

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Britz obo Britz (76318/2013) [2017] ZAGPPHC 762 (3 November 2017) [2017] ZAGPPHC 762

COURT

North Gauteng High Court, Pretoria

BEFORE

Petersen

CASE / FILE NUMBER

76318/2013

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 76318/2013

DATE: 03/11/2017
Not reportable
Not of interest to other judges
In

the matter between: ROAD
ACCIDENT
FUND Applicant
And
LANESE
CARIKA BRITZ obo ROE
BRITZ Respondent

JUDGMENT

PETERSEN AJ:

[1] This is an application by the applicant (defendant in the main action) for the removal/upliftment of bar served on the defendant by the respondent (the plaintiff in the main action). I will refer to the parties as they are cited in the main action.

- [2] The plaintiff instituted action against the defendant by way of combined summons on 19 December 2013. The summons was served on the defendant on 20 December 2013 by the Sheriff of the High Court.
- [3] The defendant filed its notice of intention to defend the action together with a notice in terms of Rule 36(4), which was served on the 10 January 2014. The plaintiff replied to the Rule 36(4) notice on 10 January 2014 and provided the requested documents to the defendant on 13 January 2014.
- [4] The plaintiff prepared a notice of bar on 25 February 2014 which was served on the defendant on 26 February 2014. The defendant was called on to deliver its plea within five (5) days of service, failing which the defendant would be ipso facto barred from delivering its plea. The defendant prepared its plea and served same on the plaintiff on 13 March 2014 after having been barred from doing so. The reason put forward for the delay is premised on a claim that the defendant received an incomplete summons at the time of service by the Sheriff.
- [5] The plaintiff took no further steps in the main action from 13 March 2014 until 18 October 2016 when notice was given to the defendant in terms of Rule 28 of the plaintiff's intention to amend her particulars of claim by increasing the claim in respect of damages from R300 000 to R414 559.
- [6] The plaintiff enrolled the matter on the unopposed motion roll of 14 February 2017, seeking default judgment in respect of damages. The defendant opposed the application. The application for default judgment was removed from the unopposed motion roll on 14 February

2017 with an order that the defendant pay the costs.

- [7] The defendant submits that the plaintiff failed to file a Rule 30 notice informing it that the filing of its Plea constituted an irregular step considering the fact that the defendant had been barred from taking any further procedural steps. Having failed to do so, the defendant submits that the plaintiff in terms of Rule 30(2) forfeited the right to have the offending step set aside. In addition thereto the plaintiff took further steps in the cause with knowledge of the offending step. The plaintiff submits that there was no obligation to inform the defendant of the irregular step and contends that the relief sought by the defendant is restricted to Rule 27.

[8] It is common cause that the defendant was ipso facto barred from pleading when it failed to deliver its Plea. In the ordinary course of litigation the defendant could take no further procedural steps. The filing of its Plea after being barred from doing so would ordinarily be pro non scripto unless it sought relief under Rule 27. The plaintiff submits that there was no obligation to notify the defendant that an irregular step had occurred with reliance on the decisions of *Swart v Flugel* 1978 (3) SA 265 (E) and *KOL Motorcycles v Pretorius Motors* 1972 (1) SA 505 (0). The fact that an irregular step had been taken by the filing of the plea is not in dispute and brings Rule 30 squarely into focus.

[9] Rule 27(1) and (3) of the Uniform Rules provide:

27 Extension of Time and Removal of Bar...

"(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(3) The court may, on good cause shown, condone any non-compliance with these rules."

[10] Rule 30 provides:

30 Irregular Proceedings

"(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety

alleged, and may be made only if-

- (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
- (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
- (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

..."

[11] It is clear from Rules 30 and 27 that time limits and abridging thereof is central to the Rules. The role of the Rules in the

litigation process must therefore be placed in context. The Rules are formulated to govern procedural matters in the litigation process within specified time limits. They are meant to bring matters to a point where an executable order can be given by a competent court in an expeditious manner. The Rules are designed to remove the burden of regulating procedural matters from the Court. The rules are meant for the Court and not the Court for the rules. The common law jurisdiction of the high court further allows a high court to govern its own procedures and with Rule 27, to condone non-compliance with any of the rules. The time limits provided for in the Rules are, therefore, not inflexible. However, in interpreting the Rules of Court, Schreiner JA in *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) said:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[12] The Plea was delivered six (6) days after the defendant was ipso facto barred from doing so. If the Court moves from the premise that this constituted an irregular step, the time frame within which the irregular step was taken is negligible. Whilst the procedural step taken by the defendant is not countenanced by the Rules, it does

indicate the defendant's intention to contribute to the flow of the litigation. The plaintiff waited two and half years before taking the next step in the proceedings, delayed by a Compensation Commissioner claim. The best interest of the child standard, considering the delays in the litigation, cannot be used as a basis for not lifting the bar and allowing the plea to stand. This is a matter which calls for a flexible approach by the court without acceding to rigidity. It is a clear case of substance over form which would be in the interests of justice. This flexible approach to the Rules is clearly demonstrated in the case of *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) at 611D-F where it was held in the context of a Rule 30 application that:

"The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can be simply ignored."

[13] On the question of costs, the court is satisfied that the plaintiff was fully justified in opposing the relief sought in this

application. The rigid approach the plaintiff, however, sought the court to adopt for reason stated above could not be adopted. Whilst costs generally follow the result, the court deems it fair that the defendant pay the costs of the plaintiff in opposing this application.

[14] In the result it is ordered:

1. That the application is granted.
2. The bar is removed (lifted).

3. The defendants' Plea is allowed to stand as a plea in the main action.

That the applicant (defendant) is to pay the costs of the respondent (plaintiff) in the application.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Applicant: Adv. JG van den Berg

Instructed by: Tsebane Molaba Incorporated

On behalf of the Respondents: Peet Delport Attorney of the Respondent

DATE HEARD: 31 OCTOBER 2017

DATE OF JUDGMENT: 03 NOVEMBER 2017

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