pm on the same day to file affidavits. The defendant did not meet this self imposed deadline either.
- [21] The defendant's affidavits were only handed up on the morning of the hearing of the matter on 19 May 2015. The defendant's attorney of record Mr Tembe took responsibility for same. In light of the deficiencies in the affidavits and the fact that the same was only handed up at the hearing of the matter, the matter was adjourned and directives were issued for the filing of further affidavits by the defendant. This was to provide the defendant with a further opportunity to deal with aspects not canvassed in the affidavits and as Mr Mbambo was no longer on record for the defendant.

Legal Position

- [22] It is trite that the court has discretion, to be exercised judicially upon a consideration with the facts in each case what costs to award. In essence it is a question of fairness to both sides.
- [3] The ordinary rule is that the successful party is entitled to costs on a scale of which must be determined depending on the nature of the matter and the manner in which the litigation was conducted. An award of attorney and client costs is not lightly granted by the court and the tendency is to do so on rare occasions and if the conduct of the litigants necessitates same.
- [23] Costs de bonis propriis is a punitive cost award which is issued to show one's displeasure for the manner in which a party has conducted litigation. The award of costs against a legal practitioner or a person in their representative capacity applies to conduct which substantially and materially deviates from the standard expected of practitioners. A court also makes such awards when it feels compelled to mark its displeasure of the conduct of an attorney or a representative in any particular context. Conduct that exhibits a "lack of care" also results in a punitive cost award.

[24] It is true that a legal representative sometimes makes errors of law. In addition practitioners omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence and does not, however, per say ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interest of justice, irresponsible and gross negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and lack of care. The list is not exhaustive.

[25] There must be good reason to order a litigant in a representative capacity to pay costs de bonis propriis. Innes CJ in *Vermaaks Executor v Vermaaks Heirs*[4] summed it up as follows:

‘the whole question was very carefully considered by this Court in *Potgieters* case([1908] T.S. 982) and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity is conduct in connection with the litigation in question must have been mala fide, negligent or unreasonable.’

[26] In *Khan v Mzovuyo Investments (Pty) Ltd*[5] the court considered such an order appropriate when an attorney displayed slack and unconcerned attitude in handling a matter. In awarding costs de bonis propriis Hancke J said the following:

‘In my view plaintiff’s attorneys slack and apparently unconcerned handling of his client’s case in the present matter, namely to enrol the matter while it was not ripe for hearing at a stage when it had been either postponed or removed from the roll on seven previous occasions, amounts to such unreasonable conduct as to warrant a punitive order as to costs. In my opinion it would be grossly unfair to order the plaintiff to bear the costs occasioned by his attorney’s unreasonable and negligent conduct, particularly in view of the fact that plaintiff was mulcted with costs on three previous occasions.’

[27] The underlying principle of awards of costs de bonis propriis is applicable where a person acts or litigates in a representative capacity. The basis for such award is a material departure from the responsibility of office,[6] there must be good reasons for such an order such as improper or unreasonable conduct or lack of bona fides. Of late courts will in appropriate circumstances award costs de bonis propriis against an attorney where it involves reasonably serious cases such as dishonesty, wilfulness or negligence in a serious degree.

[28] In *Thunder Cats Investments 49 (Pty) Ltd v Fenton*[7] Le Grange J held:

‘An order to hold a litigant’s legal practitioner liable to pay the costs of legal proceedings is unusual and far-reaching. Costs orders of this nature are not easily entertained and will only be considered in exceptional circumstances.’

[29] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and Others*[8] the court at paragraphs 34 and 35 held the following:

[34] Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. ... [T]he obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner ...

[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.'

[30] In respect of statutory and quasi-judicial bodies and public officers there are special rules relating to the award of costs in legal proceedings. The locus classicus is the decision of *Coetzeestroom Estate and GM Co v Registrar of Deeds*[9] in which Innes CJ said:

'With respect to the question of costs, the Court should lay down a general rule in regard to all applications against the Registrar arising on matters of practice. To mulct that official in costs where his action or attitude, though mistaken, was bona fide would in my opinion be inequitable. And it would be detrimental to that vigilance in the administration of the Deeds Office, which is so essential in the public interest to maintain. For the Registrar would be chary in giving effect to his own views on points of practice, if the result might be an order against him to pay the costs of a successful application; and this would be so whether the Government indemnified him or not. On the other hand, if costs are not given against the Registrar when his action has been bona fide though mistaken, it is only right that an applicant who bona fide and upon reasonable grounds asks for an order against the Registrar on a matter of practice should be similarly protected. Such an applicant should not, if unsuccessful, be ordered to pay the costs of the Registrar. This general

rule we shall follow in the future; but the Court will reserve to itself the right to order costs against the Registrar if his action has been mala fide or grossly irregular, and against an applicant who has unreasonably or frivolously brought the Registrar into Court. The rule will not apply to cases in which the Registrar may be sued for damages caused to a third party by a negligent or improper discharge of his duties. In all such cases the question of costs will have to be decided simply on the facts before the Court. In the present instance the motion was a reasonable and proper one for the applicants to bring, and there will be no order as to costs.’ (Emphasis supplied.)

[31] The decision in the Coetzeestroom has been qualified in certain respects by a number of subsequent judicial decisions. The Appellate Division has ruled that a court has a discretion to award costs against such officials if it considered the circumstances justified such a course of action.

[32] In matters involving statutory bodies or public officers, courts do not easily award costs if the public officer acted mistakenly but in good faith. It is trite that the award of costs is an exercise of judicial discretion even if it is done in terms of the provisions of a statute. The Supreme Court of Appeal in *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng Provincial Government*[10] was critical of an official’s highhanded behaviour and remarked that it is time for courts to seriously consider holding officials who behave in such a highhanded manner personally liable for costs incurred. In the matter as such a punitive costs order was not asked for, it was not addressed.

[33] In *Lushaba v Member of the Executive Council for Health, Gauteng*[11] the court considered the rule in the Coetzeestroom case and the appropriateness of its application in modern South African conditions. A rule nisi had been issued calling on the defendant, the MEC for Health, to show cause why she ought not to be held liable for costs de bonis propriis, alternatively to identify the responsible official. The court confirmed that costs de bonis propriis orders are not easily awarded and that certain situations may be appropriate and warrant the court issuing such orders. At paragraphs 69 and 70 the court held the following:

‘[69] The authorities caution that costs de bonis propriis should only be awarded in exceptional circumstances. A legal advisor or legal representative is not to be punished with such a costs order for every mistake or error of interpretation. To err is, after all, human.

[70] But there is a limit. That limit is, to my mind, crossed when one encounters the degree of indifference, and incompetence evidenced in this case. Erring when trying to do one’s work well is one thing. Not even caring is quite another. The public should not have to suffer this complete indifference and incompetence at the hands of public servants. In 1902 Innes CJ thought that it would be detrimental to the public service to “mulct that official in costs where his action or his attitude, though mistaken, was bona fide”. But circumstances appear to have changed, with not even censure from our highest courts being sufficient to induce public officials to public-minded service. Something is required to so induce them. Perhaps the answer lies in greater accountability.’

The court granted a cost de bonis propriis order against the responsible official and remarked as follows:

[86] Costs orders de bonis propriis against state attorneys and public officials are drastic measures. These functionaries should not be terrorised and paralysed into not doing their jobs by the fear that every little error could be met with the extreme sanction of a personal costs order.

[87] But we are not faced with an error in this case, be it an error of interpretation or judgment or even an oversight. We are faced with state employees who could not be bothered to do their work.

[88] Such incompetence undermines the Constitution and, with it, the social contract underlying it. Our constitutional order was not arrived at easily. One might argue that we have been fighting for this for a number of millennia. It cannot be permitted to die with a whimper, sunk away under a swamp of slothful indifference. Drastic measures are called for to turn the tide. If personal accountability among public officials does not come naturally it must be inculcated. Somehow these officials must be taught that their actions (or lack thereof) have consequences; that what they do matters. Somehow they must be conditioned to care, such that a Vuyisile Eunice Lushaba, in the midst of a physical crisis, could expect to enter a provincial hospital and

receive the best possible care, the kind of care that committed service produces. And when mistakes are made (as they inevitably will be) then there must be the courage and intellectual honesty not to lie to her, not to threaten her right of access to court by foot-dragging and further incompetence, not to further insist that she was not entitled to emergency medical treatment in circumstances where the facts have no patience with such mendacity.'

[34] Subsequently the matter went on appeal and the Constitutional Court set aside the order. The order was set aside on the basis that the rule nisi ought not to have been granted and it was the manner and form thereof was incompetent given the facts of the matter.[12]

[35] In opposition to the order the defendant submits the following. I have merely highlighted those relevant portions. I have deliberately

refrained from dealing with other portions of the affidavits filed by the Defendant. The allegations and submissions made therein are reckless in the absence of a transcript[13] and are simply without foundation if one had regard to the transcript. In addition, at the hearing of the matter, the legal representative, presumably having read the transcript, did not pursue any of the submissions. In fact appeared to even concede the challenge to the competence of the order in respect of future medical expenses.

