REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 3892/2023

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 27/01/2025

SIGNATURE:

In the matter between:

STEPHEN MATSOBANE SEBOTHOMA **:PLAINTIFF**

And

ROAD ACCIDENT FUND **:DEFENDANT**

JUDGMENT

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1. The matter came before court for determination on both merits and quantum aspect of the claim. At the calling of the matter both the plaintiff and the defendant were present in court, however, the plaintiff indicated that the defendant was under bar which was not uplifted and as such the defendant remain bared from the proceedings. The defendant also confirmed that they were bared, however, contested that the bar does not prevent them from participating in the proceedings like any other normal litigants.

2. When the court enquire from the defendant on how they were going to proceed defending the matter when bared and there is no plea(Defence) before court, the counsel for the defendant indicated that, the fact that one is bared from filing any further pleadings does not prevent the person from presenting his or her case to the court even though there is no plea before court. He further indicated that a party can still lead his or her case and still be allowed to cross examine the other party during the proceedings. He indicated that there is a precedent (Case law) to the submission which he was making and that he was not in possession of such case law but he was very sure that such case exists.

3. The defendant was then allowed to participate in the proceedings pending him providing the court with the authority which he was making reference to. It must be indicated that, it was put to the defendant that, his participation in the proceedings must be limited to the filing of notice of intention to defend the proceedings as nothing before court which indicate what is the defendant's case in the form of a plea and or any form of defence. If no plea before court at the start of the hearing a party can not be allowed to plead during the proceedings and that will again defeat the purpose of bar.

4. I must indicate that later in the day, defendant provided the court with the case law he was referring to earlier which is a case of *Pulane Qhamakoane v Road Accident Fund case number 19131/2020, Gautenf Division, Pretoria dated 12th August 2024 a reportable case*. If one considers the merits of this case, they are completely

different from what is before court and I am of the view that the defendant counsel misread the case and that lead to him misleading himself regarding the status of a party who is bared from participating in the proceedings. In the case referred to a party was initially bared and latter the plaintiff amended its pleadings. The court in that case correctly indicated that should a party amend the pleadings which must then be served on the other party, it then re-opens the pleadings and the party who was under bar is now given the second lease of life in that he/she may now file a plea and continue with the proceedings as if there was no bar.

5. The counsel for the defendant also misinterpreted the case in that the case does not allow a party from participating in the proceedings without filing a plea. The court re-opened the pleadings and allowed the defendant to file its plea which will allow the defendant to put its case before court whereupon, they will be able to lead their own case. It must be indicated that, the defendant must be able to distinguish himself from the case he is representing his client on. The case belongs to the client and not counsel. The legal practitioner present his client's case before court and that case must be in the form of pleadings. In the absence of the pleadings before court, the counsel will not be able to address the court as there is no case before court and if the counsel then need to present any case before court which is not in the pleadings, the counsel will then be exposing himself to becoming personally involved in litigation.

6. As such should then the situation be allowed to prevail, the counsel will at some stage, expose himself to having to take a witness box and be cross examined on the merits of the case. If no plea has been filed by a party to the litigation, it clearly means there is non compliance with Rule 18(4) of the Uniform Rules and whoever expose himself or herself to such then, expose himself or herself to being an object of preparation by the other party and being cross-examined accordingly. I am not sure if the counsel is aware of what he is exposing himself to or whether he is aware of such consequences of his submissions to the court.

7. The approach regarding the pleadings and putting each party in a position to be able to prepare for trial and not be taken by surprise was indicated in the case of *Trope v South African Reserve Bank 1992 [3] SA 208 T at 210G-J:*

> " It is , of course, a basic principle that particulars of claim should be phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made(Harms Civil Procedure in the Supreme Court at 263-4) At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now(In term of Rule 18(12)) amounts to irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleadings".

8. The ultimate test, is always whether the pleadings before court complies with the general Rule 18(4) and the principles laid down in number of existing case law. What make the current case even worse is that there are no pleadings at all to assess whether the other party will be prejudiced by the non disclosure of the defence in the pleadings or not, it is just non existing and the counsel for the defendant will in a way be disclosing the defendant's defence during the proceedings. This will not only be prejudice to the plaintiff but it will amount to serious injustice and non compliance with the Rules of this court which stood the tests of time for decades if not centuries.

9. Wherefore, I am of the view that the defendant's case is not before court and the counsel will not be able to introduce the case during the proceedings. As such the counsel's submission that, he should be allowed to present his case and cross examine the plaintiff is misplaced and not based on any law nor the counsel failed to

convince this court in creating a new precedents. On the counsel's insistence that he should be allowed to participate in the proceedings it was made clear to him that his participation will only be limited to his papers before court which at the stage its only notice of intention to defend.

10. Upon the defendant being allowed to participate up to where his papers allows him to, he then submitted to the court that he basically had no intention of proceeding with litigation in that should the court have allowed him to fully participate in the proceedings, his next step was to request a matter to be postponed on the basis that he was never provided with the bundle. However, such application was not before court and never placed before court. It must however be indicated that should that have been the reason, the defendant would then have to go to detail in convincing this court to postpone the matter on the basis that, index and pagination were not served on a matter where a party is under bar. It is therefore, clear that, the defendant was basically trying his luck knowing that his request was not provided for by any legislation nor case law but proceeded with his submission, which in my view was trying to intentionally mislead the court.

11. It must further be indicated that the defendant did not ask for any indulgence to make an application to uplift the bar, the only submission they made was to be allowed to participate in the proceedings like any other litigants which was denied. I will therefore deal with the plaintiff's case.

