

SOUTH AFRICA / JUDGMENT

Nthabiseng and Others v Road Accident Fund (3492/2016) [2018] ZAGPPHC 409 (19 June 2018)

[2018] ZAGPPHC 409

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi JP

CASE / FILE NUMBER

3492/2016

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IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION

[FUNCTIONING AS GAUTENG DIVISION PRETORIA, MBOMBELA CIRCUIT COURT]

CASE NUMBER 3492/2016

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

19/6/2018

MOGALE PATRICK NTHABISENG AND 10 OTHERS

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

LEGODI JP

- [1] The norms and standards issued by the Chief Justice of the Republic of South Africa on 14 February 2014 under circular 1 of 2014 have brought about a new dispensation in dealing with the pace of litigation in our courts throughout the Republic. These norms and standards are binding on all judicial officers across the spectrum of all our courts.

- [2] The objectives of the norms and standards are noble ones. They 'seek to achieve the enhancement of access to quality justice for all, to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts, where applicable.

These objectives can only be attained through the commitment and co-operation of all judicial officers in keeping with the oath of their office to uphold and protect the constitution and the human rights entrenched in it and to deliver justice to all persons alike without fear, favour, or prejudice with the Constitution and the law.[1]

- [3] In my view, it is not only the commitment and co-operation of all the judicial officers in keeping with what the oath of their office requires of them. But most importantly, the cooperation and commitment of the practitioners and the litigants. The practice of allowing litigation to run at a snail pace through and to the convenience of practitioners, but at a huge expense to their clients,

ought to be arrested and brought to a halt, failing which the norms and standards would be an uneventful piece of paper.

- [4] One sometimes is tempted to come to the conclusion that practitioners in particular would want to question the appropriateness of the norms and standards. Hopefully, I am wrong in this regard. But in the event I am right, then it is important to set the record straight and at the same time bring home the point that when change is imminent everyone look for cover and in the process turn into a resistant mode.

- [5] In terms of section 165(6) of the Constitution read with section 8(2) of the Superior Courts Act 10 of 2013, the Chief Justice exercises responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions for all courts. The Chief Justice may issue written protocols, directions or give advice or guidance to judicial officers in respect of the norms and standards for judicial functions[2].

- [6] Section 34 of the Constitution deals with access to courts and provides that everyone has the right to have any dispute that can be resolved by the application of

law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum. Therefore any delay in finalisation of cases resulting in unnecessary costs of litigation, in my view, impedes on a fundamental right to 'a

fair public hearing'. As it is said, 'justice delayed justice denied'. (My emphasis).

- [7] On the other hand, section 173 of the Constitution deals with the inherent powers of courts and provides that the Constitutional Court, Supreme Court of Appeal and High Court have inherent powers to protect and regulate their own processes and to develop the common law, taking into account the interest of justice.

- [8] One way of protecting and regulating the courts' own processes is to ensure that matters issued in our courts for resolution of disputes do not take months and years before they are finalised. It is in the interest of justice to expeditiously deal with these matters as they are issued in our courts.
- [9] Norms and standards, rules of courts, pre-trial conferences and the directives with strict time lines made during pre-trial conferences are all a way to achieve speedy finalisation of cases in our courts. Therefore, enforcement of these directives with serious consequences where appropriate, appears to be the only way-out to deal with transgressions and those who are in defiance to change.
- [10] The core values of the norms and standards are, inter alia, equality and fairness, accessibility, transparency, responsiveness and diligence in dealing with matters brought before our courts for adjudication[3]. That being so, it is required of judicial officers in any high court to finalise civil cases within 1 year from the date of issue of summons[4] and within nine months in the magistracy. Judicial officers should take control of the management of cases at an earliest possible

opportunity[5], and should take actions and primary responsibility for the management of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay[6]. The Head of each court should ensure that judicial officers conduct pre-trial conferences as early and as regularly as may be required to achieve the expeditious finalisation[7]. No matter may be enrolled for hearing unless it is certified ready by a judicial office and judicial officer[8] must ensure that there is compliance with all applicable time limits[9]. (My emphasis).

- [11] What is stated above is a repetition of what was said in the case of Ercilia Macia and 16 others under Mbombela case number 578/2016. The following cases except one were all on the civil roll of 26 March 2017 and were all either settled or had to be postponed on the date of trial mainly for non-compliance with pre-trial directives and time-limits which parties' legal representatives set for themselves during pre-trial conferences before a judge:

P N Mogale v RAF Mbombela case no: 3492/2016

C Omelaza v Minister of Police & Other Mbombela case no: 375/2017

M Van Wyngaard v Wyngaard Mbombela case no: 3540/2016

R Z Makam v RAF Mbombela case no: 1628/2017

M Makhubele v RAF Mbombela case no: 503/2017

D G Mangani v RAF Mbombela case no: 576/2016

MT Phala v Minister of Police & other Mbombela case no: 1631/2017

K N Wiil v RAF Mbombela case no: 1820/2017

E Mashego v RAF Mbombela case no: 1620/2017

M Sekatane v RAF Mbombela case no: 3243/2016

C P Ncongwane v RAF Mbombela case no: 3332/2016

- [12] The court has already in more than thirty matters given judgments dealing with the same subject. In fact in every trial week more cases on the civil roll are settled on the dates of trial or are postponed due to non-compliance with pre-trial directives. Unfortunately in the majority of these cases, it is the parties' legal representatives who are at fault. Either they were found to have forgotten about the cases post the pre-trial conferences or did not do enough to ensure that there was compliance to the time- limits set as part of the pre-trial directives.
- [13] It is worth mentioning that in this Division no matter is enrolled on the trial roll unless such a matter was laid before a Judge during a pre-trial conference and a trial date was allocated or determined by a Judge during pre-trial conference. There is an advantage resulting from this method of case management. Firstly, cases are enrolled as speedily as possible. Secondly, parties are given the opportunity to set out time- frames for themselves and therefore to ensure that the pace of litigation is not allowed to move at a snail pace.
- [14] Failure by an officer of the court to comply with pre-trial directives or any directive for that matter given by court, or judge during pre-trial conference amounts to a wanting conduct unless good and acceptable explanation is offered when an opportunity is so given. In more than thirty matters this court had an occasion to deal with, as I said, parties' legal representatives were ordered either to forfeit a day's fee or any other charges occasioned by the late settlement or postponement. But that does not seem to avert the occurrence as it would appear hereunder.
- [15] The court is determined to deal with defaulters to ensure that matters are not settled on the dates of trial or postponed without

due course. For this, the court will pursue every late settlement or postponement by requiring parties or their legal representatives in every such given case to file affidavits explaining themselves, or to summarily hold an enquiry in court and in appropriate cases dish out punitive costs order or forfeiture of day fee or payment of costs out of own pocket.

- [16] Whilst this court has not ordered payment of costs out of own pocket occasioned by the late settlement or postponement and has not reported any of the parties' legal representatives to their professional bodies, time will come and this will be guided by the facts of each case and repeat defaulters. Hopefully, it will not only be this court which pursues and deals vigorously with those who do not comply with the pre-trial directives given during pre-trial conference, but that colleagues will also be on the look-out for defaulters to ensure that consistency where facts so allow, is achieved. When that happens, forum shopping and taking an advantage would be avoided and in the process, we all become winners. I now turn to consider facts relevant to judgment being reserved on costs issue in each of the cases mentioned in paragraph 10 above.

P.N Mogale

[17] In this case pre-trial conference before a Judge was held on 30 June

2017. On the date in question a date of trial for 26 March 2018 was determined. In terms of the pre-trial minutes, the plaintiff was directed to file all reports by not later than 30 January 2018. Similarly, the defendant was directed to file all reports by the said date including completion of any investigation outstanding. Parties were further directed to file joint minutes by not later than 28 February 2018 and thereafter to hold a pre-trial conference among themselves by not later than 9 March 2018. In the event the matter was settled, that it be settled by not later than 16 March 2018 and thereafter remove it from the trial roll and immediately have it be placed on the settlement roll.

[18] Despite the lapse of nine months from 30 June 2017, on the date of trial, that is, 26 March 2018 this court was presented with a draft settling the matter in its entirety in the amount of R469 000.00. I made the draft an order of court except for costs in respect of which judgment was reserved and parties were directed to file affidavits explaining why those responsible for the late settlement should not be ordered to pay costs on punitive scale and or why an order for forfeiture of day fee or payment out of own pocket should not be made.

[19] I have now been provided with the affidavits. Starting with the explanation by plaintiff's attorney: On 24 January 2018 he informed the defendant's attorney that the plaintiff will rely on defendant's reports and that the plaintiff would therefore not be filing any experts' reports to avoid an unnecessary duplication of costs. Then he states:

"The only outstanding substantive report from the defendant was one from an industrial Psychologist (which was subsequently filed on 06/02/2018) as well as an Actuarial report."

