

SOUTH AFRICA / JUDGMENT

Malebana v Road Accident Fund (27833/2016) [2024] ZAGPPHC 1353 (10 December 2024)

[2024] ZAGPPHC 1353**COURT**

North Gauteng High Court, Pretoria

BEFORE

E M Kubushi

CASE / FILE NUMBER

27833/2016

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case****Number: 27833/2016****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: YES****(3)****REVISED: YES/NO****DATE:**

10/10/24

SIGNATURE

In

the matter between:

M.B.

MALEBANA

Plaintiff/Applicant

and

ROAD

ACCIDENT FUND

Defendant/Respondent

In

re: Malebana M B v

Road Accident Fund Case Number: 27833/2016;
Milaza E obo
Musawenkosi Milaza v Road Accident Fund Case
number: 18946/2019;
Mathebula
Sikulekile Ntando v RAF Case number
78290/2019;
Mkhonto Albert
Doctor v Road Accident Fund Case number
26626/2018;
Sekwane Zodwa
Lucy v Road Accident Fund Case
number 19462/2019;
Chauke Hasani
Corners v Road Accident Fund Case
number: 29728/2022

JUDGMENT

KUBUSHI J

Introduction

- [1] Whilst presiding in the interlocutory court I became aware of a tendency where one application was used to obtain an order that compels a respondent to comply with the rules of court which was coupled simultaneously with an order for striking out.
- [2] An order is sought that the respondent be ordered to comply with the provisions of a certain rule within a specified time period failing which the defence is ipso facto struck out. I had earlier in the week refused to grant the striking out orders and only granted orders for compliance.
- [3] However, in the matter of MB MALEBANE v THE ROAD ACCIDENT FUND CASE NUMBER: 27833/2016 which was on the roll of 11 September 2024, and all other matters that followed thereafter, I directed counsel to provide me with written submissions setting out reasons why the two orders should be granted simultaneously, in one application.
- [4] During argument in court by the applicant's counsel in this matter, he provided me with two reasons why the orders should be granted at the same time. The first was to obviate costs. The second reason was because the practice directives allowed it. The practice directive, according to counsel, states that "In the event that the respondent fails to comply with the aforesaid order, the respondent's defence is intra facie struck out on the day of default, after the service of the order."

- [5] In reply to a question asked from the bench as to whether the said practice directive reads in line with the specific rule of court, counsel submitted that it does, because rule 30A provides that if there is a failure to comply with a court order, one is entitled to strike out.
- [6] My understanding of the rule at the time was that the applicant has first to approach court for an order compelling the respondent to comply with the rule in question within a prescribed time. The period stated in the order is so that the respondent be given an opportunity to comply with the order. When the time provided for in the order expires, without the respondent complying with the court order, then, in that event, the applicant may approach court for an order to strike out.
- [7] The manner in which the applicants approached court was one application in which an order to compel compliance with a specified rule is sought, together with an order that should the respondent fail to comply with the court order within the time provided for in that order, the strike out must ipso facto apply without the applicant having to come back to court for an order to strike out either the claim or defence, as the case may be.
- [8] Counsel insisted that when rule 30A is read together with the practice directive, the approach that is currently taken in practice is correct, mainly to obviate costs. In that regard, counsel made reference to an analogy that was used years ago by His Lordship, Mr Justice Flemming, in which that judge was of the view that if there is an AB scenario, and the A application is brought to court and if the respondent complies or not, the B falls away. This, according to counsel, is the same principle, and it obviates the incurring of costs. The fact is, it is less burdensome on the courts as well, so counsel argued.
- [9] Counsel further stated that I should take note that –

“There is now a new tendency that is developing in this division, that the registrar fails to issue these applications if the application does not provide purely only for a striking. They are of the view, and that is the registrar, and it makes it more difficult for the applicant. Your Ladyship will see that an originally uploaded order provides only for a striking and that is on instruction of the registrar. So, Your Ladyship must bear in mind the difficulty applicant’s faced with. In fact, is the registrar now by virtue of the provisions in the practise directive, which says you have to approach the registrar for a date in order to pre-trial. Now there is a misconception in this division. It is being applied that one needs to approach the registrar for a date. The registrar allocates a date, and on that date if the respondent fails, the registrar is now of the opinion you no longer compel, because they are doing away with the compelling, according to the registrar. You only ask for a striking, and that is totally wrong, because the practise directive clearly stipulates that one needs to comply or there must be a provision in the rules, like rule 30A, and that is why we still follow, is to say rule 30A. But that is occurrences that is on the doorstep of all these courts the coming weeks, because in this instance I was advised or instructed by my attorney that the registrar initially failed or refused to issue if the notice of motion is not amended to a purely striking out.” (the argument is taken verbatim from the transcript).

