

SOUTH AFRICA / JUDGMENT

L.N and Another v Road Accident Fund [2023] ZAGPPHC 274; 43687/2020 (20 April 2023) [2023] ZAGPPHC 274

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

43687/2020

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 43687/2020

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

DATE: 20 APRIL 2023

In the matter between:

L[....] N[....] First Plaintiff

ADV J VAN DER MERWE NO

obo L[....] B[....] Second

Plaintiff

and

ROAD ACCIDENT FUND Defendant

Summary: Practice- abuse of process- litigation against the Road Accident Fund (RAF) as a delinquent litigant does not permit practitioners who act for plaintiffs to abuse court processes – a court should be astute to prevent this, even more so where the interests of minors are involved – courts’ oversight role in this regard restated in relation to RAF litigation and interlocutory proceedings.

ORDER

1. The abandonment of the application to compel the furnishing of further particulars is noted.
2. The application to compel discovery is refused.
3. The plaintiff’s attorney shall not be entitled to recover the costs of either of these two applications from any of the plaintiffs or from the defendant.
4. It is directed that a copy of this order be distributed to the Taxing Masters of this court, both in Pretoria and in Johannesburg.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

- [1] It is a well-known fact the Road Accident Fund (RAF) is a perpetually recalcitrant or delinquent litigant. This fact has received the attention and censure of our courts on numerous occasions and has primarily been brought about by the RAF’s precarious financial position and the termination of the mandates of its erstwhile attorneys[1].
- [2] In an attempt to manage the almost overwhelming avalanche of RAF-litigation in this Division, which litigation often proceeds by

way of default, either as a result of a failure to enter an appearance to defend or, after having done so, due a subsequent lack

of any meaningful participation in the litigation by the RAF, the Judge President(JP), Acting JPs, the Deputy Judge President(DJP) or Acting DJPs of this Division, have from time to time published various directives since 2019. The most significant of those

directives was directive 01/21 with the most recent revision thereof published on 1 December 2022. These directives have all been designed to case manage the workload of the Division, particularly in relation to RAF-cases[2]. Some statistics, although they vary from time to time, give an indication of the magnitude and scope of the problem: on the daily trial roll in Pretoria some 40 RAF-trials feature. That is sometimes up to 200 trials per week. Most of these end up

being settled or by proceeding by default of appearance while others are dispensed with by way of argument based on evidence produced by affidavit, including that of experts. At the same time, a default and settlement roll daily proceeds before no less than two judges with anything from between 10 and 20 matters per judge per day, that is up to a further 200 matters per week. Of the twenty or so matters which come before yet another judge in the Special Interlocutory Court (SIC), most are RAF-matters. The position is only slightly better (i.e. with fewer matters) on all these rolls in Johannesburg.

[3] The unfortunate corollary of the RAF's litigation delinquency, is that a substantial number of legal practitioners who represent

plaintiffs in this milieu of non-cooperation, abuse the processes of this court for purposes which are not beneficial to the proper

functioning of the court and appear to be principally aimed at either generating fees or "engineering" default judgments. This cannot be in the interests of justice, particularly where, such as in the present instance, litigation is being conducted on behalf of a minor, of which the court is the upper guardian[3].

The procedural steps taken in this matter

[4] In order to contextualize the observations made above and to consider whether this case is one of those where processes have been abused, it is necessary to refer to the procedural steps taken in this matter on behalf of the minor. I shall summarise the most relevant thereof hereunder in chronological fashion.

[5] The start of the matter is that it has been alleged that on 18 April 2017 the vehicle in which Ms Sandisa Bhumka (hereafter "the deceased") was travelling as a passenger, then driven by one Zolice Ngcebo, left the road between Ixopo and Richmond, and overturned. The deceased subsequently passed away as a result of her injuries sustained in the accident. Her brother incurred funeral expenses when he saw to her burial and thereafter started to care for her minor daughter, who was then less than two years old.

[6] Pursuant to the above, the brother, acting as plaintiff/claimant in both his personal capacity and as the de facto guardian of the minor, caused the prescribed RAF 1 claim form to be lodged by his attorneys with the RAF on 10 October 2019.