[35.1] The court was functus officio once judgment was delivered and consequently had no authority to correct alter or supplement the order.

[35.2] No exceptions existed and neither was an application in terms of rule 42 made. Consequently, this court could not have granted the rule nisi as had no authority to do so;

[35.3] There was no gross negligence or any failure to carry out a statutory obligation;

[35.4] Marine and Trade Assurance Company Limited v Katz N.O[14] was incorrectly interpreted and consequently there was no obligation on the Fund to tender a certificate in terms of section 17(4);

[36] In the preliminary answering affidavit, Ms Mohamed appears to misconstrue the reasons for the court issuing the rule nisi. She appeared to be of the opinion that the court was directing the defendant to settle the matter before judgment. Nothing could be further from the truth. The defendant is entitled to defend the matter specifically in relation to the loss of earnings and the fact that there was no collateral information. However, the defendant waited until the eleventh hour to request the information and instruct an assessor to confirm the loss of earnings. From the chronology referred to hereinbefore, these documents were only requested on 13 May 2015.

[37] Despite reminders being sent to the defendant's handler inter alia reminding them of the looming trial dates, that despite the block booking in March 2015, no attorney had been appointed for the defendant no trial preparation was done. The defendant waited till the eleventh hour to verify loss of earnings. What is not explained is why, despite the reports being available to its previous attorneys, no responses were forthcoming to the plaintiff's attorneys numerous emails regarding trial preparation.

No explanation was provided as to why past medical expenses could not be agreed nor why an undertaking could not be given, once the evidence had been presented.

[38] In the supplementary affidavit the defendant took issue with the competency or otherwise of the order I issued in relation to the medical expenses. In addition, the defendant took umbrage with the request that supplementary affidavits be filed, as this was an invasion of the right of attorney and client privilege. In addition, it challenged the competency of the order in relation to future medical expenses. A reckless statement was made in the affidavit[15]. Mr Tembe confirmed that no evidence was led as to the quantum of the future medical expenses which the plaintiff on a balance of probabilities, would incur, nor was there any agreement between the parties respective counsel that the plaintiff would incur future medical expenses in an amount of R56 610.98. Mr Tembe's affidavit indicates the record of proceedings will have to be transcribed and an affidavit will have to be procured from Advocate Mbambo. The deponents to the affidavit adopt the view that 'the court essentially through the demand for supplementary affidavits explaining the position of the defendant invades their rights against self-incrimination'.[16]

[39] In circumstances where the court contemplates issuing a costs de bonis propriis order, it is incumbent to adhere to the principles of audi alterem partem. The defendant's officials had to be granted an opportunity to provide an explanation of their conduct. Being legal officials, and having the benefit of legal counsel, one would have expected that the explanation would have been provided without any breaching any rules of self-incrimination and attorney client privilege. In any event these are civil proceedings and I

am not certain in what context the right against self- incrimination is asserted in the affidavits. As these submissions were never advanced at the hearing and appear to have been abandoned nothing more need be said about this.

[40] Much is made by the defendants in their answering supplementary affidavits of the fact that the plaintiff bore the onus. Whilst I accept that the plaintiff bore the onus as far as proof of earnings is concerned, if it was the defendant's view that the plaintiff would have to prove its case, what is not explained then is why the defendant's attorney then instructed investigators to confirm and investigate the collateral information in respect of loss of earnings, why it was necessary to request these documents from the plaintiff's attorneys after Ms Hill testified at the end of the first day of the trial. This is also inconsistent with the instructions provided to the legal representative Mr Mbambo and what he placed on record both at trial roll call and before me when he requested the matter stand down for two hours as he was awaiting instructions. If it was the intention of the defendant for the plaintiff to prove his case, then one would have expected at trial roll call to advise the Judge that the matter was proceeding, and also even prior to that to have responded to the Plaintiff's attorneys emails advising them that the trial must proceed. In addition, one would have expected the defendant to instruct its legal representative, to enable him to properly cross-examine the plaintiff's expert witnesses and the plaintiff on his loss of earnings. The defendant's conduct is inconsistent with that of a litigant who had conducted extensive investigation into the matter in preparation for trial and who had as Ms Mahomed and her Senior indicate in their affidavits made a decision that the trial proceed as the plaintiff had to prove his case.