- [10] It became apparent during argument that counsel was not in possession of the practice directive that he sought to refer to in reinforcement of his argument. I in that regard, decided that judgment be reserved in this matter and that I take time to consider counsel's arguments with the benefit of both the practice directive and the provisions of rule 30A. I also directed that counsel provide short written submissions in relation to the issues that he argued in court. In the circumstances, I also thought it prudent that all the matters that were on the roll on that day and were similar to the current matter, should be reserved and be decided together with this one. I reserved judgment in all the matters that were similar to the current matter and were on the roll on that week, except those that had already been decided before the current matter.
- [11] In addition to the current case, the matters that were on the roll on that week to be decided together with the current matter are the following:
- (a) Milaza v RAF Case number 18946/2019.
 - (b) Mathebula v RAF Case number 78290/2019.
 - (c) Mkhonto v RAF Case number 26626/2018.
 - (d) Sekwane Z L v RAF Case number 19462/19.
 - (e) Chauke H C v RAF Case number 29728/22.
- [12] Counsel for the applicant in the Malebane matter uploaded the requested written submissions on CaseLines. I received no submissions in respect of the other matters.
- [13] For the benefit of the parties in the other matters, I quote the whole argument raised in the written submissions, hereunder:

"APPLICANT'S SUCCINCT HEADS SPECIAL INTERLOCUTORY COURT INTRODUCTION

1. The matter is enrolled on 11 September 2024. Applicant, as envisaged in Practice Directive 1 of 2024, seeks an order compelling the Respondent to attend to a pre-trial, in the absence of which it is requested that the defence be struck. Pursuant to the practice directive, annexure 8, Applicant modelled the template as proposed by the practice directive. The concept order provides that:
 - 1.1 The respondent is ordered to [insert compliance required], within 10 (ten) days of service of this order in terms of the Rules of court.
 - 1.2 In the event that the respondent fails to comply with Par 1. of this order, the respondent's defence will ipso facto be struck out on the day of default (i.e., on day 11 after service of this order) and the applicant may then approach the registrar for a date for hearing on the default trials roll.
 - 1.3 The Respondent is to pay the costs of this application on a scale as between [insert applicable scale of costs].

2. It is prudent to be mindful of the fact that the Applicant may only apply for a default judgment date on the trial default roll when the Respondent's defence is struck. The practice directive further provides that a defence may only be struck if the uniform rules of court provide for it. Uniform Rule 30A determining that non-compliance with Rules and Court Orders stipulates:
 - 2.1 Rule 30A(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.
3. In this matter, Applicant caused a notice of motion to be served on 16 July 2024. A final notice of set down was served on 7 August
2024. Accordingly, the required notice period as envisaged in the said has been complied with.
4. It is prudent to take cognisance that: rule 30A (1) provides that, where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order ..., 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 — that such rule, notice, request, order or direction be complied with; or that the ... defence be struck out.
5. In this matter, the Respondent failed to comply with rules, failed to comply with it on request, despite the notice of motion notifying it pursuant thereto, now entitles the Applicant to seek a compliance order or striking the defence.
6. Suffice to submit that because of the Respondent's failure to comply the uniform rules, a 10-day notice was in fact given by serving the application on 16 July 2024. In the said notice, i.e. the notice of motion clearly stipulates, comply or Applicant will seek a compelling order and in the event of failure striking of its defence. In reality by serving the court order in casu is giving the Respondent the proverbial second bite at the cherry. Because it stipulates that upon failure to comply within 10 days of order the defence is ipso facto strike on day 11. Under the circumstances it is unnecessary to separate the compelling and the striking order because the rule provides for a notice upon non-compliance with the rule per se. It is furthermore not costs conducive and over burden the court roll.
7. In addition to the afore and to obviate the incurrence of extra costs and being mindful of the overcrowded court rolls, the practice directive provides a draft order which corresponds with that of the Applicant. Accordingly, there is compliance with the court rules and practice directive.

8. Currently the Registrar refuses to allocate a SIC application where it provides for compelling the Respondent before the defence is struck. The Registrar only furnish a date if there is a striking application only. The aforesaid view is supported by the fact that:

8.1 A Party must first file a Rule 37(2)(a) notice calling upon the Respondent to attend a pre-trial.

8.2 Upon failure, the practice directive dictates that a party must procure a date from the Registrar for pre-trial purposes.

8.3 In the event that the Respondent fails to attend to a pre-trial so scheduled by the Registrar, a party is entitled to []

9. Regard being had to what was set out above it is plausible to suggest that a party must apply for a striking order only.