[7] Some 10 months later, particulars of claim were signed by the plaintiff's attorney and her counsel on 3 August 2020.

[8] A month later, summons was issued on 3 September 2020 and served on the RAF on 29 September 2020. The claim amount was for R50 000.00 for funeral expenses, R 300 000.00 for past loss and R900 000.00 for future loss of support of the minor.

- [9] A notice of intention to defend was signed some 5 months later on 11 February 2021 and served on 3 March 2021. A plea was promptly signed a week later and delivered on 23 March 2021.
- [10] The RAF's plea was in a general nature, contained blanket denials, including the denial of negligence on the part of the insured driver but, in the alternative, that his negligence did not cause the accident. As to compliance with the Road Accident Fund Act, 56 of 1996 (RAF Act), the RAF pleaded that it had no knowledge thereof. The RAF was then, and still is, represented by the State Attorney.
- [11] On 18 June 2021, the plaintiff's attorney served and uploaded onto the Court's online Caselines platform a confirmation that the plea had been received three months earlier and uploaded a report by a Dr Ogbeiwi in terms of Rules 35(9)(a) and (b). The doctor's "report", consisted of that which was contained in the relevant portion of the RAF 1 form. It simply dealt with the deceased's treatment prior to her transfer to the hospital where she eventually passed away.
- [12] On the same day, 18 June 2021, a notice of a set down for a pre-trial conference on 16 August 2021 was served by the plaintiff's attorney together with a notice to make discovery in terms of Rule 35(1).
- [13] Some two months later and five days before the proposed date of the pre-trial conference, on 11 August 2021 the plaintiff's attorney served and filed the following five documents, entitled as italicised:
- A "MERITS PRE-TRIAL QUESTIONNAIRE/AGENDA" (30 pages).
 - A "MERITS##PRO FORMA## PRE-TRIAL MINUTE" (33 pages).
 - A filing notice entitled "Judge Mlambo JP Directive dated 18 February 2021 – Pre-trials not signed by defendant – Application JCMM" (12 pages).
 - A draft order, completed with the name of the Deputy Judge President inserted, making provision for 100% liability of the RAF and containing a noting that it has been "resolved" that the deceased had a legal duty to support her minor child. The draft order also includes extensive provision for costs.
 - A "Merits request for further particulars in terms of Rule 21", signed by the plaintiff's attorney and her counsel (9 pages).
- [14] There is no explanation on the papers as to what had transpired on 16 August 2021, if anything, but it appears that the only pre-trial conference which had in fact taken place, was one some 5 months later on 18 January 2022. This is apparent from actual minutes of a "FIRST PRE-TRIAL CONFERENCE", apparently lasting 1 hour and attended by the State Attorney on behalf of the RAF, who had also signed the minute. I shall deal with what transpired at this meeting later.

- [15] After delivery of the set of documents mentioned in par 13 above, a Judicial Case Management Meeting(JCMM) took place on 30 May 2022 in terms of the then operative directive of this Court, at which the matter was certified trial ready in respect of merits. I interject that the requirement for such judicial case management meetings has been suspended indefinitely by way of the aforementioned revision of Directive 01/21 on 1 December 2022 due, not only to the large volume of matters but also due to “the disproportionate time and effort expended on judicial case management with no commensurate advantage and to simplify the process towards the issue of a trial date or default judgment date”.
- [16] A trial date for hearing on 10 October 2023 has subsequently been allocated.
- [17] In the interim a curator ad litem had been appointed for the minor on 21 June 2022, who had been substituted as the representative plaintiff on 6 July 2022. The plaintiff’s attorneys labelled the application for this appointment “Application 1”.
- [18] Before I proceed to deal with the applications to compel which form the subject matter of this judgment I find it necessary to describe the most pertinent of the documents delivered on 11 August 2021 (and which feature in paragraph 13 above).

