

SOUTH AFRICA / JUDGMENT

Johester and Others v Road Accident Fund (2020/23383) [2024] ZAGPJHC 574 (12 June 2024) [2024] ZAGPJHC 574

COURT

South Gauteng High Court, Johannesburg

BEFORE

B. Ford

CASE / FILE NUMBER

2020/23383

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FLYNOTES:

RAF

– Special Interlocutory Court – Striking
out of defence –

Compelling

Fund to call expert witnesses – Party cannot be compelled to
make an election to call expert witnesses or

not – Or comply

with undertaking in a pre-trial minute to call experts if party
elects no longer to call any expert

witnesses or vice versa –

Compelling RAF is a nonsensical encroachment on party's
right to decide how it intends

to run its case – Application

dismissed.

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

1. REPORTABLE: NO

2. OF INTEREST TO OTHER

JUDGES: YES

3. REVISED: NO

12

June 2024

Case

Number: 2020/23383

Case

Number: 2022/001504

Case
Number: 2022/008957
Case
Number: 2017/22147
Case
Number: 2016/738
Case
Number: 2019/43974
Case
Number: 2022/24763
Case
Number: 2020/23158
In
re several matters in the Special Interlocutory Court
BEUKES
EMMARENTIA JOHESTER
Plaintiff (Case 1)
MBONGO
SAMUEL MFAHELO
Plaintiff (Case 2)
NJIYELA
PHUMEZA CLEOPATRA
Plaintiff (Case 3)
SHAWA
WINSTON
Plaintiff (Case 4)
MPILA
MATTHEW S THABANI
Plaintiff (Case 5)
MAHLATSI
THEKISO SIMON
Plaintiff (Case 6)
MOHALE
TSAKANE PERTUNIA
Plaintiff (Case 7)
LEE
MINYOUNG
Plaintiff (Case 8)
and
ROAD
ACCIDENT
FUND
Respondent
As

well as:

Case
Number: 2020/14101
NSELE
LULU
PURITY
Plaintiff (Case 9)
MEC
FOR HEALTH GAUTENG
Respondent

JUDGEMENT

FORD AJ,

Introduction

[1] The principal purpose of our courts; the adjudication of legal disputes, is at times, subverted by unnecessary peripheral litigation, which demands a lot of court time and resources, and detracts from that principal purpose. Significant amounts of court time and resources are employed to deal with interlocutory matters, as opposed to dealing with the real disputes between parties.

[2] In *Szedlacsek v Szedlacsek*, Leach J, clearly alive to the subversion alluded to above, remarked as follows[1]:

‘It is trite that Rules are there for the Court, not the Court for the Rules and this Court must zealously guard against its Rules being abused, particularly by the making of unnecessary procedurally related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation but which appear to be designed merely to inflate costs to the advantage of a practitioner’s pocket.’

[3] In our division, a Special Interlocutory Court (“SIC”) has been established to deal with interlocutory matters in a quick and expedient manner. This was done, by and large, to ensure that procedural delinquencies are addressed, so that the court can hear and determine matters (the real disputes), on their merits.

[4] The learned authors Herbstein & Van Winsen, identify the procedural nature of an interlocutory order as follows:

An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties[2].

[5] In a more recent decision of *Peter Tanya Millu v City of Johannesburg Metropolitan Municipality & 1 Other*, Sutherland DJP, eloquently describes the function of the SIC, as follows:

Its function is to provide swift relief to overcome an adversary's obstructiveness which improperly delays the orderly progress of litigation.[3]

- [6] An appreciable sum of matters in the SIC, as expected, concerns applications to compel, and applications to strike out defences. Most of these matters involve the Road Accident Fund ("RAF"), and deal in the main with addressing procedural delinquencies perpetrated by the RAF. Either it failed to comply with undertakings issued in pre-trial minutes, or it failed to comply with court

orders.

- [7] Since the cases before me involve the same defendant, and various plaintiffs, I considered it necessary to dedicate one judgment to all these matters, and to the extent necessary, seek to advance a more cohesive approach to these types of matters.