[20] I pause for a moment to say that since 30 June 2017 a red light apparently at a snail pace from the plaintiff's attorney side, has been pointing towards 30 January 2018 being the date by which all reports by both the plaintiff and defendant were to be filed. Consequently 'the plaintiff would not be filing any expert reports to avoid an unnecessary duplication of costs on 24 January 2018', is a choice or a route which was followed out of panic having faced with the deadline of 30 January 2018.

[21] Therefore whatever explanation is provided by both parties in their affidavits, one has to move from the premise that both parties failed to meet the deadline of 30 January 2018. In paragraph 2.2 of the affidavit by the plaintiff's attorney is stated: "By 22/03/2018 defendant had still not filed its actuarial report and plaintiff's and defendant's attorneys offices where it was agreed that plaintiff would appoint its own actuary to do calculations based on defendant's industrial psychologist's findings. Plaintiff duly served and filed the calculations the following day on 23/03/2018. A copy of plaintiff's notice in terms of Rule 36(9)(b) is annexed hereto marked "B"

- [22] By 22 and 23 March 2018 the horse had already bolted because joint minutes were to be filed by 28 February 2018, pre-trial conference amongst the parties and the filing of pre-trial minutes thereof by not later than 9 March 2018. If the case was to be settled, to file settlement agreement by not later than 16 March 2018 and then remove the matter from trial roll and thereafter immediately enrol it on the settlement roll. None of the above was heeded to and no acceptable explanation is offered.
- [23] The plaintiff in any case is the dominus litis and for the plaintiff or his attorney to decide to renege from the time-frames the parties through their attorneys set for themselves and then waited until late on 24 January 2018 including 22 or 23 March 2018, sends a message that the parties and their respective attorneys left everything to run at a snail pace. The conduct clearly deserves the displeasure of this court.
- [24] ' / submit that there is nothing that the plaintiff or his attorney did or did not do that resulted in the matter being finalised only on the day of the trial', without explaining when was the plaintiff informed of the time limits parties' attorneys set for themselves on 30 June 2017, in my view, is a clear man-made delay which in my view, is unexplained. Therefore both the plaintiff and his attorney should be counted amongst defaulters and in defiance to the pre-trial directives issued during pre-trial conference of 30 June 2017.
- [25] But of course the appropriate order regarding costs in this case should also be seen in the context of should be seen in the context of the explanation provided by the defendant's attorneys in their affidavit. As a start, they too did not comply with any of the pre-trial directives given on 30 June 2017. One Ms Kagiso Makhafola for the defendant deposed to an affidavit. She confirms receipt of an email on 24 January 2018 from the plaintiff's attorneys in which it was indicated that the defendant's reports of orthopaedic and plastic surgeons and occupational therapist were being admitted. Based on this, it is said joint minutes could not be filed.
- [26] It did not matter. The parties were still supposed to hold a pre-trial conference amongst themselves and file minutes thereof by not later than 9 March 2018. It is of a great concern that the wake-up call apparently only started to ring late in on 24 January
2018. The six months period that had lapsed since 30 June 2017, is not accounted for and it looks like it is of no concern to the
- parties and their legal representatives. Stating ashamedly that, "Parties held a further pre-trial conference on 23 March 2018" after having missed the date time of 9 March and settlement date of 16 March 2018, in a way, is a display of defiance and not seriously considering the importance of pre-trial conference before a judge and directives given thereto.
- [27] It is note-worthy to mention that the trial date of 26 March 2018 was for both merits and quantum and therefore the explanation by Mr Makhafola has to be seen in context. In his affidavit he further states as follows:

7. "On the 12th of May 2017, we sent our opinion to client. We requested instructions to tender merits 70/30% up to 80/20% in favour of the plaintiff and to appoint experts, we attach emails marked "MK2" and executive summary (opinion) marked "MK3". On 27th June 2017, we sent another opinion to the client to request instructions we attach email marked "MK4" we received instructions to appoint experts on 30 June 2017, we attach email marked "MK5".
8. On 08 March we sent an opinion to client to request instructions, we attach emails marked "MK6" and "MK7" respectively. We did follow-up for instructions but instructions were not forthcoming from client. We only received instructions on the date of trial.
9. It is therefore my humble submission that we the defendant's attorneys did the best we could and had intentions to settle the matter prior to the trial date and comply with the court's directive; however we could not do so without instructions from client."

[28] Summons in this matter were issued on 30 November 2016 and appearance to defend was entered on 12 December 2016. One therefore can accept that summons were served before 12 December 2016. Before that, the plaintiff would have lodged the claim with the defendant and thus giving the defendant time to investigate the case starting with merits. This apparently did not happen and therefore what is stated in the quotation above without more, does not serve to help either the defendant or its attorney in providing acceptable explanation for the late settlement. It looks like post the pre-trial conference of 30 June 2017 the file was forgotten and only thought of it six months thereafter when it was too late.

[29] It is not clear from the affidavit what defendant or its attorney did after 30 June 2017 to ensure that none of the time frames the parties set for themselves was missed out. For example, was the defendant (claim handler) and or assessors informed well in advance about those time-frames? And if so, what steps were taken to ensure that there was compliance? It is very clear that if this matter was properly attended to, the settlement date of 16 March 2018 and removal from the trial roll could have been achieved and in the process enormous costs could have been spared. Under the circumstances, I find that none of the litigating parties should be entitled to any costs occasioned by the late settlement. Their attorneys too should be ordered to forfeit any day fee, other costs or charges including disbursements occasioned by the late settlement.

C OMELAZU

[30] This case relates to a claim against the Minister of Police and the National Director of Public Prosecutions for unlawful arrest and detention. On 14 November 2017 the matter was laid before me during a pre-trial conference when a date of trial for 26 March 2018 was set and the parties' legal representatives on 14 November 2017 determined time-frames which formed part of the pre-trial directives as follows: That the defendant will file all reports by not later than 15 March 2018 including any investigation report. Parties to file joint minutes by not later than 15 March 2018 and hold a pre-trial conference amongst themselves by not later than 19 January 2018 and thereafter file pre-trial minutes by not later than 25 January 2018. The latter two dates clearly have lost the sequence and that shows the extent to which

parties' legal representatives do not seriously consider the time-frames which they set for themselves or for their clients during judicial pre-trial conference. For example, how do you hold effective and meaningful pre-trial conference before the filing of joint minutes? The sequence in paragraph 5 of the pre-trial form is meant to produce meaningful pre-trial conference and that is why filing of all reports and joint minutes must come before the holding of pre-trial conference amongst the parties.

[31] In paragraph 6 of the pre-trial form parties' legal representatives set for themselves the settlement date and removal from the trial roll as 20 March 2018. The parties' legal representatives by their signatures at the end the pre-trial minutes acknowledged what is recorded in paragraph 7 as follows:

"7. It is hereby recorded that should this matter be settled on the date of trial, parties run the risk of punitive cost order and/or forfeiture of a day's fee, against any person responsible for the late settlement of the matter and any such costs order may include payment out of own pocket by whoever is responsible for the late settlement including claim handlers and or attorneys for the parties."

[32] In paragraph 9 of the pre-trial minutes the parties' legal representatives in their own handwriting and on their own initiatives

recorded:

"The postponement of the matter will ONLY be acceptable under compelling circumstance." The pre-trial minutes amongst others, were signed by an attorney, N Qongqo who is a deponent to the alleged 'affidavit' filed on behalf of the police. I refer to this alleged "affidavit" later in this judgment. On 26 March 2018 being the date of trial, the defendant's counsel asked for a postponement of the matter and the case was postponed to 30 April 2018. The defendants were however ordered to file affidavits by 29 March 2018 explaining why there should not be a forfeiture of a day fee and or disbursements connected to or occasioned by the postponement and why an order of costs on punitive scale and or out of own pocket should not be made against any person responsible for the postponement.

[33] I have now been provided with the purported explanation. On 29 March 2018 a document titled: "FOUNDING AFFIDAVIT IN SUPPORT OF THE APPLICANT'S APPLICATION FOR POSTPONEMENT" was filed with the Registrar. The document apparently was meant to be an affidavit in compliance with the order made on 26 March 2018. I must immediately say I am surprised and concerned by this document and the contents thereof. The document is meant to be an affidavit of Attorney Nangamso Qongqo who as I said, also signed the pre-trial minutes of 14 November 2017. As a start, whilst the document is termed "FOUNDING AFFIDAVIT", it is certainly not an affidavit because no names of the alleged Commissioner of Oaths is indicated in the document neither the capacity of any such Commissioner of Oaths or the address is indicated as is supposed to be.