The “MERITS PRE-TRIAL QUESTIONNAIRE/AGENDA”

- [19] It was somewhat surprising to find, in a matter where a passenger had passed away due to injuries sustained in a single vehicle accident, a “questionnaire/agenda” spanning 30 pages. Although any number of disputes could notionally have arisen as to whether the injuries sustained in the accident were causally linked to the death which occurred some months after the accident but while the deceased had all the time been in hospital, or whether there might have been some intervening cause, this was not
- the case in this matter and, apart from a bare denial, no such circumstances had been pleaded. In addition, no exclusions of liability in terms of any of the circumstances contained in sections 17, 18 or 19 of the RAF Act had been pleaded. For reasons unknown, the plaintiff’s attorneys only elected to proceed on merits and, apart from the issue of separation, the issue of quantum could also not account for the length of the “questionnaire/agenda”.
- [20] When the document is scrutinized, the answer for the bulk of the document is made up by the manner in which it has been formulated, which appears to be a regular practice of the plaintiff’s attorneys (when regard was had to numerous similar cases instituted by her in this Division).
- [21] By way of illustration, I only refer to 4 of 163 questions raised in the “questionnaire/agenda”:

“A(2). PAR 6.2.2. & 10.3 (DIR MLAMBO); PAR 2.6 (DIR LEDWABA DJP) RULE 37A(5)(b)(ii):

(Real issues that need to be adjudicated in court/issues in dispute & the contentions of the parties in respect thereto)

16-08-21 Whether the negligence of the insured driver(s) caused or contributed to causing the accident ## Whether the deceased died as a result of the injuries suffered in the accident.

... A(13) PAR 4 & 10 (DIR RAULINGA ADJP): PAR 14 (DIR LEDWABA DJP): (Does defendant concede merits/if not both parties to state why merits cannot settle)

16-08-21 Plaintiff records that settlement has not been reached because an acceptable offer has not been made...

16-08-21 Merits to be dealt with first and quantum to be postponed for later

determination

...

B 3.9 In regard to supplier's claims:

3.9.1 was/were any suppliers claim(s) lodged with the defendant which has any bearing on the accident in question

3.9.2 if any supplier's claim(s) was/were lodged, the defendant is required to answer the following:

3.9.2.1 who/which hospital/doctor/clinic exactly lodged such supplier's claim(s)?

3.9.2.2 what amount was/were claimed in respect of such claim(s)?

3.9.2.3 In respect of which person(s) was/were such supplier's claim lodged? Full names and contact details are required.

3.9.2.4 was/were such supplier's claim(s) was/ were paid, when was/were it/they paid and what amounts was/were paid?

3.9.2.5 If such supplier's claim(s) was/were paid, when was/were if/they paid and what amounts was/were paid?

3.9.2.6 was/were any apportionment applied to any such payment/s made in respect of any such supplier's claim(s) and, if so what percentage appointment was/were applied?

3.11 If the accident happened whilst the insured driver was on duty, the following is required:

3.11.1 By who was the insured driver employed at the time of the accident?

Full particulars are requested that will include the employer's name, physical address and telephone number.

3.11.2 Was a disciplinary hearing held by the employer of the insured driver as a result of the happening of the accident?

If so full details are requested ...

3.11.3 Did the employer insure the vehicle and/or third parties against damage to the insured vehicle/third parties?

If so:

3.11.3.1 With whom was the insured vehicle and/or third parties insured?

3.11.3.2 What is the policy number under which such insurance was effective?"

[22] In respect of the issue of separation of the issues relating to merits and quantum, the plaintiff's attorney moved for such a separation and motivated it in a closely spaced set of five paragraphs, spanning a whole page. In addition, the "questionnaire/agenda" contains the following admonition:

"3.19 The plaintiff herewith records that should the defendant not answered the questions posed above regarding related claims, documents and information within four weeks from date of the pre-trial or on/ or before such date as the parties agree to at the pre-trial, the plaintiff reserves the plaintiff's rights to subpoena the claims handler or any of his/her superiors duces tecum with the relevant requested information/documentation and furthermore reserves the plaintiff's right to apply for a postponement of the matter at the costs of the defendant The defendant is hereby notified that should it fail to disclose who the claims handler and seniors are (as per paragraph 2 above) that the plaintiff reserves the plaintiff's rights to subpoena the chief executive officer of the Road Accident Fund for purposes of the foregoing."