[41] The defendant's submissions in relation to the interpretation of the Katz's case and the award of a monetary amount for future medical expenses and the award of general damages is not borne out by the record of proceedings. This is clear from the address by the defendant's legal representative which is recorded in the transcript as follows:[17]

'Mr Mbambo addresses court As the court pleases. With regard to future medical expenses, they were proved and there's nothing I can say on that, M'Lady. With regard to general damages, the plaintiff seeks R280 000 and I think it's reasonable in the circumstances, M'Lady.'

[42] A further challenge relates to the award of past loss and future loss of earnings and the contingencies to be applied thereto as well as the retirement age. The evidence in this regard was unchallenged. During the address the defendant's legal representative makes the following submissions:

'Mr Mbambo With regard to the past loss of earnings and future, with regard to the question of contingencies, I submit M'Lady, that huge contingency should be applied in this case, the reason being, looking at the

Henriques J Huge contingencies should be applied to what?

Mr Mbambo with regard to-no, with regard to-specifically with regard to past loss of earnings, normal contingency of 5% should be applied, I understand that 5% is a normal contingency, M'Lady. With regard to future, I also think that normal contingencies should apply.

Henriques J so you agree with the scenarios that Mr Oliff has put forward during the address?

Mr Mbambo Yes M'Lady

Henriques J What do you say about retirement age?

Mr Mabambo Sorry, M'Lady?

Henriques J Retirement age?'

Mr Mbambo Retirement age also, I mean, it was undisputed that, from the experts it was undisputed that it is 65.'

[43] In relation to the question as to why an undertaking had not been tendered, the defendant in its answering affidavit deals with it in the following fashion:

'[26.2] Statutorily, and within the meaning of s 17(4), it is not an obligation of the Road Accident Fund to tender or offer an Undertaking as the legislation makes it clear that if an Undertaking is not offered, it is within the compass of the Trial Judge to order an Undertaking. As it turns out, the Honourable Madam Justice Henriques did not order an Undertaking but instead, gave a money judgment for future medical expenses which as mentioned is ultra vires. There was also no acceptable evidence confirming why such a large amount of future medical expenses was warranted.'[18]

[44] What is startling in relation to the initial answering affidavit filed was that at no stage was it communicated to the court,

according to the plaintiff's representative, that the plaintiff was being required to prove its case. Both the advocate

appearing for the defendant and the candidate attorney who attended at court with him indicated that they wanted their matter to stand down as they were awaiting instructions, not that their instructions were to proceed to trial with the plaintiff to prove its case. The transcript will also indicate that on more than one occasion I had made enquiries with the defendant's representative as to whether or not instructions had been forthcoming. The answer was always in the negative. This is in stark contrast to the contents of the affidavit filed by Ms Mohamed and confirmed both by the defendant's attorney of record Mr Tembe and the senior Ms Morar that a decision had been made for the plaintiff to prove his case. If it in fact was the case this appears not to have been communicated to the candidate attorney present at court or the advocate present at court for the defendant. What also compounds the problem with the defendant is the fact that at the hearing of the matter on 21 August 2015 and it must be assumed that by that stage the defendant's representatives were in possession of the transcript of the proceedings, the defendant changed tack and appeared to abandon the arguments in relation to the following:

[44.1] the fact that it was incompetent for the court to issue the rule nisi;

[44.2] that it was incompetent for the court to issue a monetary judgment for the future medical expenses; and

[44.1] that no evidence had been led in relation to the anticipated future medical expenses to be incurred.

[45] The defendant's change of tack that it was always intended that the plaintiff prove its case is inconsistent in relation to the aspect of anticipated medical expenses in light of the fact that the defendant had admitted Dr Fraser's report. Such report is always read together with the report of an occupational therapist.

[46] As already indicated hereinbefore, the conduct of the officials is to be depreciated as these are public funds. The defendant has publically indicated it has no funds to compensate victims. It constantly seeks additional funds from Parliament to do so. Costs could have been saved had instructions been forthcoming specifically in respect of the future medical expenses and general damages. Reports could have been agreed. Yet the defendant did not provide instructions to its legal representatives.

[47] The rule nisi came about as a result of the manner in which the defendant conducted the defence of the plaintiff's claim. The transcript of the proceedings accurately records the conduct of the defendant's throughout the trial and the exchanges at various times with the defendant's legal representative.