[34] Commissioner of Oaths Regulations are very clear. Of relevance they provide:

"4(1) Below the deponent's signature or mark the Commissioner of oaths shall certify that the deponent has acknowledged that he or she knows and understand the contents of the declaration and he shall state the name, place and date of taking the declaration.

The Commissioner of oath shall:

- (a) sign the declaration and print his full name and business address below his signature; and
- (b) state his designation and the area for which he holds his appointment or the office held by him if he hold his appointment ex officio.

5.....

6.....

7(1) A Commissioner of oath shall not administer an oath or affirmation relating to matter in which he has interest".

[35] One expects every attorney to be well acquainted with these basic principles set out in the regulations. Secondly, in a matter like the present one, when an officer of the court might find himself or herself in a firing line, one would expect sticking to

the rules of the game to be a priority to avoid being blemished. But that was not to be in the present case. The signature

of the alleged Commissioner of Oaths is a somewhat zig-zag mark clearly not identifiable. In addition, the date is shown as 24 March 2018 and the place where the document was signed and sworn before the alleged Commissioner of Oaths is indicated as Pretoria.

[36] Assuming that the date is correct, that would mean the document was brought to court on 26 March 2018 and when the court ordered the filing of affidavits as indicated in paragraph 35 above, steadfastly attorney Ms Nangamso Qongqo contented herself with the document as an affidavit containing inter alia, "compelling circumstances," the parties set for themselves to be the standard for a postponement as indicated in paragraph 9 of the pre-trial minutes quoted in paragraph 32 above.

[37] I find the attitude to be discontenting to the extreme as it would further appear hereunder. In paragraph of the alleged affidavit it is stated:

"On 13 November 2017, the Honourable Judge President Justice Legodi directed that before this matter is 26th March 2018, the parties attended a pre-trial conference before his Lordship on the same day in the above honourable court. He essentially placed in this matter under case management".

[38] As a start, pre-trial conference in this matter was held on 14 November 2017 and not 13th when a date for trial of 26 March 2018 was determined. The rest of the paragraph makes no sense as to what Ms Qongqo sought to convey to the court. Under the heading "REASONS FOR POSTPONEMENT" she starts by stating:

"4. On 16 March 2017, counsel and I attended to a consultation with members of the South African Police Services at the Mpumalanga Provincial Head Office on 5 Ferreira Street, Nelspruit'

[39] 'March 2017' would have been long before the pre-trial conference was held on 14 November 2017. But I want to believe she meant to say 'March 2018'. However, Ms Qongqo was assisted by counsel, one Adv M Boikanyo who also attended the pre-trial conference of 14 November 2017 and he also signed the pre-trial minutes. One would have expected that a document meant to be an affidavit on a serious matter like in the present case, would ensure that correct, coherent and flawless message is conveyed to the court. But that did not happen.

[40] One wonders why efforts to consult with the defendant's witness did not take place much earlier than 16 March 2018 seen in the context of the following: The parties agreed amongst themselves as recorded in the pre-trial minutes that for the purpose of trial they will hold a pre-trial conference amongst themselves by not later than 19 January 2018 and thereafter file pre-trial minutes by 25 January 2018. Therefore one would have expected Ms Qongqo to have insisted on consultation before 16 March 2018 for the purpose of envisaged pre-trial conference on 19 January 2018. Also seen in the context of the fact that the defendant under paragraph 4 of the pre-trial minutes undertook to file inter alia, investigation report by not later than 15 March 2018, one would have expected attempts to consult with witnesses to have been much earlier. Whether or not investigation report was so required, could only have been so determined if consultation had taken place in time.

[41] Having consulted with some members of the police on 16 March 2018, the legal team (including Ms Qongqo and counsel) was informed that the arresting officer could be one Colonel A.T Wales. They could not immediately locate his whereabouts, so it recorded in the alleged "affidavit". This of course is the result of procrastination being the thief of time. It is therefore of no surprise that "On Friday March 2018, we contacted Colonel A T Wales and he explained that he is now stationed in the Kwa- Zulu Natal and was not aware the matter was going to court', was offered as an explanation for not being ready for trial. "Friday March 2018" was 23rd, when the date of trial was Monday 26 March

2018. As recorded by the parties' legal representative on their own initiative in paragraph 9 of the pre-trial minutes of 14 November 2017, any party asking for a postponement was required to show "compelling circumstances". I suspect that the attorney for the defendant forgot about this recording as she makes no reference to "compelling circumstance" in the document.

[42] The point is this: From 14 November 2017 red light was flickering towards 26 March 2018 and in-between there were reminders to ensure that at the end, the light will turn green when everyone was expected to be ready for trial on 26 March 2018. But the red light and the stops in-between, did not seem to have worried the defendant's attorney. When were the police told of the trial date and the time-frames in question? To suggest that 'it is apparent that the delay in finalising the matter is created by the logistics involved in the case not by any tardy handling of the case by the representatives of the defendants' and that 'counsel or

myself should not be liable for a costs order granted herein, as what has transpired was wholly out of control, without providing justifiable facts, is unhelpful to the cause of the un-readiness to proceed with trial on 26 March 2018. For example, what did they say to Colonel Wales when on Friday 23 March 2018 he told them that he "was not aware that the matter was going to court"? Did they ask him to take a plane to court on Monday? Or did they ask him to drive to court? "We are taking steps to rectifying the situation" referring to the events after 16 March 2018 as alluded to in paragraphs 11 and 12 of Ms Qongqo's document slaps in the face of clear lack of acceptable explanation.

- [43] One would have expected that when Ms Qongqo got out of the pre-trial proceedings of 14 November 2017, she would inform the defendant (the police) of the date of trial and the need to consult as speedily as possible. Failure to deal with this aspect in the document, is in my view, fatal to Ms Qongqo.
- [44] Subsequent to the order of 26 March 2018 she was given an opportunity to explain why an order for payment of costs out of own pocket and or on punitive scale should not be made against any person responsible for the postponement. If it was the police or any other person, one would have expected Ms Qongqo to start by explaining step by step what she did immediately from the pre-trial conference of 14 November 2017 to ensure complete trial readiness on 26 March 2018.
- [45] In my view, time has come that those who work in our public institutions like Ms Qongqo working for the state under the Department of Justice and Constitutional Development, should be made to be accountable for their actions like in the present case. The notion that legal costs can be incurred with impunity because it is not for those who work for our public institutions to pay costs, must

come to a stop in deserving cases. The present case in my view, is one such case. The statement referred to in paragraph [40] of this judgment, for example, that "I further submit that counsel or myself not be held liable for a costs order granted herein, as what has transpired was wholly out of our control", seems to blame the police and suggests that the police out of the public purse should be liable for the costs occasioned by the postponement. I find no merit in this implied submission as it is not supported by facts.

- [46] Perhaps counsel for the defendant has nothing to do with the failure to ensure that the defendant's witnesses were in attendance on 26 March 2018. He or she takes instructions from the instructing attorney and in this case it happens to be Ms Qongqo. For the

reasons

mentioned in this judgment, Ms Qongqo cannot escape paying costs to the plaintiff out of own pocket including disbursements that would normally be incurred and payable out of public purse insofar as same is directly connected to or occasioned by the postponement. The conduct also deserves punitive costs order. Having given the opportunity to explain herself, she decided to be cursory in her

document which does not even meet the requirement for an affidavit to be relied upon. Plaintiff should not be allowed to be put out of pocket.