12. The plaintiff was called as the only witness in the proceedings to give evidence on the merits on how the accident occurred. There was also a section 19(f) affidavit filed on record, however, the affidavit does not fully disclose on how the accident occurred. The plaintiff state the following: ' On or about 09th August 2019 I was involved in a motor vehicle accident at Elandskraal Road to Marble Hall in Limpopo Province. At the time of the accident, he was a driver on a motor vehicle bearing registration number F[...] which collided with a silver Polo Vivo driven by Tshep[o Motsepe bearing registration number F[...]2 in that results I sustained fatal injuries".

13. He further indicated the following: " I know how the accident happened because I was present at the time where vehicle B hit my right front and I lost Control". the plaintiff was called to give evidence on how the accident occurred to confirm the allegations as indicated in his Section 19(f) affidavit. In his evidence the plaintiff confirmed the accident and further indicated that on the day of the accident he was the driver of the vehicle with registration numbers and letters F[...] when he collided with the insured driver.

14. The plaintiff alleges that on the day of the collision he was travelling on the road between Zebediela and Marble Hall D3600. He alleges that he was alone in the vehicle and while so travelling, the insured vehicle came from the apposite direction and driving in a zig-zag motion. He alleges that the insured driver came into his lane of travel and he tried to avoid the collision by moving to the far left. He alleges that the insured driver still came to his lane of travel and collided with him in his lane of travel on the right front of his vehicle. He alleges that the collision was caused by the sole negligence of the insured driver who drove into his lane of travel. As a result he sustained serious injuries and was taken to hospital.

15. The defendant was given an opportunity, as requested in term of the filed notice to defend. The counsel for the defendant did not proceed to cross examination nor asking any clarity question as he indicated that he had no question to ask. There was no other witnesses to be called by either of the parties and both of them closed their cases.

16. Under the circumstances I have no reason not to believe the evidence of the plaintiff which is unopposed by the defendant. Wherefore, I am of the view that the plaintiff has proven his case on the merits and that the defendant should be held liable 100% in respect of proven damages by the plaintiff resulting from injuries sustained in a motor vehicle accident which occurred on the 09 August 2019.

17. The next issue to be dealt with is with respect to the quantum aspect of the claim. The plaintiff has filed three experts reports and an actuary to prove his quantum

claim against the defendant. According to the orthopedic surgeon the plaintiff sustained multiple abrasions of the right upper limb, chest and right thigh, Diaphragmatic rupture and right acetebular fracture. On his admission in hospital he was resuscitated in ICU ward and later had laparotomy for the ruptured diaphragm repair. The acetabulum was treated conservatively, including physiotherapy until was discharged home.

18. As a result of the injuries sustained, it is indicated that he has post-traumatic severe Hip osteoarthritis, with loss of motion on the right hip which has impact on his abnormal gait being antalgic and stigg limb gait. The expert further indicated that it could be improved with future right hip replacement. His whole person impairment was assessed at 27% and was qualified for general damages under the narrative test.

19. With respect to his employment, the orthopedic surgeon indicated that, his current occupational productivity is reduced to 40% which means it has reduced by 60%.

20. The occupational therapist indicated that his pre-accident employment falls under the medium type workload. His current residual capacity considering the injuries sustained and the sequelae thereof falls within the sedentary type work load. On that basis the occupational therapist indicated that he does not meet the physical requirement of his pre-accident employment. The occupational therapist further indicated that he remains a vulnerable employee in the open labour market and that looking at his past work exposure and level of education he will find it difficult to secure employment in the open labour market.

21. The industrial psychologist indicated that at the time of the accident, the plaintiff was employed by a construction company receiving a monthly income of R35 000.00 as his net earnings. It is assumed that but for the accident the plaintiff would have continued working for the same company with growth through promotional opportunities. It is indicated that he would have secured a semi-skilled to skilled

better paying jobs in the construction in line with her work experience and qualifications.

22. It is indicated that he would have reached his career ceiling at the median quartile of Paterson C5 level when he would have been 55 years and there after inflationary increases until the retirement age.

23. According to the available records, the plaintiff remains unemployed post the motor vehicle accident. It is therefore indicated that the plaintiff then present with loss of earnings capacity in that the plaintiff is not completely unemployable. The industrial psychologist indicates that the plaintiff will never be able to reach his pre-accident potential and that the deference between his pre- and post accident status will constitute loss of earnings.

24. The plaintiff has also appointed an actuary to calculate the plaintiff's past and future loss of earnings resulting from the injuries sustained in the accident. I take note of the calculations as in the plaintiff's heads or arguments where contingencies of 5% both pre and post past earnings have been applied. With respect to the future loss of earnings a contingencies of 20% and 25% was applied. Having considered the facts of the claim considering that the plaintiff remain unemployable at this stage, I am of the view that a higher contingencies should be applied. Under the circumstances and having applied 25% contingencies pre-accident , the plaintiff present with loss of both past and future loss of earnings in the amount of R2 747 843.00.

25. In the resultant the court makes the following order:

25.1 That the defendant is to pay the plaintiff 100% of his proven or agreed damages.

25.2 That the defendant is to pay the plaintiff an amount of R2 747 843.00 in respect of the plaintiff's past and future loss of earnings.

25.3 That the defendant to provide the plaintiff with an undertaking in term of Section 17(4)(a) of the Act as amended.

25.4 That the issue of general damages is postponed sine die.

25.5 That the defendant is to pay the plaintiff's party and party costs including counsel's fee on scale B of costs.

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T C MAPHELELA
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : ADV NKABINDE
INSTRUCTED BY : NTSHOSA MADIBA INCORPORATED
FOR THE DEFENDANT : STATE ATTORNEYS
INSTRUCTED BY : MR MOSHABANE MAFIRI
DATE OF HEARING : 27 NOVEMBER 2024
DATE OF JUDGEMENT : JANUARY 2025