REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – PORT ELIZABETH)

Case No: 2879/2001

In the matter between:

TEMBISA RALAWE **First Plaintiff**

MZIYANDA RALAWE **Second Plaintiff**

NOLUVUYO GILLIE **Third Plaintiff**

And

ROAD ACCIDENT FUND **Defendant**

Coram: **Chetty J**

Date Heard: **19 November 2012**

Date Delivered: **6 December 2012**

JUDGMENT

CHETTY, J

[1] This matter featured on the civil trial roll of cases set down for hearing on Monday, 5 November 2012. The court file was conspicuously sparse,

containing merely the particulars of claim, the plea, a notice to amend the plea, the amended plea, a notice of removal from the roll and a notice of set down. The papers were not, as enjoined by the provisions of Practice Rule 3(a), paginated or indexed. Such dereliction of duty on the part of the plaintiffs' attorney would ordinarily have resulted in the matter being struck from the roll. Thus, when the attorneys appearing for the parties reported to my chambers on the morning of the hearing, I raised the aforementioned infraction of Rule 3(a) by the plaintiffs' attorney, Mrs *Ndlovu*. Mr *van Rooyen*, the defendant's attorney, however prevailed upon me that given the longevity of the matter, his intended adjuration to the defendant that an offer in settlement of the plaintiffs' case be made and the anticipated positive response, that the matter stand down for resolution later during the week to await the defendant's offer of settlement.

[2] I interpolate to say that the salutary approach adopted by the defendant's attorney militated against me making an order striking the matter from the roll for a number of reasons, principally, the prejudice to the plaintiffs. Although summons had been issued on 5 December 2001, the appearance to defend was only filed on 26 October 2005 and the plea, on 1 February 2006, more than five (5) years later. During the intervening period the litigation

hibernated and was awoken from its slumber two and a quarter (2¼) years later by the filing of an amended plea. On 31 March 2008 the defendant sought trial particulars which were slothfully furnished some four (4) months later. On 8 December 2008 the Registrar gave notice to the parties that the matter had been placed on the roll of cases for hearing on 10 February 2009. It was however promptly removed from the roll at the instance of the plaintiffs' attorney, set down by the Registrar once more on 4 February 2011 and again summarily removed at the instance of the plaintiffs' attorney. On 8 March 2012 the Registrar once more gave the parties notice that the matter had been placed on the civil trial roll on 5 November 2012. By then, the second and third plaintiffs, *Mziyanda* and *Noluvuyo*, aged thirteen (13) and ten (10) at the time of the collision, had long since passed into adulthood. It is evident from the aforegoing historical overview that the prolixity of this litigation was occasioned by the laxity of the plaintiffs' attorney who permitted the matter to stagnate to the prejudice of the plaintiff and her minor children.

[3] On Wednesday morning, Mr *van Rooyen* and advocate *Simoyi*, now representing the plaintiffs on the instructions of attorney *Ndlovu*, approached me in chambers and requested that the matter stand down further to afford

the plaintiffs an opportunity to consider the offer of settlement proposed by the defendant. I acceded to the request.

[4] On Friday morning, Mr *van Rooyen* and advocate *Mabenga*, now acting on behalf of the plaintiffs, approached me in chambers and appraised me that the matter had become settled and requested that the settlement agreement, which she handed to me, be made an order of court. Counsel informed me that her instructing attorney had concluded a contingency fee agreement with the plaintiffs and furnished me with attorney *Ndlovu's* affidavit made pursuant to the provisions of s 4(1) of the **Contingency Fees Act**[1] (the Act). On enquiry as to the whereabouts of the plaintiffs' affidavit as contemplated by s 4(2) of the Act, counsel's confounded countenance bespoke her nescience of the provisions of s 4(2) and I was left with the distinct impression that the plaintiffs may not have been consulted as regards the offer of settlement. However, on the assumption that I was mistaken and that the plaintiffs had been so consulted but the affidavit from the first plaintiff inadvertently not having been obtained, I stood the matter down further for the procurement of the envisaged affidavit and, in the interim, perused attorney *Ndlovu's* affidavit with mounting anxiety.