M Van Wyngaard

- [47] This is a divorce matter. On 26 February 2018 Rule 43 application was postponed by Mudau J to 26 March 2018 costs to be costs in the cause. On 30 June 2017 an interim order pendente lite relating to the parental responsibilities and rights was granted. At the same time the court decided to case managed the divorce action. For this purpose, parties were directed to conduct pre-trial conference by not later than 30 November 2017, file minutes thereof by 15 December 2017 and if settled, file settlement agreement and removal from the trial roll by the latter date.
- [48] The case was then enrolled for the week of 26 February 2018. As I said on this date the case was postponed to 26 March 2018. Similarly on the latter date a request for a postponement was made and reluctantly the matter was postponed to 14 May 2018. Judgment on costs occasioned by the postponement was reserved and the plaintiff's attorneys were directed to file an affidavit by not later than 29 March 2018 explaining why they were not at court and why they should not be reported to the Law Society and why punitive costs order insofar as such costs have been occasioned by the postponement, should not be made against whoever is responsible for the postponement.
- [49] I have now been furnished with the affidavit aforesaid deposed to by attorney Matlale Mabotse Mohlala. The affidavit starts as follows:
- "I confirm that I was aware of the court date of the 26 March 2018 and I was further aware that our correspondence(sic) will be attending to that for another matter on the same day and thus cannot attend to the postponement".
- [50] 'And thus cannot attend to the postponement' boggles one's mind. He or she was not required to attend for the postponement, but rather for trial. On 26 February 2018 the case was not provisionally postponed for trial on 26 March 2018. It was a date fixed for definite trial. Therefore the least he could have done was to instruct his or her correspondent attorney to attend to the trial of the matter or attend court to ask for a postponement.
- [51] In the next paragraph of the affidavit is stated: "I confirm that we had an agreement with the defendant attorneys to humbly request the court for a postponement of the matter pending the Family Advocate's report, and letter were filed in support of her intentions". In the first

place parties cannot without the sanction of the court agree to postpone a case which has been properly enrolled for trial. Any party who seeks a postponement ought to justify it and procedurally by filing a substantive application. That did not happen in the present case. Instead the deponent as an attorney for the plaintiff also absented himself from court on 26 March

2018. That shows disrespect to the court.

[52] 'Pending the Family Advocate's report', should also be seen in context. In the order of 30 June 2017 the plaintiff was granted full parental responsibilities and rights pendente lite and therefore he should have known better that the report of the Family Advocate was key in making final recommendations relating to parental responsibilities and rights towards the minor children. Therefore 'humbly request the court for a postponement of the matter pending the Family Advocate's report', is a man-made result and cannot serve as an excuse to avert adverse costs order occasioned by the postponement.

[53] The statement: "Due to the financial implications of having an advocate postpone the matter, I was acting in her best interest of my client by not requesting an advocate to postpone the matter, but rather arranging an attorney with rights of appearance in the high court", ought to be seen in context. Any postponement of a trial matter is never legal costs saving. In this case, the plaintiff was caused to start with a rule 43 application, a trial date that was scheduled for 26 February 2018 despite the fact that the date was determined on 30 June 2017 did not see the light of parties going on trial and finalising the case. Instead it was postponed to 26 March 2018 and on the latter date postponed to 18 May 2018. All of this in my view, is a man-made but, to a great prejudice to the plaintiff.

Her attorney is at the forefront of the delay and postponement for not taking every step necessary to ensure speedy finalisation of the case. Postponement of the case on 26 March 2018 is not costs saving to the plaintiff.

[54] In an ideal situation, the plaintiff will have been responsible for costs occasioned by the postponement both to the correspondent

attorney and instructing attorneys. But because this is a man-made outcome occasioned by the plaintiff's attorney, the latter is

destined to forfeit any charge, fee and or disbursements including that of correspondent attorneys connected to the postponement. In other words, the plaintiff should not be debited with any fee, costs or disbursements incurred as a result of the postponement.

KZ MAKAM

- [55] This is a loss of support claim against the Road Accident Fund. On 8 December 2017 the matter was laid before Mphahlele J during pre-trial conference when it was enrolled for trial on 26 March 2018. The defendant during pre-trial conference was directed to seek to settle merits by not later than 28 February 2018. In loss of support cases, merits are seldom an issue taking into account the fact that all what is needed is 1% of negligence against the insured driver.
- [56] In paragraph 4 of the pre-trial directives the defendant was directed to file all its reports, including its investigation reports by not later than 28 February 2018. On 26 March 2018, that is date of trial, the case was postponed to 30 April 2018 after the defendant asked for a postponement of the case. Parties were then directed to file affidavits by 29 March 2018 explaining why the matter was not ready for trial and why costs order and or forfeiture of day's fee including payment of costs out of own pocket should not be made against any person responsible for the postponement on 26 March 2018.
- [57] I have now been furnished with the affidavits. The affidavit by the plaintiff's attorney, Ms P P Mabuza is very short. The plaintiff submitted its last report on 21 February 2018. That was contrary to paragraph 3 of the pre-trial directive which required of the plaintiff to file all reports by not later than 31 January 2018. And that "failing which the plaintiff's attorney are directed to file an affidavit by the said date explaining why expert reports are not filed timeously". This too, the plaintiff's attorney did not do or deal with in her affidavit.
- [58] Then in paragraphs 5, 6 and 7 of the affidavit, Ms Mabuza proceeded as follows:
- "5. On the 26th February 2018 , we called and sent an e-mail to the defendant's attorneys where we enquired if the defendant's required anything from the plaintiff to bring this matter to finalization see attached marked "B".
6. Subsequent to above, I phoned the defendant attorneys to enquire if they have not yet received instructions to settle on 19 March 2018 and I was informed that there is another claim on the deceased name.
7. On the 26th march 2018, the defendant attorney requested that we stand the mater down to enable them to do re-calculations and thereafter give us a settlement offer which the court refused and instead postponed the matter to 30 April 2018 , plaintiff never received calculation from defendant to date.
8. I humbly submit that the plaintiff was ready for trial.
- [59] The parties' legal representatives decided to scratch or draw a line across paragraph 5 which required of them to hold a pre-trial

conference amongst themselves by a particular date and to file pre-trial minutes thereof also by a particular date. So, the statement that " on 26 February 2018 we called and sent an e-mail to the defendant's attorneys where we enquired if the defendant required anything from the plaintiff to bring this matter to finalisation," has to be seen in context. If the plaintiff's attorney, honestly wanted finalisation thereof in time, they could have called for pre- trial conference.

[60]

It is not clear from paragraph 6 of the affidavit quoted above as to when did the plaintiff's attorney phoned the defendant's attorney to enquire if 'they have not yet received instructions to settle'. If the parties elected to hold pre-trial conference amongst themselves this kind of an enquiry could have effectively been dealt with during pre-trial conference amongst themselves as that was the purpose. 'On the 25th March 2018 the defendant's attorney requested that we stand the matter down to enable them to do re-calculations and therefore give us a settlement offer...,' is a statement that displays the relentless practice by practitioners to wish to settle on the dates of trial particularly with reference to RAF matters. The statement suggests that if stand down was allowed, the parties could have settled the matter on the date of trial.

[61] We are dealing here with public funds. Stand downs on the dates of trial is a waste of time and impede on speedy finalisation of deserving matters. But the story has more to it. As I said in the matters of Macia & 16 others Mbombela case and Radingoana and others, Middelburg case 1840/2017, settlement of matters on the dates of trial at a blink of a stand-down reveals a trend that is abusive and needs to be rooted out. The time frames by which parties need to settle, if possible, is meant to avoid a situation where cases are settled on the dates of trial. Even most importantly, it is intended to curb on legal costs which significantly has a negative bearing on the ability of the Fund to sustain its budget and affordability to an acceptable level.

[62] The point which I am making is that any party or legal representative who without good cause allows a matter that is scheduled for trial not to be ready to start immediately on the date of trial run the risk of a punitive costs order or forfeiture of day fee or payment out of own pocket. The defendant's attorney as on 18 April 2018 had not filed any explanatory affidavit as directed by the court. For the reasons stated above both parties' legal representatives should be ordered to forfeit any day fee and or disbursement connected to or occasioned by the postponement. Failure to heed to a court order to file affidavits as so ordered by the court on 26 March 2018 amounts to unprofessional conduct and is reminiscent of being in contempt. For this reason the defendant's attorney has to file explanatory affidavit.

M MAKHUBELE.

- [63] This matter against the Road Accident Fund was part of many cases which were enrolled for trial during pre-trial conference before a judge. In the present case pre-trial conference was held on 8 September 2017. A trial date for 26 March 2018 was fixed, parties having set time-frames for themselves. It was also recorded that if the case was to be settled it must be settled by not later than 21 March 2018 and have same be removed from trial roll and immediately be placed on the settlement roll.
- [64] In paragraph 7 of the pre-trial minutes which was signed by attorneys for both parties, it was recorded that should this matter be settled on the date of trial, parties run the risk of punitive costs order and or forfeiture of day's fee by any person responsible for the late settlement of the matter. Despite directives referred to in above, on 26 March 2018 (date of trial), the court was presented with a draft settling the matter in its entirety in the amount of R918 342.60. An order to this effect was made. However judgment relating to costs was reserved and parties were directed to file affidavits to explain themselves for the late settlement and why punitive costs order should not be made against whoever is responsible including forfeiture of day fee and or payment out of own pocket.
- [65] Attorney for the defendant, Ms T N Khoza deposed to an affidavit. She starts by indicating that in compliance with a directive that the defendant files all reports including its investigation reports by 31 January 2018, a letter dated 18 December 2017 was sent to client (the defendant.) Having alluded to this, she states:

"The defendant filed all its reports including actuarial calculations by Independent Actuary and consulting on time as per the directive. The plaintiff had only filed its orthopaedic surgeon report on the 31st of January 2018."