[48] In particular I was advised at the commencement of the trial by Mr Mbambo who appeared for the defendant, that the defendant did not intend tendering an undertaking in terms of s 17 of the Road Accident Fund in respect of the plaintiff's claim for future medical and related expenses. The plaintiff would in turn have to lead evidence in respect of this aspect of his claim.

Notwithstanding various enquiries made to the defendant in the course of the trial, still no instructions were received from the

aforementioned officials with regard to the furnishing of the said tender.

[49] The defendant led no evidence in defence of the plaintiff's claim. The plaintiff's evidence went largely

unchallenged. The cross-examination of the plaintiff and the plaintiff's expert witnesses was superficial. In fact, the defendant's legal representative did not test the evidence presented, least of all that of the plaintiff's experts in respect of loss of earnings and the future medical expenses.

- [50] The approach adopted by the defendant is clearly not in keeping with the objects and the purposes for which the Road Accident Fund is established, namely to pay compensation to claimants in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles. It uses public funds to achieve the purposes assigned to it by the Act and it has a responsibility to do so in a responsible manner.
- [51] The officials together with the defendant's attorney of record filed affidavits appraising this court of the manner in which the matter was dealt with by the defendant. It is clear from a reading of those affidavits that the reasons advanced are less than satisfactory. In addition, these officials align themselves with the sentiments expressed in their attorney of record's replying affidavit which I have referred to in footnote 13 above. Despite the reckless and derogatory manner in which the affidavit was drafted, I am constrained by the decision of the constitutional court in the Lushaba matter, and am thus precluded from issuing any order against the defendant's legal representative, Mr Tembe. Mr Tembe as an officer of this court, and an attorney of many years ought to in future refrain from making such reckless and derogatory remarks in affidavits especially when he does not have the benefit of a transcript, and all the more so when he did not attend at court.
- [52] The explanations given in the said affidavits are with submission not the type described as 'dishonest, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence as described in the Multi Links case referred to hereinbefore.
- [53] Having regard to the authorities referred to, and more specifically the decision of the Constitutional Court, it would appear that in light of the explanations proffered by the officials, they do not warrant a costs order de bonis propriis. However, I trust that this matter will serve as a warning to the officials that they bear in mind the purpose of the legislation and constantly bear in mind that these are public funds which they are dealing with and these ought not to be wasted, and they should deal with such Funds in a responsible manner.

Conclusion

- [54] In the result the order I issue is the following:

The rule nisi issued on 14 May 2015 is discharged.

Case Information Date of hearing : 14 and 19 May 2015, 21 August 2015 Date of judgment : 13 December 2017
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Ref: Mr Friedman/RM01/F14374/00 Counsel for Defendant : Mr Mbambo, Mr Tembe, R Padayachee SC Instructed by : Tembe Kheswa and Nxumalo Inc (TKN Incorporated) 101 Mathews Meyiwa Road (Stamford Hill Road) Greyville Durban (T) 031-309 8881 (F) 031-309 6977 Ref:

T.A.Tembe/BN/RAF01131

[1] Para 13, Affidavit of Michael Harris Friedman, page 91, Bundle Index to documents

[2] Transcript page 63 line 12 and 13.

[3] Norwich Union Fire Insurance Society Ltd v Tutt 1960

(4) SA 851 (A) at 854 D.

[4] 1909 TS 679 at 691.

[5] 1991 (3) SA 47 (Tk) at 48 G.

[6] Blou v Impert & Chipkin 1973 (1) SA (A) 14.

[7] 2009 (4) SA 138 (C) at 151.

[8]

[2013] 4 All SA 346 GNP at 369-370.

[9] 1902 TS 216.

[10]

[2013] Vol 3 All SA 370 SCA at 385.

[11] 2015 (3) SA 616 (GJ).

[12] MEC for Health, Gauteng v Lushaba 2017 (1) SA 106 (CC) paras 13-14 and 17-19.

[13] Para 10.2 indexed page 23, Para 3.4 indexed page 150 and 151; Para 3.5(a) indexed page 151; Para 3.6 indexed page 152 and 153; Para 3.7 indexed page 153 and 154; Para 3.8 (b) indexed pages 154 and 155, Para 3.9 page 155 and 156, Para 3.10 page 156, Para 3.21(b) indexed page 163, Para 3.24(d) indexed page 165, Para 3.34 (a) indexed page 167

[14] 1979 (4) SA 961 AD.

[15] Paragraph 10.2, page 22 of the indexed papers.

[16] Paragraph 18, page 27 of the indexed papers.

[17] Page 98 line 8.

[18] Page 34 indexed papers.

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