[1]Act No, 66 of 1997

[5] The affidavit is replete with falsehoods. It is common cause that no medical reports or opinions were either commissioned or obtained by either party. Notwithstanding, attorney *Ndlovu's* deposition records the following: -

"b) **ESTIMATE OF THE AMOUNT THAT MAY BE OBTAINED BY TAKING THE MATTER TO TRIAL**

. . .

In regards to the proposed settlement of the quantum of Plaintiff's claims herein, Counsel and I estimate that Plaintiff would be at a real risk, of not proving damages in excess of the aforesaid amount offered on quantum, in light specifically of the contents of the medical records and reports filed herein, and accordingly at risk in proceeding to trial and not accepting the offer herein. Accordingly, in our estimate, there is no issue of any material compromise on the quantum of Plaintiff's claims, specifically taking into account the contents of the reports filed herein, including the reports of Plaintiff's own experts. (Emphasis supplied)

c) **ESTIMATE OF CHANCES OF SUCCESS OR FAILURE AT TRIAL**

I believe that it is not in the Plaintiff's interest to have pursued the matter further in respect of the issue of both merits and quantum of Plaintiff's claims, taking into account all the available evidence, including Plaintiff's instructions as well as the expert opinions herein.

Further, notwithstanding my investigation in this regard, no further witnesses in respect of the

issue of quantum could be found. Accordingly, I advised Plaintiff to accept the said offer.

The quantum of the damages offered, as per the settlement herein, accords with the quantum of damages that can be proved by Plaintiffs, there is a real risk of Plaintiff not proving damages to the any further extent (*sic*) and accordingly I advised Plaintiff to accept the said offer." (Emphasis supplied)

[6] It is furthermore not in issue that no Rule 37 conference was convened. Notwithstanding, the affidavit contains the following false averments: -

"d) **OUTLINE OF LEGAL PRACTITIONERS FEES OF THE MATTER IF SETTLED AS COMPARED TO TAKING THE MATTER TO TRIAL**

It was anticipated at the pre-trial conference held between the parties that the hearing would be approximately two days. In the event of the matter proceeding to trial, Plaintiff would have to call at least Two expert witnesses in addition to 3 lay witnesses, and further there were probably various expert witnesses employed by Defendant, who it is anticipated would also have testified at the trial, and accordingly if the action had proceeded extra costs would have been incurred, which would not have been justified in the circumstances. Further, Plaintiff would also have been at risk if the offer was rejected, and to the extent that Plaintiff may have been liable for Defendant's costs, beyond the date of the said offer of Defendant, if the judgment obtained for damages was less than the offer." (Emphasis supplied)

[7] It will be gleaned from the aforegoing that the affidavit contains a plethora of not only inaccurate but false statements. Thus, prior to the parties presenting themselves as agreed at 14h15 for finalisation of the matter, I instructed that attorney *Ndlovu* herself be present and informed all present that given the obvious untruths in the affidavit, I could not make the settlement agreement an order of court prior to an explanation being tendered by attorney *Ndlovu* thereanent and postponed the matter to Monday, 19 November 2012 for that purpose.

[8] On Monday, 19 November 2012, attorney *Ndlovu* intimated that she required further time to comply with my instruction and, not to further prejudice the plaintiffs, I made the settlement agreement an order of court with the imprimatur that attorney *Ndlovu* would be debarred from levying any fees pursuant to the contingency agreement pending the furnishing of an explanation as regards her false affidavit. The lamentable excuse subsequently furnished in her affidavit is articulated thus: -

> "Any error that is inconsistent with the file herein occurred as an oversight rather than it being deliberate or negligent."

[9] The perjurious content of the affidavit deposed to in conformity with s 4(2) of the Act is undoubtedly serious and obligates me to refer the matter to

the Law Society and the Director of Public Prosecutions. In the result the following orders will issue: -

(i) The settlement agreement concluded between the parties, annexed hereto marked "A" is made an order of court;

(ii) The registrar is directed to forward a copy of this judgment and the contents of the court file to the Cape Law Society, 29th and 30th Floors, Absa Centre, 2 Riebeck Street, Cape Town, 8001 and the Director of Public Prosecutions, Eastern Cape, 94 High Street, Grahamstown, 6140.

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D. CHETTY

JUDGE OF THE HIGH COURT