- [66] The 31 January 2018 is actually the date by which the plaintiff was supposed to have filed all his reports. However Ms Khoza having indicated that 'joint minutes by orthopaedic surgeons was served and filed on 26 October 2017', makes no sense if indeed the plaintiff had only filed its orthopaedic surgeon report on the 31st of January 2018'. I merely mention this because in terms of the pre-trial directive, parties were directed to file joint minutes of experts by not later than 23 February 2018. That did not happen. Instead the plaintiff's attorney apparently on 13 February 2018 indicated to the defendant's attorneys that the plaintiff will rely on the defendant's reports and calculations.
- [67] On 23 February 2018 the plaintiff caused occupational therapist and industrial psychologist reports to be served on the defendant's

attorney. By this time, the worse had already happened in that filing by 31 January 2018 had already passed and the plaintiff provided no explanation for this delay despite having been given the opportunity to do so on 26 March 2018. The plaintiff's attorney furthermore filed actuarial calculations on 9 March 2018.

- [68] In paragraph 8 of her affidavit, Ms Khoza states:

"Upon receipt of the plaintiff's reports and calculations, we noted that the experts were not in agreement regarding loss of income damage and this necessitated joint minutes. We then proceeded to instructions(sic) the occupational therapist as well and the industrial psychologist to compile joint minutes, I attach hereto email correspondence marked "TN6" and "TNT" respectively. On the 16th March 2018 our office received correspondence from the occupational therapist indicating that the plaintiff's attorneys occupational therapist denied assessing the plaintiff and also denies the report, I attach hereto the email correspondence marked "TN8". We received the joint minutes by the occupational therapist from on the 20 March 2018 and we were advised by our occupational therapist that it was very difficult to find relevant expert who compiled the report but eventually his or her identity was established and this cause a delay on the finalisation of the joint minutes..."

[69] As a result, the industrial psychologist's joint minutes was received on 22 March 2018 and an actuary was instructed to do calculations for loss of income based on the joint minutes, which calculations were received on the same date. Opinion to client was sent on 23 March

2018. Instructions were only received from client (defendant) to settle on 26 March 2018 being the date of trial. It is very clear that failure to heed to the time-frames parties set for themselves on the date of pre-trial conference resulted in settlement on the date of trial. The plaintiff's attorney and the plaintiff are to be blamed. Firstly, they filed no affidavit to explain themselves. Secondly, they elected to rely on the defendant's reports and then at the last moment and beyond 31 January 2018 decided to come with reports of occupational therapist and industrial psychologist. Later their own expert became uncooperative.

[70] Pitching up at court on the date of trial and then with a blink of an eye caused the matter to be settled when enormous legal costs for preparation and attendance in court are already incurred, is something that our courts in this Division constantly will strive to root out. One way of doing it, is to enforce unashamedly what is recorded in every minutes of pre-trial conference. That is, should any matter be settled on the date of trial, those responsible for the late settlement run the risk of punitive costs order, forfeiture of a day fee and or payment out of own pocket.

[71] In the present case and in the absence of any explanatory note from the plaintiffs attorney, they should be found to be more blameworthy than the plaintiff. For this, whilst the plaintiff must be liable for costs occasioned by the late postponement his attorneys should forfeit a day fee and any costs directly connected to and or occasioned by the late settlement. Any other proposed order in the draft should be covered by 'costs of action', than to seek to restrict the Taxing Master in the exercise of his or her discretion during taxation process.

D.C. MANGANI

[72] This is another case against the Road Accident Fund. Merits having been settled on 6 September 2017 during pre-trial conference, 26 March 2018 was set as trial date on quantum. On the latter date the court was presented with a draft settling the matter in its entirety in the amount of R430 000.00 for general damages and loss of earnings. I made the draft an

order of court and reserved judgment on costs and then ordered parties to file affidavits explaining the reasons for the late settlement and why those responsible for the late settlement should not be held liable for costs. I have now been provided with the affidavits.

- [73] Before I deal with the explanation, I find it necessary to allude to the following: Parties through their attorneys set out time-frames for themselves. The plaintiff and defendant were to file all reports by 21 February 2018. In the event the plaintiff was to fail to file all reports by the said date, an affidavit was to be filed by the said date explaining why expert reports are not timeously filed. On the other hand, failure to file reports on the part of the defendant by the said date, it was recorded, would result in the matter proceeding on the basis of the plaintiffs reports.
- [74] In addition to the above time-lines, parties agreed that joint minutes will be filed by 28 February 2018 and thereafter to hold pre-trial conference amongst themselves by 5 March 2018 and minutes thereof by 19 March 2018. The time-lines are contained in a pre-trial form prepared for this Division and titled "Pre-Trial Minutes and Directives". However, in the present case time lines were made an order of the court on 6 December 2017.
- [75] When the pre-trial directives of 23 June 2017 were not complied with, the parties on 27 November 2017 were ordered to file affidavits explaining why there was no compliance with the pre-trial directives and why whoever was responsible for the un-readiness of the trial should not be held liable for costs occasioned by the postponement, in particular to explain why punitive costs order, forfeiture of day fee and payment out of own pocket should not be made and why the matter should not be reported to the Law Society for non-compliance with the practice-directives. I deal with affidavits later hereunder.
- [76] The pre-trial directives of 23 June 2017 required of the parties to file all their reports by 30 September 2017 and joint minutes by 23 October 2017, to be followed by pre-trial conference amongst themselves by 6 November 2017 and pre-trial minutes thereof to be filed by 10 November 2017. It was recorded that failure by the defendant to file reports as indicated above would result in the plaintiff being entitled to proceed on trial on the basis of the plaintiffs reports. On the other hand, it was recorded that should the plaintiff fail to file affidavits by 30 September 2017, an affidavit had to be filed by the said date explaining the reasons for non-compliance.
- [77] So for the purpose of the enquiry herein, on two occasions the parties and or their legal representatives were ordered to file affidavits explaining the failure to comply with the pre-trial directives of 23 June 2017 and the order of 6 December 2017. The plaintiff's attorney only responded to the order of 27 November 2017 in terms of which, inter alia, the case was stood down until 6 December 2017. The reasons for

not being ready for trial on 27 November 2017 was due to the fact that the attorneys for the plaintiff did not have sufficient funds to pay for the reports of Occupational Therapist Industrial Psychologist and Orthopaedic Surgeon which came to a total of R35 642.00. This is a lot of money and one does not expect every attorney who is doing third party claims on contingency basis to have money at every given moment to pay for the expert reports.

[78] However to wait almost until the date of trial cannot be a good excuse for the purpose of the enquiry under consideration. Paragraph 6 of the practice directive of 23 June 2017 reads as follows:

"If the plaintiff expert report are not filed by 30 September 2017, the enrolment will fall off and the plaintiff's attorney is required to file an affidavit by 30 September 2017 explaining why expert reports are not filed as directed and why the matter should remain on the court roll".

[79] In the affidavit Ms PM Ngobeni, attorney for the plaintiff alluded to the fact that the plaintiff was examined by both industrial

psychologist and occupational therapist respectively on 5 May 2017 and by the orthopaedic on 1 July 2017. She however does not address herself to the imperative in paragraph 3 of the pre-trial minutes of 23 June 2017 quoted above, I find this as a concession that she just did not have good cause for not filing an explanatory affidavit by 30 September 2017 as directed. She could have asked for a postponement well before the date of trial. Clearly parties for being in attendance at court on 27 November 2017 was an acceptance on their part that the enrolment did not automatically lapse.

[80] I always find it unacceptable, strange and unprofessional that despite clear non-compliance, the parties' attorneys will still stay put and wait for the date of trial and only then seek to explain themselves in an application for a postponement made from the bar. Prudent attorney is expected to launch a substantive application for a postponement. That did not happen in the present case. Instead and indeed the plaintiffs attorney launched an application for a postponement from the bar. I find this to be completely unacceptable. It cannot be things as usual to want to litigate at a slow pace and not be pro-active where a delay in finalisation of a case becomes imminent. The plaintiffs attorney cannot escape the displeasure of the court for the stand down on 27 November 2017 followed by postponement on 6 December 2017 to 26 March 2018.

[81] The defendant's attorney, Mr R T Makhubele on the other hand must find himself in the same boat. Only the orthopaedic surgeon's report was filed on 20 September 2017. It is said they could not file the educational and industrial psychologist's reports before the 3Q1h of September 2017 in that educational psychologist could not compile the report without having any proof of schooling for the plaintiff and that the industrial psychologist was still waiting for the educational psychologist's report to prepare the report.

[82] The explanation for not obtaining the reports is characterised as follows:

"We failed to file the rest of the reports in that we were not in possession of the plaintiffs proof of schooling and when we contacted the plaintiff's attorneys to request same, we were advised that they are struggling to get hold of the plaintiff and that the proof of schooling will be sent on as soon as they obtain them from the plaintiff."