10. Under the circumstances, the Applicant will seek an order in terms of the draft handed up.”

Rule 30A reads 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 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 the 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.”

[14] The question for me is whether the order envisaged in (a) and (b) can be applied for in one application.

[15] Rule 30A is a relatively newly promulgated rule. The author Erasmus sets out a short history of how it became necessary to have this rule. For that reason I thought it pragmatic that I include that

history in this judgment. The following is stated by the author:

“General: Rule 30(5) used to provide for a remedy where a party failed to comply timeously with a request made or a notice given pursuant to the rules. The subrule was deleted by GN R2407 of 13 December 1996. The reason for the deletion was probably because the rest of the rule 30 deals with situations where an irregular step has been taken by a party to proceedings. Prior to its repeal. The subrule was the source of some controversy. There was a difference of opinion as to whether it was intended to apply in all cases where a particular rule did not itself provide for a special sanction for non-compliance with a notice of request, as for example in rules 14(5), 14(9), 36(2) and 37(1), but not in

cases where such a special sanction was provided for, as an example in rules 21(6) (prior to the substitution of rule 21 in 1987) and 35(7). This rule now provides a general remedy for non-compliance with the rules. It follows the wording of the repealed subrule (5) of rule 30, except that it is applicable to any failure to comply with these rules, or with the request made or notice given pursuant to the rules, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A.

To the extent that the provisions of this rule may be in conflict with a provision in another rule which provides a specific remedy for non-compliance with that rule, a party need only follow the provisions of the other rule, without first having to give notice in terms of this rule or follow the provisions of this rule.

The court has an inherent power to dismiss an action on account of a delay in its prosecution by the plaintiff. The circumstances under which the court may do so will depend on the period of delay, the reason therefor and the prejudice suffered by the other party. . . ”

[16] The author Erasmus when explaining the phrase “the court may make such order thereon as it deems fit” in subrule (2) of rule 30A, goes further to state the following:

“This subrule confers a discretion on the court which, it is submitted, must be exercised judicially on a proper consideration of all the relevant circumstances. Striking out a claim or defence is a drastic remedy and, accordingly, the court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order. Consequently, the necessary affidavits in support of and opposing such relief should be delivered. Relevant factors will include (a) the reasons for non-compliance with the rules, request, notice, order or direction concerned and, in this regard, whether the defaulting party has recklessly disregarded his obligations; (b) whether the defaulting party’s case appears to be hopeless; and

(c) whether the defaulting party does not seriously intend to proceed. In addition, prejudice to either party is a relevant factor.”

[17] My understanding in my reading of rule 30A(1), leads to the conclusion that the wording of the subrule affords the applicant an election whether to apply for an order compelling compliance or strike out. The phrase “or” sets out that election. It means that either an order for compliance or an order for strike out may be sought and ordered by the court. I do not get a sense that subrule (1) of rule 30A envisions a process where an order for compliance should be considered as a prelude for an order for striking out. Each of the applications sought and/or orders to be granted, are distinct applications and/or orders, and each must stand on own facts.

[18] It follows therefore that if an order for compliance is required, an aggrieved party must notify the defaulting party that he or she intends applying to court for an order compelling him or her to comply. Depending on the non-compliance, the aggrieved party must notify the defaulting party that he or she intends to apply to court for an order to strike out the claim or defence, as the case may be.

- [19] The Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*, when dealing with the question of the High Court's exercise of discretion in terms of rule 30A, expressed itself as follows:

"[79] The second judgment reasons that the High Court's decision to deny the HSF the recording of the JSC's deliberations was based on that court's exercise of discretion in terms of rule 30A of the Uniform Rules of Court. The second judgment says, because the High Court's decision was based on the exercise of discretion in the true sense, on appeal its decision should be liable to be set aside only on the narrowest of grounds. I have no quarrel with the fact that in terms of rule 30A(2) there is an exercise of discretion as to what an appropriate order should be once a court has held – under rule 30A(1) – that there has been non-compliance with the rules. As to the antecedent question arising from rule 30A(1) whether there has, in fact, been non-compliance with the rules, there is no question of an exercise of discretion. The court must determine – as an objective question of fact or law – whether there has been non-compliance. On that question, therefore, a court of appeal makes the simple determination whether the lower court was right or wrong in its conclusion on compliance. The discretion under rule 30A(2) does not feature at all. The second judgment does not draw this distinction between what is required of the court first under rule 30A(1) and then under rule 30A(2)."

