

SOUTH AFRICA / JUDGMENT

Tshenodi and Others v Road Accident Fund (2019/11156; 2020/05922; 2019/28478) [2023] ZAGPJHC 1487 (17 January 2023) [2023] ZAGPJHC 1487

COURT

South Gauteng High Court, Johannesburg

BEFORE

Thupaatlase

CASE / FILE NUMBER

2019/11156; 2020/05922; 2019/28478

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2019/11156

CASE NO. 2020/05922

CASE NO. 2019/28478

TSHENODI PHUMZILE APPLICANT

MOHOSOANE KANANELO

APPLICANT

MASILOLA MBALI PETUNIA

APPLICANT

And

ROAD ACCIDENT FUND

RESPONDENT

Judgment

Thupaatlase AJ

Introduction

- [1] The three matters were placed on the interlocutory application roll and in each case the defendant is the Road Accident Fund (RAF). The plaintiffs are claimants in terms of the Road Accident Act. The common relief sought by each of the plaintiff was to strike out the defence of the defendant for its alleged failure to comply with the respective orders by Keighley J issued on 01 June 2023.
- [2] Plaintiffs seeks to strike out the defence of the defendant as they allege that the defendant has failed to file notice in terms of Rule 36(1) & (2) and also failure to attend a pretrial hearing. The basis of the relief sought was that the defendant had failed to comply with order granted by the court.
- [3] The applications to strike out the defences were brought under Rule 35 (7) read together with Rule 30A. It is to be noted that the purpose of the latter rule is to compel compliance with the rules where a party has failed to take required procedural step. Rule 30A is a general rule to ensure compliance.
- [4] In the first matter of Tshenoli v RAF the application was based on the alleged non-compliance with the court order. The court order was couched in the following terms:
1. The Respondent/Defendant is to make arrangement within 15 days of the order being served on the Respondent/Defendant to have the Applicant/Plaintiff examined by the Occupational Therapist.
 - 1.1. the arrangements must take the form of delivery of a written notice in terms of rule 36(1) and (2);
 - 1.2 the Notice shall specify the nature of the examination require, the person or persons by whom, the place and date (being no less than fifteen days from the date of such notice) and time when it is desired that such examination shall take place.
 2. The defendant is to attend pre-trial conference with the plaintiff as contemplated in Rule 37 of the Uniform Rules virtually at 11h00 on 21 July 2023.
 3. The signed pre-trial minute shall be filed on or before the 15 days if no consensus can be reached as to the content of the minute, the plaintiff and defendant are to file separate minutes. The order also stipulated the manner in which it was to be served and costs were awarded against the respondent.
- [5] In the matter of Mohasoane it was prayed that the respondent's defence be struck out and respondent barred from serving any expert notice in this matter unless the trial court ordered otherwise. The applicant also sought leave to approach the registrar of this court for an allocation of a date in the default judgment roll. The applicant also prayed for costs. The application was based on the alleged failure by the respondent to comply with the order of court dated 11 July 2023. The order was similarly worded as the order in the matter of Tshenodi. In order to avoid prolixity, the court will not repeat the order verbatim.

- [6] The third matter is the case of Masilola. The application was also brought in terms of Rule 37(7) and read with Rule 30A. According to the affidavit, the applicant alleges that the respondent has failed to comply with the order of this court dated 11 July 2023. In terms of the order the respondent was ordered to make an election whether to use the applicant's experts as joint experts. In the event that the respondent elected to use its experts to make arrangements and deliver a notice in terms of rule 36(1) and (2). As already stated, the orders are similarly worded.

Issues

in dispute

- [7] The question this Court must determine whether it is competent to strike out a defence entered by the respondent where the respondent

has failed to comply with the court order compelling respondent to either make an election to appoint its own medico-legal experts or to indicate if it intends to do so and will rely on the medico-legal reports of the applicant. In other words, does Uniform rule 36 obligate a respondent to appoint medico-legal experts and file reports and summaries. The plaintiffs seek to strike out the defendant's defences in each of the cases cited above for such failure.

- [8] The applications were opposed. The crux of the opposition is premised in an earlier decision of Legaole Kagiso Sonnyboy v RAF (2019/31546; 2019/31545; 2019/29804) [2020] ZAGPJHC (3 June 2020) where the court stated at para 6 that 'It cannot be said that a defendant who fails to give notice of his intention to call an expert witness does not comply with Rule 36. There is no obligation on a defendant to call expert witnesses. All uniform rules provide is that, in the event the defendant opting to call expert witnesses, the procedure outlined in that uniform rule 36(9) should be followed'.

- [9] The Legaole decision also dealt with the background that resulted in litigants embarking on these types of applications. The court stated that all these applications are based on rule 36(9A) (a) which came into effect during July 2019. The rule encourages parties to the litigation to attempt to endeavour as possible.

- [10] The respondents argued that based on the above decision there was no basis in law for the defendants' defences to be struck out due to failure to appoint an expert or failure to attend a pre-trial conference. It is apparent that the respondent is basing its opposing on a different a rule than one which was dealt with in the above quoted case.

- [11] The facts in the Legaole are clearly distinguishable from the facts before this court. It is clear in all three matters the court has granted orders to compel compliance with the rule. It is not for this court to question the legality or otherwise of that decision. The fact of the matter is that the respondent has in all these three matters failed to comply with the order of court. An attempt to try and challenge that court order by invoking a different rule cannot be countenanced.

Nature of the application

[12] According to the applicants these applications are in terms of rule 35 (7) read with rule 30A. Rule 35(7) provides that ‘

(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence. It clear that rule 35 deals with Discovery, Inspection and Production of Documents.