- [83] The explanation ought to be seen in context. The plaintiff as alluded to by his attorney Ms Ngobeni, was examined by both the educational and industrial psychologists on 5 May 2017. One therefore would have expected information the defendant or its attorney was allegedly waiting for, that is, the school report to be easily obtainable either from the plaintiff herself or her attorneys. Secondly, it was not the version by the plaintiff's attorney that the delay was occasioned by the fact that the plaintiff could not be traced.
- [84] But even more importantly, it is not clear why the defendant or its attorney did not do everything in their power to cause the plaintiff's attorneys to trace the plaintiff from June 23 to 27 November 2017 if they considered the time-lines set out during the pre-trial conference of 23 June 2017 seriously and if they considered the school report as important. It looks like all was a casual and accustomed way of dealing with RAF matters. That is, no hurry, postponement will be requested on the date of trial.
- [85] Of course it is this kind of an attitude and practice that our courts in this Division seek to root out. The court will also express displeasure regarding the handling of this matter by the defendant's attorney post 23 June 2017. That is, they should be ordered not entitled to charge the defendant any costs, fee and or disbursements occasioned by the stand down and postponement on 27 November 2016 and December 2017 respectively. I do not find it necessary to report any of the attorney to the Law Society.
- [86] I now turn to the settlement of the case on 26 March 2018 being the date of trial. Just to recap, parties were ordered on 6 December 2017 that should the matter become settled, a settlement agreement and notice of removal from the trial roll ought to be filed by not later than 19 March 2018. It was further recorded that failure to settle as directed may result in punitive costs, forfeiture of day fee and payment of costs out of own pocket. As I said earlier in this judgment, I made a draft settling this matter in the amount so indicated an order of court and reserved judgment on costs. I have now been provided with an affidavit by the defendant's attorney. The plaintiffs attorney has not as on 20 April 2018 filed any explanatory affidavit. Appropriate order in this regard will be made. Mr Makhubele on behalf of the defendant explains that the order of 6 December 2017 having been made, he on 15 December 2017 sent it to the client (RAF). Their attention was drawn to the fact that if the matter is settled, it must be settled by 19 March 2018 as so directed.
- [87] Then in paragraph 4 of his affidavit he alludes to the fact that during the proceedings of 27 November 2017 an offer was made to the plaintiffs attorneys and that they however declined the offer citing the need to consult with their client. They also indicated to the defendant's attorney that they were still waiting for their medico- legal reports. Then in paragraphs 5 and 6 of the affidavit Mr Makhubele proceeds further as below:

"5. On the 15th of December 2017 the defendant advised our office that the offer which was made on the 27th November 2017 with regard to General damages remained the same and that with regard to loss of earnings, furthermore we must request Matric certificate and the proof of registrations from the college to enable our educational and industrial psychologists to prepare the addendums to their respective medico-legal report. Copy of the email is attached herein as annexure "MNG-1"

6. After receipt of the Matric certificate and the college proof of registration, we forwarded the documents to our Educational psychologist to prepare the addendum to her Medico-legal reports. The educational psychologist furnished us with the addendum to its initial medico-legal reports on the 15th of March 2018 and same was forwarded to the Defendant. The copy of the email is attached herein as annexures "MND-3"

[88] The issue of matric certificate and proof of registration from the college did not surface for the first time on 15 December 2017. Reference to it was made in paragraph [82] of this judgment suggesting that the school reports be obtained. This became apparent

long before September 2017. The defendant through its attorneys could have been pro-active in search for such report if it felt and decided in time that it was important.

[89] ' After receipt of the matric certificate and the college's proof of registration we forwarded the documents to our educational psychologist to prepare the addendum to her medico-legal reports....', without any indication on how was the matric certificate requested, is unhelpful and does not provide an adequate explanation for the delay in settling this matter. Secondly, annexure "MND-3" enclosed in an email dated 15 March 2018 was clearly too late to be able to file joint minutes by 28 February 2018, to hold pre-trial conference amongst the parties by 5 March 2018, to file pre-trial minutes thereof by 12 March 2018 and to file settlement agreement and removal from the trial roll by 19 March 2018.

[90] An enquiry made by claim-handler on 15 March 2018 in response to the email of the said date in which addendum to the initial medico-legal reports was attached also was just too late to produce any significant proposal for settlement by the 19 March 2018. Waiting for the plaintiff's actuarial calculations after having failed to meet the time-lines as indicated in paragraph [89] above, was out of panic to re-undo a bolted horse.

[91] Neither of the litigating parties can be blamed for the delay and for not having met the timeframes. There is nothing in the affidavit which suggests that either the plaintiff or the defendant was to be blamed for the non-compliance with the order of 6 December 2017. It cannot be okay for the parties' legal representatives to confine themselves to certain timeframes and thereafter fail to comply therewith and find it necessary to wait for the date of trial before settlement negotiations are conducted in earnest. For the reasons mentioned in the preceding paragraphs, I put the blame for the late settlement at parties' legal representatives' doorstep. Same order as with regard to failure to comply with the pre-trial conference of 23 June 2017 would have to be made to an extent.

TM PHALA

[92] In this case Mr Phala had sued the police for unlawful arrest and detention and for malicious prosecution. On 14 November 2017 a pre-trial conference was held before a Judge during which a trial date was set as 26 March 2018. The pre-trial conference was initially enrolled for 10 November 2017 and on the latter date it was postponed to the 14 November 2017. This was one of the pre-trial conferences which was initiated by the Registrar of this court, the case having been transferred from the Gauteng Division Pretoria.

[93] In the course of the pre-trial conference parties set the time-frames for themselves as follows: That pleadings will be closed by no later than 20 February 2018 after the defendant shall have filed an amended plea by the 15 January 2018. That the defendant should seek to settle merits by not later than 28 February 2018 seen in the light of a claim for unlawful arrest and detention. That should the defendant wish to file any investigation reports it shall do so by not later than 15 March 2018 thereafter parties to file joint minutes by the latter date. Parties also elected to fix the date by which to hold pre-trial conference amongst themselves as 2 March 2018 and pre-trial minutes thereof by 7 March 2018 and that in case of settlement to file settlement agreement and removal from the roll by not later than 20 March 2018.

[94] Under paragraph 9 of the pre-trial minutes it was recorded that postponement of the matter will only be accepted under "compelling

circumstances". However, on 26 March 2018 an application for a postponement was launched on behalf of the plaintiff. The

postponement to 3 September 2018 was granted. In the order for a postponement parties were ordered to file affidavits by not later

than 29 March 2018 explaining the reasons for the postponement, reasons for the stand down of the matter and reasons why there should not be a forfeiture of a day fee, punitive costs order against whoever is responsible for the postponement including attorney

involved, if any.

[95] As on 20 April 2018 this court had not received any affidavit from the plaintiff's attorney. However, the defendant's attorneys Ms N P Khoza of the State Attorney Pretoria had filed an affidavit. She alludes to the fact that the matter was postponed on 26 March 2018 because the plaintiff was not ready and he wanted to bring an application for condonation for non-compliance of giving a notice as contemplated in Act 40 of 2002.

[96] The plea for non-compliance under Act 40 of 2002 was delivered on 28 July 2014. The plaintiff failed to request or to apply for condonation. In her affidavit Ms Khoza states that the defendant complied with the directive issued by this court on 14 November 2017. However the plaintiff's attorney despite the fact that the defendant's attorney on 22 March 2018 wrote to them requesting for their position or reply to the special plea raised long time

ago. This fell onto the deaf ears. In paragraph 13 of the affidavit Ms Khoza proceeds to state as follows:

"13 On the date of the trial, which was Monday the 26 March instant, the defendants counsel called the matter as the plaintiff's counsel was running late, the matter was stood down for allocation. Upon his arrival and after the issue of the special plea was discussed and heads of argument was served upon him, he informed me that he was not briefed on the special plea and that he had only prepared for trial.

[97] As I said earlier in this judgment, the plaintiff's attorney has failed to file an affidavit to take the court into his confidence.

Their failure to heed to the order given by this court on 26 March 2018 is completely unacceptable. It is not expected that an officer of the court can just simply defy court order like that. Having been served with a special plea on 28 July 2014 and having held a pre-trial conference on 14 November 2017 and then instructed counsel for trial on 26 March 2018 without instruction on special plea in my view, is unheard of.

