

SOUTH AFRICA / JUDGMENT

Nxolo v Road Accident Fund (34757/2014; 60468/2018) [2024] ZAGPPHC 1350 (11 December 2024) [2024] ZAGPPHC 1350

COURT

North Gauteng High Court, Pretoria

BEFORE

Davis

CASE / FILE NUMBER

34757/2014; 60468/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE

NO: 34757/2014 & 60468/2018

DATE:

26-11-2024

(1)

REPORTABLE: NO.

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED.

DATE:

11 DECEMBER 2024

SIGNATURE

In

the matter between

L N

NXOLO

Plaintiff

and

THE ROAD ACCIDENT

FUND

Defendant

CASE NO: 60468/2018

In the matter between:

N N

LIMBA

Plaintiff

Summary: Practice of
plaintiffs to apply for a second order to compel the RAF to furnish
an undertaking to pay for future medical and ancillary
costs where
such an order had already been granted, should stop. Such
applications are improper. The proper remedy
is to apply for
orders of contempt of court.

JUDGMENT

DAVIS, J:

- [1] Matters 20 and 21 on this Court's unopposed roll of today, 26 November 2024 are similar in nature. They are also in similar nature to two other matters on the roll to which I shall refer to later. In all these matters the Road Accident Fund (the RAF) featured as the defendant.
- [2] That means that there are four similar matters on this Court's roll, that is approximately 10 percent of the roll and in my view the practice evinced by these matters justifies judicial attention.
- [3] For that purpose I shall render an ex tempore judgment. The matters are as follows:
- L N Nxolo v the RAF, 34757/2014
- [4] In this matter the plaintiff obtained judgment in this court on 19 April 2022.
- [5] Apart from the issue of merits, loss of earnings and general damages having been included in the judgment, the RAF was also ordered to furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act[1].
- [6] The plaintiff now claims that, despite having furnished the RAF with a copy of this order and despite having sent letters of demand, the plaintiff has been unable to obtain an undertaking.
- [7] The plaintiff (as an applicant) therefore launched the current application seeking an order in the following terms. "1. That pursuant to the applicant's notices in terms of Section 17(4)(a) the respondent be ordered to furnish the applicant within 10 days from date of service of this order with an undertaking in compliance with a court order of 19 April 2022". Certain cost orders are also claimed.

N N Limba on behalf of a minor and the RAF, 60468/2018

- [8] In this matter Raulinga J granted an order in favour of the plaintiff as long ago as 23 August 2021. In that order similarly, the RAF was ordered to furnish the plaintiff with an undertaking in terms of Section 17(4)(a) and similarly, the plaintiff as applicant now seeks another order compelling the respondent to furnish the undertaking.

Discussion

- [9] Whilst the Court has sympathy for the applicants and whilst this Court has in various judgments already referred to the RAF as a perpetually delinquent litigant,[2] the facts of these two cases indicate that the RAF remains in breach of its obligations, albeit this time in respect of court orders.
- [10] The Court, however, is of the view that in each of these matters, it would be improper for a Court to grant a second order, ordering exactly the same as what had already been ordered in a first order regarding the furnishing of an undertaking. Not only would that be a duplication of orders, it would be tantamount to granting meaningless orders. There is no sense in the Court saying, or ordering the same thing twice. In fact, if a court does so, then it undermines the validity and the value of its own initial orders.
- [11] The question is then what is to be done by a plaintiff when the RAF is again in default of its obligations?
- [12] Firstly, it should be noted that orders of court are broadly divided into two categories, namely orders ad pecuniam solvendam, that is orders to pay a sum of money, and orders ad factum praestandum, that is orders to do, or abstain from doing a particular thing or to deliver a thing.
- [13] An order ad factum praestandum is by its nature no different from a mandamus which is exactly what the applicants now seek this Court to order a second time. The approach of our courts have always been that civil contempt proceedings is the remedy to be utilised to obtain compliance with an order ad factum praestandum or to deliver a thing.
- [14] This approach regarding civil contempt for non-compliance has received much judicial attention. Also, in particular, in instances

where the distinction between the two types of orders have been made[3].