[13] Rule 30A provides ‘30A Non-compliance with rules:

‘(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice, or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet’.

[14] The cases of Mohasoane and Masilola the orders related to the requirements of Rule 36 are to be satisfied. The case of Tshenodi related to the failure to attend a pre-trial conference. As I have already indicated the order are sought as the respondent has failed to comply with an order of court.

The Legal Principles

[15] The rule that the respondent is alleged to have failed to comply with is rule 36. The purpose of the rule was discussed in the case of DURBAN CITY COUNCIL v MNDOVU 1966 (2) SA 319 (D) as follows: ‘As I interpret the Rule, not only in relation to a medical examination required in terms of sub-rule

(1) but as a whole, it is mainly designed to avoid a litigant being taken by surprise in relation to matters with respect to which he would in the normal course of events be unable, before trial, to prepare his case effectively so as to meet that of his opponent. Sub-rule (1) Rule 36 confers a right, albeit a qualified right, upon the party against whom the claim is made, but in no sense can it be said to confer any right upon the claimant. The right thus created is subject to compliance with sub-rule (2), and also to the right of the claimant to object in terms of sub-rule (3). Sub-rule (6) and

(7) have the dual purpose of informing an adversary in advance of evidence relating to immovable things, so as to acquaint him with the evidence which might be led in relation thereto, and to dispense, possibly, with the need of formal proof. The same applies to sub-rule (10). Sub-rule

(9) is in my view primarily designed to avoid a party being met with surprise by expert evidence produced against him at the hearing’.

[16] The principle was reinforced in the decision of *COOPERS (SOUTH AFRICA) (PTY) LTD v DEUTSCHE GESELLSCHAFT FÜR SCHÄDLINGSBEKÄMPFUNG MBH* 1976 (3) SA 352 (A) at page 3711 where the court held: ‘In deciding whether there has been due compliance with sub-rule (9) (b), it is, in my opinion, relevant to have regard to the main purpose thereof, which is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise, which in earlier times (regarded as an element affording a tactical advantage) frequently caused delays in the conduct of trials. Indeed, all the sub-rules of Rule 36 were formulated with that purpose in mind. Consequently, when summarising the facts or data on which the expert witness premises his opinions, the draughtsman should ensure that no information is omitted, where the omission thereof might lead to the other side being taken by surprise when in due course such information is adduced in cross-examination or evidence’.

[17] It is therefore clear that rule 36 is designed to ensure that In deciding whether there has been due compliance with Rule 36

(9) (b) it is relevant to have regard to the main purpose thereof, which is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise, which in earlier , in order to enable a party to present its pleaded case more adequately and to promote the smooth running of the case to its final determination.

[18] The rule as it stands does not provide for a remedy to strike out a defence. The hurdle that a party who is found to be non-compliant

with rule 36 is that a party will be prevented from calling such an expert witness, except were it would be allowed by a court.

[19] In *ABSA Bank Ltd v The Farm Klippan* 490 CC 5 5 2000 (2) SA 211 (W) at 215 A – B the Court made it clear that if a provision in the rules provides a specific remedy for non-compliance with the rule, a party need only follow the specific rule and need not give notice in terms of, or follow, Rule 30A.

[16] The in *Harms*, Civil Procedure in the Supreme Court: LexisNexis provides that: “The rule applies only if compliance with the rules is sought and then only if the relevant rule does not have its own inbuilt procedure such as rule 21(4), which provides for an enforcement procedure in the event of a failure to provide particulars for trial. ... Under rule 30A, a party making a request, or giving a notice, to which there is no response by the other party, may through a further notice to the other party warn that after the lapse of 10 days, application will be made for an order that the notice or request be complied with, or that the claim or defence be struck out, as the case may be. Failing compliance within the 10 days mentioned, application may then be made to court and the court may make an appropriate order.”

- [20] It has been held that the subrule confers a discretion on the court which, it is submitted, must be exercised judicially on a proper consideration of all the relevant circumstances. Striking out a claim or defence is a drastic remedy and, accordingly, the court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order. Consequently, the necessary affidavits in support of and opposing such relief should be delivered. Relevant factors will include
- (a) the reasons for non-compliance with the rules, request, notice, order, or direction concerned and, in this regard, whether the defaulting party has recklessly disregarded his obligations; (b) whether the defaulting party's case appears to be hopeless; and (c) whether the defaulting party does not seriously intend to proceed. In addition, prejudice to either party is a relevant factor. See *Helen Suzman Foundation v Judicial Service Commission* 2018
- (4) SA 1 (CC) at 31F–G;
- [20] The requirements are clear that the order must have been made by a court. It is not in dispute that in all three cases the orders were granted by a court. It is also true that the respondent failed to comply with the orders so granted. The court was satisfied that there was non-compliance with the rules and thus granted the order.

Conclusion

- [21] I am satisfied that the applicants are entitled approach this court for relief been sought. The applicants armed with the court order obtained and they have demonstrated that the respondent has failed to comply with such order. I am therefore rule 30A finds application.

Order

- [22] Application is hereby granted.

THUPAATLASE AJ

HIGH COURT ACTING JUDGE

GAUTENG LOCAL DIVISION

Date of Hearing: 09 October 2023

Judgment

Delivered: 17 January 2023

For the Applicant: Ms LR Molohe-Madondo

Instructed by: Sepamla Attorneys

For the Respondent: Mr L Klaas

Mr D Sodlani

Ms S Ameersingh

Instructed by: State Attorneys

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