[98] The issue of an application for condonation is a legal issue governed under Act 40 of 2002. Thus the plaintiff as a litigating party would not have known of the legal imperative and was entirely dependent on his attorney for legal advice, which clearly the attorneys for the plaintiff failed to provide. Failure to provide explanation after the court so ordered is consistent with their conduct for not advising the plaintiff accordingly. This is not only unprofessional but as I said, is blatant disregard of the order to file explanatory affidavit by 29 March 2018. For this reason, the plaintiff is bound to be ordered to file an affidavit why his or her conduct should not be reported to the Law Society.

[99] I must be worried that counsel briefed to appear on 26 March 2018 found nothing wrong in informing Ms Khoza 'that he was not briefed on the special plea and that he had only prepared for trial'. He must have known that the plaintiff could not proceed to trial before having dealt with the special plea. If indeed this is what counsel for the plaintiff said to Ms Khoza, then his or her conduct is wanting. For this purpose, he too ought to be directed to file an explanation as to why the conduct should not be reported to the bar council.

[100] Plaintiff cannot be held liable for the costs occasioned by the postponement neither the defendant should be put out of pocket. At the risk of repetition and prolonging this judgment, in paragraph 9 of the pre-trial minutes is recorded: "Postponement of the matter will only be acceptable under compelling reasons."

[101] Failure to file an affidavit is a clear defiance not compatible to the professionalism that is embodied in and required by the legal profession. The attorney for the plaintiff should therefore be found to be solely liable for any costs occasioned by the postponement on a punitive scale. Accordingly an appropriate order for costs is made hereunder. But he or she must also file an affidavit explaining why his or her failure to comply with the order of 26 March 2018 to file an affidavit should not be reported to the Law Society and why his or her

conduct should not be found to be in contempt.

KN WIID

[102] This case is one of the cases which was settled on the date of trial. I made draft settling this matter an order of court in part and reserved judgment on costs occasioned by the late settlement. It is a dependant's claim. As I said, in the cases of Macia and others and Radingoana and others, dependants' claims are easy to settle and have to be dealt with as urgent seen in the light of the fact that very often such claims involve minors who might be requiring urgent finalisation thereof.

[103] 26 March 2018 was fixed as a trial date on 9 February 2018 after parties had indicated that the date was convenient for both legal representatives. The defendant in the light of the uncomplicated nature of the claim was directed to seek to settle the matter by not later than 14 February 2018. Furthermore, the defendant's attorney suggested 28 February 2018 as the date by which all reports including investigating reports if any, shall have been filed. Parties' legal representatives also bound themselves to hold pre-trial conference by 5 March 2018 and to file minutes thereof by the said date. They also agreed that if the matter was to be settled, settlement agreement thereof or draft shall be filed by 15 March 2018 and then enrol the matter on the settlement roll for the following day at 8h45, in which event the enrolment must be filed with the Registrar by 15h00 of the preceding day.

[104] None of the above had happened. Instead the court was presented with a draft order on the date of trial settling this matter in its entirety in the amount of R150 112.00 for loss of support and R11 357.00 in respect of funeral costs. Parties were ordered to file affidavits explaining the late settlement. As on 20 April 2018 none of the parties did. Failure by parties' legal representatives to adhere to the directives given during pre-trial conference without acceptable explanation being given as was the case here, should be found to be sanctionable and dishonourable conduct contrary to the profession. The parties' legal representatives owe it to their profession to provide this court with good reasons why they should not be reported to the Law Society and why they should not be found to be in contempt of the order of 26 March 2018.

[105] I will now move from the premise that failure to file affidavits by the parties' legal representatives signify absence of good reasons for settling on the date of trial contrary to the time-lines the parties' legal representatives set for themselves on 9 February 2018. In the light of their unexplained conduct they should not be entitled to charge any fee, costs or disbursement connected to or occasioned by the late settlement.

E MASHEGO

[106] In this action against the Road Accident Fund parties settled merits on the date of trial and then asked for a postponement on quantum which request was granted but judgment on costs occasioned by the postponement was reserved. Parties' legal representatives were directed to have affidavits filed by not later than 29 March 2018 explaining why a punitive costs order should not be made including forfeiture of a day fee and or payment out of own pocket occasioned by the postponement.

[107] As on 22 April 2018 none of the parties' legal representatives had filed any affidavits. As a background, on 1 December 2017 the case was laid before Nair AJ during pre-trial conference. In the pre-trial minutes and directives form signed by Attorney W Meintjies on behalf of the plaintiff and by someone whose particulars are not recorded on behalf of the defendant a date of trial to deal with merits only was set. In paragraph 4 of the pre-trial minutes and directives, a provision is made as follows:

"4. The defendant is hereby directed to file all the reports, including investigation reports if so required by not later than ____, failing which the matter will proceed on the basis of the plaintiff's reports.

[108] On the other side in paragraph 5 of the pre-trial minutes form further provision is made for date by which settlement agreement and notice of removal from the roll ought to be filed, should the matter become capable of being settled. The parties' legal representatives

before Nair AJ decided to draw a line in paragraphs 4 and 5 of the pre-trial minutes form as if insertion of the date was not relevant.

This in my view, displays an attitude. That is, not taking pre-trial minutes and directive form and what is recorded therein seriously.

[109] A omission to insert a date by which to file settlement or draft thereof should the matter become settled on merits, in a way is a defiance to what this Division intends to achieve. That is, to avoid parties' legal representatives attending court on the date of trial and then confront the court with a draft settling matters. In the present case that is exactly what had happened. The case was enrolled for trial on 26 March 2018 to deal with merits only. The trial date was determined during the pre-trial conference of 1 December 2017. This court on 26 March 2018 was presented with a draft by agreement in terms of which it was recorded:

"The defendant is liable for 80% of the proven or agreed damages".

[110] Look at it this way: If the date by which the settlement agreement and notice of removal was set by the parties as they were requested to indicate in terms of paragraph 5 of the pre-trial minutes and directives form, there would not have been any need for the parties' legal representatives to appear on the date of trial. If the matter was removed from the roll, they could have asked the Registrar to enrol it on the pre-trial roll so that a judge during pre-trial conference would engage the parties on their readiness to proceed with the matter on quantum and a date of trial on quantum would have been determined during such pre-trial

conference.

- [111] Just like in Wiid case, failure by the parties' legal representatives to provide this court with affidavits explaining the late settlement on merits, signify contempt towards this court and this must be met with displeasure in the form of forfeiture of day fee, costs and or disbursements occasioned by the late settlement of merits and postponement. Furthermore they must be ordered to file affidavits to explain why their conduct should not be reported to the Law Society and why they should not be found in contempt.

M SEKATANE

- [112] Date of trial in this matter was determined on 26 June 2017 during pre-trial conference. On that occasion the parties were directed to file settlement agreement and notice of removal from the trial roll by not later than 15 March 2018 in the event of the matter becoming settled. The case was enrolled for both merits and quantum. The consequences of late settlement was also recorded in paragraph 7 of the pre-trial minutes.

- [113] On the date of trial, the court was presented with a draft settling merits and seeking to have the case postponed for quantum. As I said in paragraph [110] above when dealing with Mashego's matter, the parties could have resorted to settlement of the matter on merits and have it removed from the roll and thereafter deal with the matter as indicated in Mashego's case. By way of further background: Defendant was required to file all reports including investigation reports on merits by 30 November 2017. However not all reports were filed by the said date. For example, actuarial report was only filed on 23 February 2018. The defendant is said to have given its attorney instructions to appoint an actuary only on 20 December 2017. This is not helpful as it does not provide acceptable explanation for the delay and for acting contrary to the directive given during pre-trial conference of 26 June 2017. It was on this date that parties were further directed to file joint minutes by not later than 15 January

2018. Only those of Neurosurgeon and Neuropsychologist were filed timeously. Those of occupational therapists were filed on 30 January 2018 and educational psychologists on 23 January 2018.

- [114] In paragraph 4 of the affidavit by Mr Mathebula is contended:

"I submit that the delay in filing of the joint minutes was created by Dr Zeptz Mazibuko Defendant's educational psychologist as instructions latter was set timeously, we attach an instruction letter and email marked "MK2" and "MK3" respectively."