The "PRO-FORMA PRE-TRIAL MINUTE"

[23] As already indicated above, on the same date of delivery of the "questionnaire/agenda" a document titled "MERITS ##PRO FORMA## PRE-TRIAL MINUTE" was delivered. It contained the same questions as in the "questionnaire/agenda", but now with draft answers to most of the questions inserted by the plaintiff's attorney.

[24] The following questions and proposed answers are particularly notable:

"A(10) PAR 2 (DIR RAULINGA ADJP)/PAR 2.3 (DIR LEDWABA DJP) (Detail and description of how they accident occurred per the plaintiff/summary of facts upon which the plaintiff's claim based).

16-8-21. The plaintiff at present relies on the following version: The deceased was a passenger in/ or a vehicle on 18 April

2017. The insured driver through his own negligence lost control over the insured vehicle, causing it to skid and capsize.

A(11) PAR 2 (DIR RAULINGA (ADJP); PAR 2.4 & 11 (DIR LEDWABA DJP): (summary of facts upon which the defendant's defence is based)

#

The defendant presently relies on the following version: It is

alleged that m/v A was coming from Flagstaff towards Mpumalanga and on R 56 Road just past Nhlamurini turn-off the driver lost control of the M/V which was a Toyota Hilux with 9 passengers at the back, the M/V lost control and skid to the right, then knocked a stone donga (wall), spilled the passengers, then capsized. Two (02) passengers passed away and seven injured, including the driver. M/V was damaged” an

B.18 COSTS:

18.1 Does the defendant agree that the following costs/fees of/incurred by the plaintiff’s legal representatives/practitioners are to be taxable as between party and party: a) incurred in compliance with the rules of court and the directives of both the court and the judiciary; b) incurred in preparation for and attendance to all scheduled pre-trials, meetings and judicial management meetings, to include preparation of questions, agendas, pro-forma minutes and minutes in respect of thereof whether it was attended by the defendant or not; c) incurred/wasted as a result of an occasioned by non-attendance of a pre-trial on any other meeting?

16-08-21: Agreed.

16-08-21: Agreed. The defendant’s attorneys also confirm having received the pre-trial questions and pro-forma pre-trial minute that the plaintiff prepared in advance to the pre-trial.”

[25] The proposed answer inserted into the “pro-forma minute” on behalf of the defendant’s attorneys by the plaintiff’s attorney to question 3.19 quoted in par 22 earlier was now “16-08-21: Noted. The information and documents will be provided”.

The further filing notice

[26] The filing notice entitled “Judge Mlambo JP Directive dated 18 February 2021 – Pre-Trial not signed by the defendant – Application JCMM”, also delivered together with the two abovementioned documents, had attached to it some eight pages extracted from the said directive (none of which expressly deals with the signing of pre-trial minutes).

The request for further particulars

[27] Apart from a proposed draft order also served on 11 August 2021, the other document served on that day, was a pleading in terms of Rule 21, signed by the plaintiff’s attorney and her counsel the previous day. Apart from the fact that this request for particulars for trial is in the form of an interrogation, it contains questions such as:

“1 *INSURANCE CLAIM:*

1.1 The defendant is required to provide the following details regarding any insurance claim made as a result of the accident:

1.1.1 With what insurance company was the insured vehicle and/or insured driver and/or owner of the insured vehicle insured?

1.1.2 What is the policy number under which such insurance was effective?

1.1.3 When was the claim lodged?

1.1.4 Was the claim paid out? If so, when?

....

AREA OF ACCIDENT/CONDITION OF ROAD/ROAD SIGNS/MARKINGS

2.1 Where in relation to the road does the defendant say the area of impact occurred?

2.2 Was the road where the accident occurred according to the defendant a turned road or a gravel road? ...

2.4 Is the defendant of the view that any other person or entity is in law responsible and/or liable for the accident? If so

2.4.1 On what basis does the defendant say that another person or entity that is presently not a party before court is responsible and/or liable for the occurrence of the accident?