Matters to be determined in the SIC

- [8] The directive applicable to most of the cases before me, is Directive 1 of 2021. It reads, in its relevant parts, as follows:

'CHAPTER 8: THE TRIALS INTERLOCUTORY COURT: ROLE AND FUNCTIONS, APPLICABLE TO ALL CATEGORIES OF MATTERS

33. [There is established a] Motion Court, the [Special] Interlocutory Court, dedicated to interlocutory matters in Civil Trials to address issues of non-compliance with this Directive, the practice manual of the Court and any Rule of Court,....
34. ...
35. In an application to strike out a non-compliant Defendant's defence, such application shall be set down on notice and filed before noon on a Thursday of a week, one clear week before the week in which the matter is set down.
36.
37.
38. Any party who, having reason to be aggrieved by the other party's neglect, dilatoriness, failure or refusal to comply with any Rule of Court, provision of the Practice Manual or provision of this Directive, must utilise the Special Interlocutory Court to compel compliance from the delinquent party.
39. Furthermore, any breach by a Legal Practitioner to promote and advance the efficacy of the Legal Process as stipulated in paragraph

60.1 of the Code of Conduct for Legal Practitioners may be referred to the Legal Practice Council for investigation into possible

professional misconduct.³

39.....

40 Among the matters which this court will deal with will be:

40.1 the failure to deliver timeously any practice note or Heads of Argument that are due.

40.2 a failure to comply with Rule 36,

40.3 a failure to sign a Rule 37 minute promptly,

40.4 a failure to comply timeously with any undertaking given in a Rule 37 conference,

40.5 a failure to secure an expert timeously for an interview with a patient,

40.6 a failure to secure a meeting of experts for the purpose of preparing joint minutes,

40.7 non-compliance with any provision of this directive,

40.8 any other act of non-compliance in respect of an obligation that rests upon a party which may imperil expeditious progress of a matter may be the subject matter of an application to compel; the list is not limited.

41. In a proper case, punitive costs (including an Order disallowing legal practitioners' from charging a fee to their clients) may be awarded where recalcitrance or obfuscation is apparent and is the cause of inappropriately delaying the progress of any matter.'

[9] The new Consolidated Directive (1 of 2024) retained most of what was set out in Directive 1 of 2021, save that as correctly pointed out by Sutherland DJP, in Millu, the text of the Directive was amplified with effect from 26 February 2024 in a revision, contained in Directive 1 of 2024, which reads as follows:

'27.10 An application in the SIC shall not be postponed or deferred because it becomes opposed since that would have the effect of undermining the very function of the SIC. Opposed matters shall therefore be disposed of within the week in which they are set down. The opposing litigant may file such papers to succinctly set out the basis of the opposition as the presiding Judge may permit.

27.11 To prevent unnecessary delays, additional costs, and a waste of court resources caused by non-compliance with orders handed down in the SIC, a party may seek an order in the SIC that provides for the ipso facto striking out of the claim or defence in the event that the other party fails to comply with an order granted by the SIC within a specified time, provided that-

27.11.1 The order has been served on the delinquent party, and

27.11.2 A rule of court provides that such non-compliance entitles an aggrieved party to apply to strike out the claim or defence.'

[10] The SIC is predominantly involved in issuing orders, to ensure that a delinquent party complies with a Uniform Rule, a directive, an undertaking arising from a pre-trial conference as captured in a pre-trial minute, a failure to secure an expert timeously for an interview with a patient, and a failure to secure a meeting of experts for the purpose of preparing joint minutes.

The delinquencies complained about in the various cases

[11] The plaintiffs complain that the RAF failed to comply with undertakings given at the various pre-trial conferences, specifically

as it relates to the appointment of experts, the exercising of an election to do so, and undertakings to revert in that regard. It is worth pointing out, that the same counsel appeared for the plaintiffs, in most of the matters against the RAF. It was argued

that any non-compliance with an undertaking issued at a pre-trial conference, reduced to writing in a pre-trial minute, constitutes

sufficient cause to invoke the striking out of a defence as contemplated in the SIC machinery. For reasons that will become apparent later herein, I disagree with this contention, as a general proposition.

[12] A pre-trial conference and the consequent conclusion of a pre-trial minute, are intended to narrow and limit the procedural and evidential issues between the parties, before the trial commences. Some undertakings advanced in a pre-trial minute, do not constitute procedural or evidential issues that would require protection, quite in the same manner as procedural or evidential issues demand. For example, the number of factual witnesses, an election to call expert witnesses, the order in which witnesses will be called, the duration of the trial etc, are all undertakings but none of which constitute undertakings, the non-compliance of which would necessitate grounds for a compelling order, or worst still, a striking out order.

[13] Even procedural or evidential undertakings may succumb to eventualities which the parties may not have contemplated at the time of concluding a pre-trial minute. To adopt a blanket approach, that any non-compliance with an undertaking may result in an order compelling compliance or striking of a defence or claim, is unreasonable, and does not, in my view, fall within the contemplation of the Directives. Each undertaking must be considered on its merit.

