

SOUTH AFRICA / JUDGMENT

# Mcunu v Road Accident Fund (37320/2022) [2024] ZAGPPHC 722 (22 July 2024) [2024] ZAGPPHC 722

## COURT

North Gauteng High Court, Pretoria

## BEFORE

G Lubbe

## CASE / FILE NUMBER

37320/2022

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case Number: 37320/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE: 22/07/2022

SIGNATURE

In

the matter between:

SILINDILE

PRECIOUS MCUNU

APPLICANT

and

ROAD

ACCIDENT FUND

RESPONDENT

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**JUDGMENT**

LUBBE: AJ

1. This case served before this Court for the first time on 10 July 2024, and it stood down until 12 July 2024.
2. On 10 July 2024, the court was informed that notice of intention to defend was filed very recently. The parties agreed to time periods in order for the Rule 30 application to be heard.
3. On the morning of 12 July 2024, the parties addressed the court on the issue of the late filing of the notice of intention to defend and whether the Plaintiff would be entitled to proceed with its case.
4. The notice of intention to defend was filed more than 2 years after the summons had been served on the Defendant.
5. The Plaintiff and the Defendant agreed thereto that the Plaintiff may proceed with the application in terms of Rule 30(2)(c) and the need to formally deliver a notice in terms of Rule 30(2)(b) was condoned.
6. The accident occurred on 8 October 2019 and the Plaintiff sustained serious injuries to which the court had regard. The court requested the parties to address the court in respect of the Rule 30 application as well as merits and quantum. The court will firstly briefly deal with the issue of quantum and the “merits” are more fully discussed under the section dealing with the Rule 30 application hereunder.
7. The Defendant, notwithstanding an open invitation by the court to call witnesses or hand up affidavits to set out its defence in respect of the merits and quantum, could not and did not accept the invitation to address the court and could not adduce any evidence or argument whatsoever to gainsay what the Plaintiff’s case consists of.
8. Plaintiff’s counsel, Mr Fourie, addressed the court after the Rule 30 application was heard in respect of the merits and quantum as the court indicated that the parties should deal with the facts of the case, in the event that the court should find that the filing of the notice of intention to defend, was irregular.
9. As stated previously, the Defendant’s counsel was not in a position to defend the case any further than to state that the Rule 30 application should be heard and no instructions were given to argue the case or put evidence before the court in order to obtain a different outcome than what the Plaintiff has put before court.
10. The Court granted the application in terms of Rule 38 (2).
11. The Defendant did not take issue in court to the arguments forwarded by the Plaintiff.

12. On perusing the documents filed by the Plaintiff as well as the heads of argument, and taking into consideration the prevailing facts, the court is satisfied that the amount proposed insofar as loss of earnings is warranted against the proven facts.
13. The Plaintiff was employed with a work record, proof of earnings and the application of a 14% and 26,5% contingency deductions for pre and post morbid income respectively, as per the actuarial report, is in line with the norm and taking also into consideration, inter alia, the WPI of 17%.
14. It is understood by this court why the Defendant could not and did not present any countervailing evidence or arguments. It seems as Defendant relied solely on the notice of intention to defend to “force” a postponement of the case.
15. It should be noted that no past medical expenses are claimed as the Plaintiff was treated in the Carletonville Government Hospital and the issue of general damages stands to be postponed sine die as the Fund has not admitted liability for payment of general damages.
16. The court will now deal with the Rule 30 application which was heard before the court was addressed on the issue of merits and loss.

#### THE RULE 30 APPLICATION:

17. The Plaintiff set out in detail in its application the chronology after summons was served on 14 July 2022.
18. The claim was lodged with Defendant on 29 July 2021.
19. The Plaintiff, on 16 August 2022 wrote a letter, which was hand delivered to Defendant and which is attached to the papers to the application, in which the Defendant was informed that it had not defended the matter and was advised to file its notice of intention to defend within 7 days.
20. On 25 August 2022, a further letter was hand delivered noting that the Defendant had not defended the case and once again advised that its notice of intention should be filed within 7 days.
21. On 7 September 2022, a further letter was written, which was delivered on 8 September 2022 once again requesting a notice of intention to defend.
22. Notwithstanding the three letters, the Defendant remained in wilful default and still elected not to defend the matter.
23. The Plaintiff’s attorneys then proceeded to take the necessary steps in terms of the directives to set the matter down for default judgment and in this process copies of all the medico-legal reports were delivered and the Registrar eventually allocated the case for 10 July 2024, for default judgment purposes.

24. The notice of set down of the hearing on 10 July 2024 was delivered to the Defendant by hand and via email on 22 May 2024. All expert reports were also delivered to Defendant by hand and emailed during May 2024.
25. After this, the Defendant then at 13h08 on 8 July 2024, delivered a notice of intention to defend.