3.4 How are any documents/information/recordings/ photos etc that in any way relate to the accident on which the claim is based, stored by the defendant?

3.4.1 If any such documents /information/ recordings/ statements/ affidavits/ photos etc are stored electronically, the defendant is required to answer the following:

3.4.1.1 On what devise is it stored and where is this devise located?

3.4.1.2 Under which exact folders are such documents ... stored ...”

5.1 Does the defendant intend raising any special plea(s) that are not recorded on the pleadings as of date hereof?

5.3 If the defendant has already raised a special plea(s) as at date hereof, does the defendant persist with such special plea(s)?”

[28] As already mentioned, nothing came of the pre-trial conference unilaterally scheduled by the plaintiff’s attorneys in the fashion as set out above and neither was there a response to the request for further particulars. None of the intended steps mentioned in the pre-trial “questionnaire/agenda” which envisaged a response from the defendant within four weeks, had been taken by the plaintiff’s attorney. The only evidence placed before the court of any further step, was a letter by the plaintiff’s attorney dated 14 October 2021 (the reminder letter). In it, she recorded the following” “To date you have not provided the outstanding answers to the pre-trial questions. Furthermore, the defendant has failed to file a Discovery Affidavit despite notice on 21 June 2021 calling for such discovery. Lastly the defendant has also failed to file answers to the plaintiff’s request for further particulars ...”.

The pre-trial conference of 18 January 2022

- [29] On 18 January 2022 the State Attorney attended a pre-trial conference at the office of the plaintiff's attorney. The signed minute reads that the conference lasted one hour. The minute of the actual conference follows exactly the same format as the "questionnaire/agenda" delivered on 11 August 2021, but with actual answers and responses from the defendant now recorded therein. In the absence of another notice calling for a conference on this date, it was not explained how the conference had been scheduled or how the attendance of the State Attorney thereat had been secured. The minute is also silent as to the actual time of the conference. It does however, indicate that this is not one of those instances where the RAF is completely delinquent in its participation in trial proceedings
- [30] The important features of the defendant's answers at the conference are that the defendant did not agree to a separation of issues but did not intend raising any special pleas. The versions of the parties as to how the accident had occurred were exactly as in the "Pro-forma" minute. In addition, the defendant admitted that the minor was the biological daughter of the

deceased and that the deceased had an obligation in law to maintain the minor, agreed that a curator ad litem was necessary and admitted that the initial plaintiff was the minor's uncle. The defendant further supplied all the particulars of the claims handler. In addition further, questions 3.1.1 to 3.1.4 and 3.4 were answered in the affirmative. This means that the particulars of the date, time and place of the accident, the identity of the insured driver as well as the fact that the deceased had been a passenger had all been admitted. The defendant was in agreement ... "that the plaintiff's claim is a one-percenter" and that the deceased was not causally negligent in respect of injuries sustained by her. In respect of all the other interrogations

the defendant stated that it would "investigate and revert within two months" that is by the end of March 2022. The defendant, however, did not intend obtaining an assessor's report. In respect of the costs issues raised by the plaintiff, the State Attorney simply agreed thereto in accordance with the draft answer previously suggested by the plaintiff's attorney in par B 18.1 of the 'pro-forma' minute.

- [31] Having made all the admissions and concessions referred to above, the defendant further admitted that the deceased had passed away "as a direct result of the bodily injuries sustained in the accident". It is therefore not clear what the actual remaining triable issue pertaining to merits could be. Certainly the issues raised in the remainder of the "questionnaire/agenda" and the request for "merits" particulars had become irrelevant. The only reason why a settlement could not be reached was the apparent lack of a mandate from the RAF to do so. This being the case, there was also no explanation why the quantum portion of the action could not have been readied for trial. In failing to do so, the plaintiff's attorney in my view, prejudiced the minor.