[14] In one example, before me, for instance, the RAF had given an undertaking, that it intends calling a number of expert witnesses. When this did not happen, the plaintiff approached the SIC and sought an order to compel the RAF to file its expert reports as it undertook to do. The plaintiff, pursuant thereto, brought an application to strike out the RAF's defence. In opposing that relief, the RAF explained, that it elected to proceed with the trial without calling any experts, and sought to agree that the matter will proceed on the plaintiff's expert reports only. The plaintiff, notwithstanding the RAF's election, persisted with the striking

application, on grounds that the RAF could not, in light of the court order, denounce an undertaking to file expert reports, as it undertook to do in a pre-trial minute. In essence, so it was argued, whether the RAF changed its mind about calling experts is irrelevant, it committed to do so in a pre-trial minute, and is accordingly barred from resiling from such an undertaking. Once a party undertakes to call expert witnesses, even though circumstances may have changed, that party, so the argument went, is obligated to comply with such an undertaking. This is on all accounts a nonsensical encroachment on a party's right to decide how it intends to run its case.

[15] Adams J, in *Legoalo*[4], where several applications served before him to compel the RAF to appoint a single joint expert, said the following:

Of particular importance is par 25.2, which provides specifically that matters to be dealt with by this court shall include the failure by a party to comply with the provisions of rule 36. The directive does however not expressly deal with a party's failure to avail himself of the provisions of rule 36(9A)(a), which, after all, does not impose on a party a positive obligation to take a particular procedural step in the litigation process. In other words, it cannot be said that a defendant who fails to give notice of his intention to call an expert witness does not comply with rule 36. There is no obligation on a defendant to call expert witnesses. All that the rule provides is that, in the event of the defendant opting to call an expert witness, the procedure outlined in that rule 36(9) should be followed. What the rule 36(9A) provide for is a procedure which encourages parties to reach agreement on the use of a 'joint expert'. My reading of rule 36(9A)(a) is that it does not afford to the plaintiffs the right to insist that the defendant agrees on a 'joint expert'. Far from it, the language used simply states that the parties should try to reach agreement on this issue. If no agreement can be reached, then there is not much more relief available to the plaintiffs.

I couldn't agree more.

[16] In several of the applications before me, the plaintiffs complain that in the pre-trial minute, in response to these questions; Does the defendant intend calling any expert witnesses? In the event that the defendant does not intend calling any expert witnesses, does the defendant agree to admit the plaintiff's expert reports? The RAF simply replied, "the defendant will revert".

[17] The RAF did not revert, and the plaintiffs then approached this court to seek an order to compel the RAF to exercise an election, whether or not it intends calling any expert witnesses and failing which, to have the RAF's defence struck out.

- [18] I invited counsel appearing for the plaintiffs to point me to the Rule that provides for an order compelling compliance, or striking out of a claim or defence on grounds that a party has not exercised an election to call an expert witness, when it previously issued such an undertaking, or where a party who formerly indicated it would be relying on expert witnesses, but who had since abandoned such reliance, ought to be held to that undertaking and vice versa.
- [19] Mr. Rossouw, in an attempt to answer my question, submitted that Rule 30A, properly considered, makes provision for such an eventuality, in that a request was made, by way of an undertaking, which has not been complied with.
- [20] Rule 30A, provides as follows:
- (1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—
 - (a) that such rule, notice, request, order or direction be complied with; or
 - (b) that the claim or defence be struck out.
 - (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.
- [21] The Rule 30A machinery is triggered by one of two occurrences: Firstly, a party's non-compliance with the Rules or with a request made or notice given pursuant thereto. Secondly, where a party fails to comply with an order or direction of court, or with an order or direction given in a judicial case management process.
- [22] A request in the context of Rule 30A, arises when there has been non-compliance with a Rule. An allegation that there has been non-compliance with an undertaking issued in a pre-trial minute in respect of calling experts, or exercising such an election, can only arise in the event that such eventuality is contemplated in a Rule. There is no such Rule, nor is it remotely contemplated in Rule 36.
- [23] Rule 36, does not place, as correctly pointed out by Adams J in *Legoalo*, a positive duty on a party to appoint experts. An undertaking to appoint an expert witness in a pre-trial minute, and failing to do so does not constitute non-compliance of Rule 36. Unless a Rule of court, court order, or directive provides that such non-compliance entitles an aggrieved party, to apply for the striking out of a claim or defence, such an application would be incompetent. Accordingly, an undertaking to elect to appoint expert witnesses, or to revert in respect of such election, does not constitute a justifiable basis for the striking out of a defence or claim. There is no "non-compliance" with the Rules where a party does not indicate an

election to call an expert, and a request or undertaking in relation thereto, does not clothe such apparent failure with stature equal to the non-compliance that Rule 30A contemplates. Properly considered, reference to “any undertaking” in the Practice Directive, refers to an evidential or procedural undertaking, not an undertaking that is subject to an election.