ANSWERING AFFIDAVIT:

26. The Defendant admits that a notice of intention to defend was filed outside the time periods provided for in Rule 19(1) of the Uniform Rules of Court.
27. The remedy as Defendant puts it in its opposing affidavit to this procedure, is to file a notice of intention in terms of Rule 19(5).
28. It is admitted that the claim was duly lodged on 29 July 2021.
29. The Defendant sets out in its opposing affidavit facts that allegedly points thereto that the claim was apparently repudiated on 18 November 2022, after a merits assessment. Defendant proceeds to state under oath that it is unable to ascertain from the physical file if the repudiation was communicated to the Plaintiff.
30. It is peculiar that the Defendant does not refer to or attach an “assessor’s report” which the Defendant has for many years used in RAF cases. The only reasonable deduction in the court’s view is that this was never requested. It follows that if the Fund was convinced that the “merits” had to be investigated one would expect that they would have requested such a report.
31. The Defendant points towards the “officer’s accident report” which was submitted and states that the Plaintiff was allegedly the sole cause of the collision. No affidavit of any witness is referred to, nor is there any indication from a reconstruction of the accident, that the version of the Plaintiff is incorrect. The averments made in this regard is to say the least “vague”.
32. From the affidavit there seems to be an intention at this stage to further investigate the matter and interview the police who had attended the scene in order to determine if indeed there were no other people injured in the collision, aside from the Plaintiff and the occupants of her motor vehicle.
33. This intention is nearly 5 years after the accident and should not be allowed as a reason to deny the Plaintiff her “day in court”.
34. It is of interest to note that in the affidavit of the Fund’s representative, it is stated that if such further witnesses cannot be found, then their statements should be obtained. This affidavit seems, with respect, to not have received the attention and care which is expected from a senior person at the Fund.

35. The finding of further witnesses, the Defendant states, creates a valid reason for the defence and the Defendant humbly submits that it should be afforded an opportunity to defend the claim. It is nearly five years after the accident and still only the Plaintiff's version is before court.
36. The court was specifically, upon a direct question to counsel for both parties, informed that the Fund had made an offer on the merits and the loss of earnings, but that such offer was not acceptable.
37. This, in the respectful view of the court, means that the case must have been considered and investigated and that Defendant is not in a position to take it any further. Allowing further time will serve no purpose other than to "delay justice".
38. The Defendant was at liberty and requested numerous times to formally oppose the case, if it was convinced that this claim should be repudiated.
39. The Plaintiff has explained in her affidavit how the collision occurred and the Defendant has not pleaded, nor placed any evidence before court, notwithstanding an open invitation on 10 and 12 July 2024, any evidence whatsoever to dispute what the Plaintiff is claiming.
40. The Plaintiff sets out in her statutory affidavit that a motor vehicle moved out from behind an approaching vehicle and started to overtake that vehicle. She realised that the driver of the vehicle committed to overtake the vehicles in front of it and she had no choice but to swerve to the left to avoid a head-on collision. On the left-hand side of the road was a slope downwards and her vehicle started to role. An accident report is contained on CaseLines and the Plaintiff sets out her version, which is confirmed in the description of the accident, which is contained at CaseLines 18.1.15.
41. The Plaintiff also filed pictures of her vehicle depicting damages all over the vehicle.
42. Under these factual circumstances there is no room for "contributory negligence" on the part of the Plaintiff and same has not been pleaded or proven.
43. The court finds the Defendant's version that it should be afforded further time to investigate the case, as far-fetched. The Defendant has, since the lodging of the claim, been in possession of more than enough evidence from the Plaintiff's side to investigate the claim. Subsequent to the filing of the papers, the Defendant was even in a position to make an offer on merits and quantum and has up to date, still not repudiated the claim. No such document has been placed before this court.
44. The court has been placed in possession of a judgment by the Honourable Davis J, in the case of Seronica Nathram v RAF case no 46876/2020 heard in the Gauteng Division, Pretoria. This court aligns itself with the court's stance and discussion of what constitutes an abuse of process as per paragraphs 12 to 16 of that well considered and presented judgment.

45. In the judgment of Davis J, it is further stated, and this court aligns it with the evaluation in paragraphs 19 and 20 of the judgment, that the right to access to court in terms of section 34 of the Constitution, should be protected but only insofar as the Defendant still has the actual intention to defend the matter by way of leading countervailing evidence at the trial. If this is not the case, then the rules are abused as in Nathram's case. No "triable issues" have been identified.
46. A bona fide defence has not been placed before court and no indication as to the fund's intention to have Plaintiff examined by medical experts.
47. A plea was not delivered nor a substantive application for a postponement. This court further aligns itself with par 24 and 25 of the Nathram judgment and finds that the belated notice has not been delivered to facilitate a hearing of any dispute and the delivery constitutes an "abuse of process".
48. This court quotes herein, with approval, par 26 of the Nathram's judgment. The RAF has furthermore displayed no interest in having the case finalised.
49. Under the circumstances the court grants an order which is annexed hereto as Annexure "X".

G LUBBE

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

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CASE PAGE              <https://chat.esheria.ai/case-law/south-africa/mcunu-v-road-unknown-topic-agpphc-2024--6a3ea5133b1caa912980ad05>

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