The applications to compel

- [32] “Application 2” was one for an order to compel the furnishing of further particulars. It was signed on 3 December 2021 and the founding affidavit was deposed to by the plaintiff’s attorney on the same day. In her affidavit the attorney refers to the request for further particulars as well as the “reminder letter” of 14 October 2021. She then goes on to state that the plaintiff requires compliance with the request “... in order to enable full preparation for trial” and that the plaintiff is being “robbed” of this opportunity. She also claims costs on an attorney and client scale.
- [33] Inexplicably, this application to compel was only served some nine months after it had been signed, on 13 September 2022 (and set down for hearing on 3 February 2023). The application was therefore signed before the actual pre-trial conference but only served eight months after the pre-trial conference at which the abovementioned admissions and concessions had been made which rendered the further particulars irrelevant.
- [34] Another application, “Application 3” was also set down for the same date. It was also signed on 3 December 2021 and the founding affidavit thereto also deposed on the same day. This was an application for an order to compel the defendant to make

discovery and, in similar fashion as in the abovementioned application, the plaintiff’s attorney complained of prejudice.

She put it stronger this time, stating the following: “Discovery is with respect the cornerstone of any civil suit. If discovery is not made, the case can effectively not go forward. The plaintiff can for example not exercise his and the minor’s rights in terms of rule 35(3) and does not know what case they have to meet ...”. Further sentiments along this fashion, including that of being robbed of knowing the weaknesses in the plaintiff’s case were also expressed. At the time the affidavit had been deposed to, a trial date date not yet been set, but, as already aforementioned, by the time the matter came before me, the matter had been set down for trial on 10 October 2023, that is in six months’ time. Again, this application was only served on 13 September 2022 with no explanation of how the sentiments expressed in the affidavit had been addressed at the actual pre-trial conference or what possible prejudice remained.

Evaluation

- [35] At the time the matter came before the interlocutory court, the plaintiff’s attorney had already, six months before, uploaded a “merits bundle”. This contained the RAF1 Claim Form, the medical report from Dr Ogbeiwi, various identity documents, the minor’s birth certificate, the death certificate, the minor’s “Road to Health Chart”, the accident report, including a typed version thereof, a list of injured persons obtained from the ambulance services who had attended the accident scene, summaries of the case by two police officers and photographs of the scene where the accident had taken place. These

photographs had apparently been taken as long ago as on 23 August

2019. It shows a winding and twisting road in a hilly area near the place described in the accident report. The plaintiff's attorney had already given notice of these photographs on 21 April 2022 and the 10 days mentioned in the notice regarding the admission of the photographs in evidence have long expired.
- [36] On the face of it, there was absolutely nothing disclosed in the pleadings or the pre-trial minutes indicating any outstanding particularity which the plaintiff (or the attorney) may need to prepare for a trial on the merits and none could be suggested by counsel who appeared for the plaintiff. In fact, when counsel was confronted with the interrogatory nature of the request for further particulars and the fact that those particulars to which the plaintiff may reasonably have had a right, had already been canvassed at the pre-trial conference, the application in this regard ("Application 2") was astoundingly, but correctly, summarily abandoned.
- [37] In respect of the application to compel discovery, apart from citing the provisions of Rule 35(7), counsel could indicate no possible document, discovery of which the plaintiff's attorney was eagerly awaiting. The version put up by the defendant as to how the accident had occurred (which had been suggested by the plaintiff's attorney in the "Pro Forma" minute) accords with that of the plaintiff and all the already discovered documents and had been extracted, word for word, from the accident report already referred to above.
- [38] The only discernable reason for insisting on an order compelling discovery at this late stage when the matter is otherwise ripe for hearing and a trial date had already been allocated, can be found in Rule 35(7), which provides that a defence may be struck out in the event of non-compliance with a compelling order. This also accords with par 41 of the Directive 01/21 (as amended from time to time). Such applications for striking out feature regularly in the SIC, despite the RAF being represented by the State Attorney. The reasons for frequent non-compliance with compelling orders preceding such applications are not known. It may have to do with the mode of service required by the RAF/the State Attorney or not. Proof of service in respect of "Application 3" in this matter was for example by way of a stamp affixed to the application which read: "ROAD ACCIDENT FUND STATE ATTORNEYS STAMP 1 MENLYN/ATTORNEYS" whilst the stamp acknowledging receipt in "Application 2" was that of the customary stamp of the state attorney's Pretoria office. For purposes of this judgment both were accepted at face value as sufficient notice to the RAF but there was no explanation furnished as to whether the applications, served on the same day, were served on the same address and whether two stamps acknowledging receipt were in operation or whether the notices had inexplicably been served at two addresses. Whatever the case, in this matter no compelling order would follow as the need for discovery could not have been for the reasons so colorfully deposed to by the plaintiff's attorney. Her assertions were as hollow as those made in the abandoned application to compel the furnishing of further particulars.
- [39] In addition to what has been mentioned in paragraph 3 above, this court has already per Thompson AJ expressed its concern about how practitioners who appear for plaintiffs in RAF litigation abuse the processes of court, including the directives promulgated by the JP.