- [80] To conclude on this aspect, the High Court first had to determine whether the JSC's refusal to furnish the HSF with a copy of the recording of the deliberations amounted to non-compliance with rule 53. This did not involve any exercise of discretion. On this the High Court held against the HSF. That remains an issue we too must determine. On whether the High Court's conclusion falls to be upheld, we cannot be subject to the strictures applicable to appeals on matters concerning the exercise of a discretion in the true sense. The question is a simple one: was the High Court right or wrong in its conclusion." (own emphasis)

- [20] Furthermore, the Court in *RVRN Crushing (Pty) Ltd v GDF Incorporated Consultants (Pty) Ltd* (where the court was dealing with the issue of whether there is an obligation on a litigant who timeously cured an irregularity, to tender the costs occasioned by that irregular step), explained the rule 30A process as follows:

"[9] The situation is different, though, where a litigant takes a step that it subsequently accepts was irregular. In that event, rule 30A provides for any party prejudiced by the irregular step to give notice of the irregularity. There follows a 10-day period during which the litigant who took the irregular step can cure the irregularity. If they fail or refuse to do so, the aggrieved party may then bring an application to set the irregularity aside."

- [21] It appears to me even from the reading of the above passages, with which I am in alignment with, that rule 30A is a twostep process. Firstly, a determination must be made whether there has been non-compliance or not. If there has been non-compliance, the second step process kicks in – the aggrieved party must apply to court for an order to strike out the claim or defence.

[22] My view, as initially held at the commencement of this matter, remains firm and is further fortified by the authorities referred to above. Rule 30A does not entitle the litigant to apply for the two orders – that of compliance and strike out, in the same application. The two stage process must be maintained as required by the rule. This is clearly, confirmed by the Constitutional Court judgment referred to above at paragraph 79, where that court bemoans the second judgment, in that case, for failing to distinguish between the two stages envisaged by the rule.

[23] I am in agreement with what is said by Erasmus that striking out of a claim or defence is a drastic remedy. In my view, it is in this sense that subrule (2) has been promulgated. The subrule, as Erasmus correctly says, confers a discretion on the court which, it is submitted, must be exercised judicially on a proper consideration of all the relevant circumstances. The court must be appraised of sufficient facts on the basis of which it could exercise its

discretion in favour of such an order. This must be on application after the defaulting party failed to comply with the order compelling

such litigant to comply with a specific rule or with a request made or notice given pursuant thereto, or with an order or direction made by a court or a judicial case management process referred to in rule 37A. The necessary affidavits in support of an application of this nature should include relevant factors, like in this matters where there is no opposition, (a) whether the defaulting party has recklessly disregarded his obligations; (b) whether the defaulting party's case appears to be hopeless; and (c) whether the defaulting party does not seriously intend to proceed. The factors to be considered are not circumscribed. In addition, prejudice to either party is a relevant factor, which the court must consider at this stage of the application.

[24] Whilst, as stated in the Constitutional Court judgment referred to above, the court has little or no discretion to exercise in relation to the order to be granted in terms of subrule (1) of rule 30A, but, before an order may be granted in accordance with subrule 30A(2) the court has a duty to exercise the discretion, conferred on it by the subrule, whether or not to strike out the claim or defence. The discretion conferred, in this regard, is a wide discretion at that.

[25] I do not find it necessary to consider the Practice Directives the applicants are relying on in this matter, for if the Practice Directives are not in line with the rules, they are invalid. They should, accordingly, be amended. Neither do I intend dealing with the allegations of the Registrar's conduct in dealing with these applications, for if such conduct is not in alignment with the rules, it ought to be stopped.

[26] Consequently, the orders to strike out sought in the respective applications before me, should be refused. Only the orders sought to compel the respondents to comply with the respective rules in the applications, ought to be granted.

[27] The order that I make is that the respective Draft Orders handed up in court, and uploaded on CaseLines, in the following cases:

- (a) Milaza E obo Musawenkosi Milaza v Road Accident Fund Case number: 18946/2019;
- (b) Malebana M B v Road Accident Fund Case Number: 27833/2016;
- (c) Mathebula Sikulekile Ntando v RAF Case number 78290/2019;
- (d) Mkhonto Albert Doctor v Road Accident Fund Case number 26626/2018;
- (e) Sekwane Zodwa Lucy v Road Accident Fund Case number 19462/2019;
- (f) Chauke Hasani Corners v Road Accident Fund Case number: 29728/2022,

are granted with the necessary amendments. The Draft Orders are deemed to operate from the date of this Court Order.

E M KUBUSHI

JUDGE OF THE HIGH COURT PRETORIA

Appearances:

For the Plaintiffs: Adv Jaco de Beer SC 082 893 5264 advrdb@mweb.co.za Instructed by: Surita Marais Attorneys 082 710 1633 estelle@lawclaims.co.za Date of argument: 19 April 2024 Date of judgment: 14 November 2024

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