- [115] "MK2" is dated 25 October 2017, that is, four months after the pre-trial conference of 26 June 2017. This is late, more so that there is no explanation as to when was the defendant informed of the time-frames given during the pre-trial conference. Without pushing the blame to clients, it looks like the defendant's attorneys cannot escape being liable for the late settlement of merits and un-readiness to proceed with trial on quantum. "MK3" is also dated 25 October 2017.
- [116] Pre-trial conference amongst parties which was supposed to be held on 20 January 2018 was only held on 23 March 2018. On 23 March 2018 was just too late to salvage any non-compliance with the directives of 26 June 2017. The agreement by the parties' legal representatives that the plaintiff's attorney should prepare and file minutes of 23 March 2018 after the horse has bolted served no purpose.
- [117] Defendant has missed on the date by of which investigation reports had to be filed, that is, 30 November 2017. There is no reference to this date in the explanatory affidavit and no fact are advanced for non-compliance Attempts to patch-up the default without more, provides not excuse. The making of an offer on merits on the date of trial which offer was acceptable by the plaintiff, that is, 80% in favour of the defendant, is a clear indication that had the parties heeded to the pre-trial directives of 26 June 2017 merits could long have been resolved and parties could also have asked for the postponement of the matter on quantum in time to avoid such a request being made on the date of trial.
- [118] Affidavit on behalf of the defendant does in any way impeach on the defendant as being responsible for non-compliance. That being so, the defendant's attorney had to bear the brunt by forfeiting day fee, costs and or any disbursements connected to and or occasioned by the late part settlement and postponement of the matter. No affidavit had been filed on behalf of the plaintiff as ordered by the court. I expressed myself with regard to such a failure earlier in this judgment when dealing with Wiid matter. Therefore in addition to forfeiture, plaintiff's attorney had to file an affidavit to explain why his or her conduct should not be reported to the Law Society and why he or she should not be found in contempt.

C P NCONGANA

- [119] This matter was laid before me on 17 April 2018 on the settlement roll regarding loss of earnings. Initially the matter was laid before this court on 30 November 2017 when the amount payable to the plaintiff for general damages was agreed at R400 000.00 and a draft in relation thereto was made an order of court. On 17 April 2018 was not the date of trial for this matter. The date of trial was 23 April 2018 and was enrolled on the settlement roll in terms of which loss of earnings was settled in the amount of R761 428.88 and a draft order to this effect was made an order of court except with regards to costs in terms of which judgment was reserved.

[120] Court was initially under the impression that the 17 April 2018 was date of trial. Having gone through the file, I have now found that was not the case. There was therefore no need to reserve judgment on costs as it was effectively not settled on the date of trial. Confusion was brought around by the fact that the parties did not remove the case from the roll of 23 April 2018. In actual fact the attorney for the plaintiff was apparently under the impression that the trial date of 17 April 2018 still stands. In the

light hereof no punitive costs order, forfeiture of day fee or payment out of pocket can be made.

[121] In conclusion, I hereby make an order in each matter mentioned in paragraph [11] of this judgment as follows:

In P N Mogale case

121.1 The defendant to pay costs of the action on a party and party scale except that no order as to costs is made insofar as such costs, disbursements and other charges are connected to or occasioned by the late settlement.

121.2 The parties' legal representatives are hereby ordered to forfeit any day fee and all other costs and disbursements directly connected to or occasioned by the late settlement.

In C Omelazu case

121.3 The defendant's attorney Ms Nangamso Qongqo is hereby ordered to pay out of her own pocket any of the plaintiff's costs on an attorney and client's scale, including fee and or disbursements connected to and or occasioned by the postponement and such costs and or disbursements shall include that of the defendant's counsel insofar as such costs and or disbursements and or fees are connected to and or occasioned by the postponement.

121.4 No order as to costs occasioned by the postponement is made against any of the litigating parties.

121.5 The Registrar of this court is hereby directed to bring a copy of this judgment and or order to the State Attorney for the attention of Ms Phaahlane to ensure that no fee or disbursements occasioned by the postponement is paid out of the public purse.

In M Van Wyngaard case

121.6 Costs occasioned by the postponement to be costs in the cause.

121.7 The plaintiff's attorneys are hereby ordered not entitled to charge any fee, including appearance fee, costs and or any disbursements directly connected to and occasioned by the postponement.

In K Z Makam case

121.8 No order as to costs occasioned by the postponement is made against any of the litigating parties.

121.9 The parties' legal representatives are hereby ordered to forfeit entitlement to charge any day fee, costs and or disbursements against their respective clients occasioned by the postponement of the matter.

121.9.1 The defendant's attorney is hereby ordered to file an affidavit within 7 days from date of this judgment explaining why an explanatory affidavit was not filed, why the matter should not be reported to the Law Society and why he or she should not be found to be in contempt for failing to comply with the order of 26 March 2018.

In M Makhubele case

121.10 The defendant to pay costs of action except those occasioned by the late settlement, which costs must be paid by the plaintiff to the defendant on a party and party scale.

121.11 The parties' legal representatives are hereby ordered to forfeit entitlement to charge against their respective clients any day fee, costs and or disbursements insofar as such fee, costs and or disbursements are directly connected to or occasioned by the late settlement.

In D G Mangani case

121.12 No costs order amongst the litigating parties occasioned by the stand down and postponement of the case on 27 November 2017 and 6 December 2017 respectively is made.

121.13 Parties' legal representatives are hereby ordered to forfeit entitlement to charge their respective clients a day fee, costs and or disbursements directly connected to and or occasioned by the stand down on 27 November 2017 and postponement on 6 December 2017.

121.14 The defendant to pay costs of the action except those occasioned by the late settlement and stand-down and postponement in respect of which no order as to costs against the defendant is made.

121.15 The parties' legal representatives are hereby ordered to forfeit an appearance fee of 26 March 2018, any charge, costs or disbursements directly connected to or occasioned by the late settlement of this matter on the date of trial.

In MT Phala case

121.16 The plaintiff's attorney is hereby ordered to pay to the defendant costs occasioned by the postponement on an attorney and client scale.

121.17 The plaintiff's attorney is hereby ordered to forfeit any day fee, costs, charge and or disbursements chargeable against his client (the plaintiff) insofar as such fee, costs, charges and disbursements are directly connected to or occasioned by the postponement.

121.18 The plaintiff's attorney is hereby ordered to file an affidavit with the Registrar of this court within seven days from date hereof explaining why his or her conduct alluded to in this judgment should not be reported to the Law Society and why he or she should not be found to be in contempt to the order of 26 March 2018.

121.19 Counsel who appeared on behalf of the plaintiff on 26 March 2018 and allegedly indicated to the defendant's attorneys that he or she was not briefed on special plea but on merits only should file an affidavit within seven days from date of this judgment explaining why his conduct as alluded to in this judgment should not be reported to the Bar Council for failure to give proper advice.

In KN Wiid case

121.20 The defendant to pay costs of action on a party and party scale except those occasioned by the late settlement in terms of which no order as to costs is made against any of the litigating parties.

121.21 The parties' legal representatives are hereby ordered to forfeit and not entitled to charge any day fee, costs and or disbursements against their respective clients occasioned by and connected to the late settlement.

121.22 The parties' legal representatives are hereby directed to file affidavits by not later than seven days from date of this judgment explaining why their conduct should not be reported to the Law Society and why they should not be found to be in contempt for failure to file affidavits as so ordered by the court on 26 March 2018.

In E Mashigo case

121.23 The costs occasioned by the late settlement on merits and postponement of the case on quantum insofar as it relates to the litigating parties, is to be costs in the cause.

121.24 The parties' legal representatives are hereby ordered to forfeit entitlement to charge against their respective clients any fee, costs and or disbursements occasioned by and connected to the late settlement of merits and postponement on quantum.

121.25 The parties' legal representatives are hereby directed to file affidavits by not later than seven days from date of this judgment explaining why their conduct should not be reported to the Law Society and why they should not be found to be in contempt for failure to file affidavits as so ordered by the court on 26 March 2018.

In M Sekatane case

121.26 The parties' legal representatives are hereby ordered to forfeit entitlement to charge their respective clients any fee, costs and or disbursements occasioned by and connected to the late settlement on merits and postponement of the matter on quantum.

121.27 The defendant to pay costs of action except those occasioned by part late settlement and postponement in respect of which no order as to costs is made.

121.28 The plaintiff's attorneys are hereby directed to file affidavits by not later than seven days from date of this judgment explaining why their conduct should not be reported to the Law Society and why they should not be found to be in contempt for failure to file affidavits as ordered by court on 26 March 2018.

In C P Ncongwana case

121.29 The defendant to pay the costs of action including reserved costs on a party and party scale.

DATE OF HEARING: 26 MARCH 2018

DATE OF JUDGMENT: 19 JUNE 2018

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REF: MAP/CPN/RAF/67/16

- [1] Paragraph 2 of the Norms and Standards
- [2] Section 8(3) of the Superior Courts
- [3] Paragraph 3 of the Norms and Standards
- [4] Paragraph 5.2.5 (i) of the Norms and Standards
- [5] Paragraph 5.2.4(iv) of the Norms and Standards
- [6] Para 5.2.4(v) of the Norms and Standards
- [7] Para 5.2.4(vi) of the Norms and Standards
- [8] Paragraph 5.2.4(vii) of Norms and Standards
- [9] Paragraph 5.2.4(viii) of Norms and Standards

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Prepared on 10 October 2026 · Esheria