[4] This will also apply to any amendments or revisions of such directives. Individual abuses or over-reaching might appear to some to be trivial, but multiplied across the volume of cases referred to earlier, amount to huge expenses or prejudice to parties on either side of the fence.

[40] It is trite that courts possess the inherent jurisdiction to prevent the abuse of court processes. This may be done by suspending a proceeding, nullifying or dismissing it.[5] There are varied and numerous ways in which a process of court can be abused and a court should be cautious not to infer abuse[6]. Abuse however, takes place where a process is used, not for purposes of obtaining the relief it was designed for, but for some other purpose.

[41] In the present matter, not only was the plaintiff neither entitled to nor in need of the further particulars sought, but the application to compel the furnishing of such particulars could not, in the circumstances of this case, have been made with the genuine conviction that those particulars were necessary for trial. If this is the case, then the continuation of that application, prior to it being abandoned, could only have been for purposes of generating fees or an attempt at engineering a circumstance justifying the striking out of a defence and a subsequent default judgment. While stating this, I am mindful of the fact that any such adverse consequence could of course simply be avoided by the RAF complying with any compelling order, but the experience has shown that, either due to defective service, deficient administration or due to the sheer volume of numbers, non-compliance with compelling orders of this court occurs daily. To rely on this occurrence, simply because an attorney is not prepared to wait until an already allocated trial date, amounts to abuse.

[42] The same applies to the application to compel discovery. Although admittedly the Rule is clear and a party who has not made discovery can generally be compelled to do so and, upon non-compliance, runs the risk of a defence being struck out, for a plaintiff to apply for such an order in the circumstances of this case where all relevant facts have been known prior to service of the application to compel and where there was absolutely no indication that discovery would prejudice the plaintiff, and by attempting to obtain a compelling order together with an order for punitive costs or by attempting to engineer a tactical advantage, amounts to an abuse of process.

[43] Strangely, the one aspect which notionally may have benefitted the plaintiff, may have been the furnishing of further answers to those pre-trial questions upon which the defendant undertook to revert. This aspect had been raised in the “reminder letter” of 14 October 2021 but it is the one aspect which the plaintiff’s attorney chose not to pursue. This choice indicates that she already had all the answers (and concessions) she needed to prepare for trial, which confirms that the request for further particulars and discovery were actually unnecessary.

Unnecessary steps and the costs incurred thereby

[44] Another feature of this matter bears mention: although the Taxing Master is customarily the functionary to deal with the issue of which of the cost items claimed by an attorney are reasonable and justifiable, this discretion has been removed by the questions and answers extracted by the plaintiff's attorney from the State Attorney as referred to as question B 18.1 quoted in this regard in par 24 and assented to as mentioned in par 30 above. My observation and evaluation of the Pre-trial "questionnaire/agenda"

is that it unnecessarily and confusingly refers to directives (some of which had been superseded and revised), contains unnecessary

interrogations and insistence on furnishing answers not within the defendant's knowledge and constitutes an excess beyond that contemplated in both Rule 37 and the directives. Insofar as I may be wrong in this regard and insofar as the "questionnaire/agenda"

may be found to satisfy the requirements of that Rule and not exceed it and may possibly have been a bona fide attempt to satisfy the directives as fully as possible (although in a cumbersome and manner), the simultaneous furnishing of a virtually duplicate document containing suggested answers for the defendant, is certainly a step too far. It cannot even be justified as a reasonable attorney and client expense, neither in general and certainly not in this case where the actual person on whose behalf the action is pursued, is, by the attorney's own admission, an indigent minor. It amounts to an unnecessary expense which the RAF ought not to bear, resulting therein that the minor bears the costs thereof. There is no real benefit to be obtained thereby, except for the attorney's pocket.