[24] There are only two sub-rules that contemplate the striking of claims or defences as a result of non-compliance. Rules 21(4) and 35(7). Rule 30A, properly considered, refers to non-compliance in respect of those rules. Owing to the fact that a striking order is such a drastic one, its implementation must be consistent with the Rules. In the absence of a Rule making allowance therefor, the striking of a defence or claim, in circumstances, other than what the Rules provide for, is incompetent.

[25] In a number of cases, before the SIC, I was referred to instances where this court granted orders striking out a defendant’s

defence for; failing to comply with a directive or an undertaking set out in a pre-trial minute; or for failing to make an election to call an expert witness; or failing to file heads of argument. For reasons that are apparent in this judgment, I cannot, with the greatest of respect, reconcile myself with those orders. The striking out of a defence, apart from being a drastic order, as stated above, can only be made if a Rule of court makes provision for it. Moreover, in most instances, there are less onerous orders that a court can impose, to adequately deal with delinquencies, short of having to strike out a party’s defence. For instance, where a party fails to appoint experts, or to exercise an election to do so, an order excluding any future reports would be more than appropriate. Or where a party fails to comply with a compelling order, to attend a pre-trial conference, the obligation placed on parties in respect of the Practice Manual (for purposes of applying for a trial date) can be surmounted by that party filing a pre-trial minute, setting out the plaintiff’s agenda, rendering that procedural step compliant for purposes of securing a trial date, without reverting to a striking out order.

[26] In *Wilson v Die Afrikaanse Pers Publikasies (EDMS) BPK*[5] the court held as follows:

“The striking out of a defendant’s defence is an extremely drastic step which has the consequences that the action goes forward to a trial as an undefended matter. In the case if the orders were granted it would mean that a trial court would eventually hear this action without reference to the justification which the Defendant has pleaded and which it might conceivably be in a position to establish by evidence. I am

accordingly of the view that very grave step will be resorted to only if the court considers that a Defendant has deliberately and contemptuously disobeyed its order to furnish particulars.”

[27] I am not convinced, on a proper conspectus of the Rules[6] and the Practice Directives, that a party can be compelled to:

a) Make an election to call expert witnesses or not;

- b) Comply with an undertaking in a pre-trial minute to call experts, if a party elects no longer to call any expert witnesses or vice versa;

And worst still, to have their defences and claims (for such non-compliance) struck out.

[28] In so far as the matters before me advanced the proposition that a party's answering affidavit can be struck out, for failing to deliver heads of argument, I agree fully with the reasoning advanced by Wilson J, in *Capitec*[7], that a party's affidavit cannot be struck out for failing to file heads of argument. What ought to happen in such circumstances is simple. The delinquent party must be precluded from filing his heads of argument in the matter, without seeking condonation therefor, and any postponement occasioned thereby, must be countenanced with an appropriate order as to costs.

[29] Similarly, in instances where the RAF fails to revert with an election regarding the RAF4 form (after being compelled to do so), such non-compliance cannot lead to a defence being struck out, as no Rule makes provision for such an eventuality. This begs the question: what is a plaintiff to do in such circumstances? That question was competently answered by Davis J, in *Makuapane v Road Accident Fund*[8], where the court held as follows:

For the sake of completeness and ease of reference, the procedures contemplated in Reg 3 preceding an entitlement to claim general

damages can be summed up as follows: a plaintiff wishing to claim general damages must in terms of Reg 3(1)(a) submit himself or

herself to an assessment by a medical practitioner in order to assess the seriousness of the injuries sustained. The medical practitioner

then records the findings in a "serious injury assessment report", known as the RAF 4 report (with reference to the form prescribed in the Regulations). The RAF 4 report is then presented to the RAF who is obliged to make a decision as to whether, in terms of Reg 3(3)(c) it is satisfied that the injuries have correctly been assessed as being serious or, in terms of Reg 3(3)(d) to reject the findings contained in the report (and furnish reasons for such rejection). As a third alternative, the RAF may direct that the plaintiff undergo a further assessment by a medical practitioner

designated by the RAF. In terms of Reg 3(4), should the plaintiff dispute the RAF's rejection or if either the plaintiff or the RAF wishes to challenge the further assessment by the medical practitioner designated by the RAF, the aggrieved party must formally declare a dispute by lodging a prescribed dispute resolution form (RAF 5) with the registrar of the Health Professions Council of South Africa (the HPCSA). Once such a dispute has been declared it is determined by an appeal tribunal consisting of three independent medical practitioners with expertise in the appropriate area of medicine, appointed by the HPCSA registrar. The procedure before such an appeal tribunal has been prescribed in some detail in Regs 3(5) – (12). In terms of Reg 3(13) the appeal tribunal's decision itself is final.