- [15] I need not traverse the requirements for an application for contempt of court as set out in inter alia Fakie[4] and Pheko[5]. What one needs to underline however, is as the Constitutional Court has said in Department of Transport v Tasima (Pty) Ltd[6] that:

“The obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system and is the stanchion around which a State founded on the supremacy of the Constitution and rule of law is built.”

- [16] One should also underline that court orders remain valid and enforceable until set aside and that necessitates compliance with such court orders, regardless of their nature or even whether the party against whom the order is granted believes it to be a nullity or not[7].
- [17] One is further reminded of the fact that the RAF is an organ of State and that the Constitutional Court has a long ago as 2014 in MEC for Health Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute[8] held that:
- “There is a higher duty on the State to respect the law, to fulfil the procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant adrift on a sea of litigious uncertainty to whom the Courts must extend a procedural circumventing lifeline.”*
- [18] In my view, to grant a second order, ordering exactly what has already been ordered, would undermine the legitimacy of the first order and would be granting the RAF an unnecessary “procedural circumventing lifeline” to which it is not entitled.
- [19] The proper procedure to be followed is that those officials responsible for the issuing of undertakings be held accountable by way of applications for contempt of court. Faced with such an application, one might more readily extract an attempt to purge the contempt by the official obliged to furnish the undertaking, which he or she should have furnished in the first place.
- [20] Simply granting a second order would be, as counsel for the applicants put it, optimistically hoping that a second “push” would get the RAF to do what it should have done.
- [21] Having made these comments, and having thereby determined that the applications should be refused, in view of the nature of the applications and the RAF’s delinquency, I do not intend mulcting the applicants with any costs.
- [22] I need to add a further rider to this judgment. On this roll there were two other applications, V N Claasen v the RAF, 41291/2018 and E P Da Silva vs the RAF, 5871/2021.
- [23] In both these matters court orders in similar terms had previously been granted. In Claasen’s matter it was granted on 17 February 2023 by Tolmay J which included the furnishing of an undertaking and in Da Silva’s matter a settlement had been made an order of court equally long ago, which also included the furnishing of an undertaking.
- [24] In both these matters the deponent for the applicants was an attorney of this court, Mr Gert Nel. He deposed that he brings these kind of applications “on a regular basis”. In his affidavit further, he said that there is “no alternate remedy”. The fact that unnecessary costs have regularly been expended only in an attempt to compel a court to provide a duplicate order, is disconcerting.

- [25] The allegation that there is no other remedy is, as I have indicated, in law misplaced. What is however further disconcerting, is that three scant court days before these matters were to be heard, they were removed by notice. This was done without any explanation as to what the reason might have been for such removal. No indications have been given to the presiding judge as to whether the undertakings had indeed been furnished or why, in these instances, the attorney's "regular practice" was not continued with.
- [26] These two cases illustrate a practice which is not only prevalent as a result of the number of matters on the roll, but which has been confirmed by Mr Nel on oath, which practice should be halted.

Orders

- [27] In matters 20 and 21, that is the matters of Noxolo and Limba they are removed from the roll. No order is made as to costs.

DAVIS, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE JUDGMENT DELIVERED: 26 NOVEMBER 2024

- [1] 56 of 1996.
- [2] For example in *Mashigo v Road Accident Fund* (2120/2014) [2018] ZAGPPHC 539 (13 June 2018).
- [3] See for example *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 (T), *East London Local Transitional Council v MEC for Health Eastern Cape and Others* 2001 (3) SA 1133 (CK), *Kate v MEC for Welfare Eastern Cape and Another* 2005 (1) SA 141 (E).
- [4] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).
- [5] *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC).
- [6] 2017
- (2) SA 622 (CC).
- [7] See for example *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* 2022 ZACC3.
- [8] 2014
- (3) SA 481 (CC) at par [82].

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