[45] A court is entitled to take judicial cognisance of procedural abuses or patterns which occur in its processes[7]. The author of the documents in question, being not only the signatory of the request for particulars, but also the pre-trial "questionnaire/agenda" and the "Pro-Forma Minute", Adv Visser, in another unrelated but similar matter with similar pre-trial documentation from the same attorney, were at pains to convince the court of the bona fides of himself and the attorney. Despite accepting his assurances, the pre-trial documents, attempting to refer to various directives in the fashion that they do, catering for eventualities not applicable to a specific matter, duplicating issues and filing and uploading documents with suggested answers which could simply orally have been canvassed at a pre-trial conference, still all suffer from the abuses of process referred to above. Adv Visser could also not afford any answer as to why an indigent client or, as in this case, a minor, should bear the unnecessary attorney and client costs occasioned thereby and neither could the counsel who had appeared in the matter.

[46] In summary, I find that the use of the "Pro-Forma Minute" is an aberration which should not be permitted, neither in this case nor in the many other cases where it has been used. Similarly, simultaneous delivery of requests for further particulars should be restricted to matters which warrant such a process for it to be reasonable. Applications to compel should similarly be restricted to genuine meritorious cases and not simply to generate fees or to "manage" the RAF as a matter of course.

[47] I am aware that this judgment has been lengthened by numerous references to the various notices and requests made by the plaintiff.

I did however find it necessary to do so as this is not a judgment in a court of appeal where a crisp legal point was to be determined, but a judgment by a court of first instance, which court has the obligation, not only to the parties in this matter, but to other

litigants in a similar position, to direct, by way of example, in what manner the relevant aspects of RAF litigation are to be

conducted. Any abuses or failures, by either plaintiffs or attorneys who represent them or by the RAF and whoever represents it and which contribute to what has even been described in the realm of RAF-cases as a “tributary money-spinning atrocity”[8] must vigilantly be opposed and rooted out.

Order

[48] In the premises I make the following

orders:

1. The abandonment of the application to compel the furnishing of further particulars is noted.
2. The application to compel discovery is refused.
3. The plaintiff’s attorney shall not be entitled to recover the costs of either of these two applications from any of the plaintiffs or from the defendant.
4. It is directed that a copy of this order be distributed to the Taxing Masters of this court, both in Pretoria and in Johannesburg.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 03 February 2023

Judgment

delivered: 20 April 2023

APPEARANCES:

For Plaintiff: Adv

C Liebenberg

Attorney for Applicant: Salomé le Roux Attorneys, Pretoria

For Defendant: No appearance.

- [1] RAF v Legal Practice Council & Others 2021
- (6) SA 230 (GP) and Fourie & Fismer Inc v RAF 2020 (5) SA 465 (GP) and the cases referred to therein.
- [2] The High Court has a Constitutional jurisdiction to regulate its own process, which includes case management.
- [3] See for example Taylor v RAF 2021 (2) SA 618 (GJ)
- [4] Munyai v RAF and related matters 2021
- (1) SA 258 (GJ).
- [5] The Law of South Africa (LAWSA), 3rd Edition, Volume 4 par 5.
- [6] Phillips v Botha
- [1998] ZASCA 105; [1999] 1 All SA 524 (A) 532[1998] ZASCA 105; ; 1999 (2) SA 555 (SCA) at 565 and Brummer v Gorfil Brothers Investments (Pty) Ltd
- [1999] 2 All SA 127 (A); 1999 (3) SA 389 (SCA).
- [7] See for example Mfengwana v RAF 2017 (5) SA 445 (ECG) at 27-29.
- [8] IM v RAF 2023
- (1) SA 575 (FB) at 25.

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Prepared on 10 October 2026 · Esheria