[30] A defence cannot be struck out where the RAF failed to make an election regarding an RAF4 form (after being compelled to do so), when relief to effect compliance is statutorily available. The plaintiff must simply declare a dispute with the HPCSA[9]. Even where, in some instances, the RAF's defence was struck out, after being compelled to make an election, as pointed out in *Knoetze NO v Road Accident Fund*[10] such striking does not divest the RAF from its statutory authority, to make an assessment on the seriousness of the injury, which in my view renders an application to strike out a defence, in order to exact compliance, redundant. Regulation 3(3)(c) provides that "... the Fund shall only be obliged to pay general damages if the Fund is satisfied that the injury has correctly being assessed in accordance with the RAF 4 Form as Serious". That duty lies with the RAF and not the court.

[31] Davis J, went on to say in *Makuapane*[11] –

It does not follow automatically that, in the event of the RAF failing (or refusing) to make a decision, the outcome preferred by the plaintiff, namely a deemed satisfaction by the RAF that the injuries are serious should follow. Although a court may have sympathy for plaintiffs regularly put to expense and effort due to a failure by an organ of state to at least make a decision (which in this case is not an unduly onerous one being either a) satisfaction; b) rejection or, even if the RAF is in doubt; c) referral to a further medical practitioner for assessment), "sympathy is not a proper basis for a court to grant orders".

[32] It is against this background that I make the following orders in respect of each of the matters placed before the SIC.

Orders

In re Case Number: 2020/23383

[33] The application is dismissed with no order as to costs.

In re Case Number: 2022/001504

[34] The application is dismissed with no order as to costs.

In re Case Number: 2022/008957

[35] Prayer 1 of the order is granted. The remainder of the application, as it pertains to prayers 2, 3, 4, 5, 6 and 7 of the Notice of Motion is dismissed, with no order as to costs.

In re Case Number: 2017/22147

[36] Prayer 2 of the order is granted. The remainder of the application, as it pertains to prayers 1 and 3 of the Notice of Motion, is dismissed with no order as to costs.

In re Case Number: 2016/738

[37] Prayer 1 of the order is granted. The remainder of the application, as it pertains to prayers 2 and 3 of the application, is dismissed with no order as to costs.

In re Case Number: 2019/43974

[38] The application is granted with the exclusion of prayer 2 of the Notice of Motion.

In re Case Number: 2022/24763

[39] Prayer 2 of the order is granted. The remainder of the application, as it pertains to prayers 1, 3 and 4 of the Notice of Motion, is dismissed with no order as to costs.

In re Case Number: 2020/23158

[40] The application is dismissed with no order as to costs.

In re Case Number: 2020/14101

[41] Prayer 1 of the order is granted. The remainder of the application, as it pertains to prayers 2 and 3 of the Notice of Motion, is dismissed with no order as to costs.

B. FORD

Acting Judge of the High Court

Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 12 June 2024 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 June 2024.

Date of hearings:

18, 19 and 20 March 2024

Date of judgment:

12 June 2024

For the plaintiff in Cases 1, 2 and 8 Mr. A. Rossouw

Instructed by:

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[1] 2000 (4) SA 147 (ECD) 149 G-H

[2] 5th Ed, 2009 chapter 39 at 1205

[3] Case no: 25039/2021 GLD 20 March 2024, para 12

[4] Legoale and Others v Road Accident Fund (2019/31546; 2019/22794; 2019/31545; 2019/37216; 2019/29804) [2020] ZAGPJHC 366 (3 June 2020) para 6

[5] 1971 (3) SA 455 (T) at 462 H-463 B

[6] An application to strike out a defence or claim, only arises in circumstances contemplated in Rule 21(4), 35(7) and Rule 30A.

[7] Capitec Bank Limited v Mangena and Another (2021/28660)

[2023] ZAGPJHC 225 (16 March 2023)

[8] (9077/2022) [2023] ZAGPPHC 15 (19 January 2023) para 7

[9] Health Professions Council of South Africa

[10] (77573/2018 & 54997/2020 (plus six amici) [2022] ZAGPPHC 819 (2 November 2022)

[11] Ibid para 18

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