REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2012/41577

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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SIGNATURE **DATE: 12 January 2022**

In the matter between:

NENE, MARGARET Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

Weiner J

Introduction

[1] On 17 August 2021, I granted an order which, *inter alia*, provided that the plaintiff's attorney, Thomas Mdlalose, (Mr Mdlalose) should depose an Affidavit which stipulates the following;

8.1 Why the matter took 10 years to get to trial?

8.2 Why an amendment of R10 000 000.00 for the claim which was served on 13 June 2019?

8.3 Why the attorney should be entitled to fees under the Contingency Fee Act?

8.4 Why the attorney shouldn't be reported to the Legal Practice Council?

[2] It is trite that a court cannot make a finding against a party or an attorney without giving him a hearing.[1] For this reason, I afforded Mr Mdlalose the opportunity to file an affidavit dealing with my queries.

[3] Mr Mdlalose filed the affidavit requested. He provided the following chronology of events in relation to why it took 10 years for the matter to get to trial:

(a) On or about 3 September 2009, the plaintiff instructed N T Mdlalose Incorporated (NTM) to launch a third party claim against the Road Accident Fund (RAF) as a result of the injuries which she sustained in a motor vehicle collision. On 3 September 2009, NTM drafted letters to Chris Hani Baragwaneth Hospital (CHBH) and the relevant Police Station. They were requested to furnish the firm with copies of Hospital Records and a Police Docket. On 5 and 7 October 2009, NDM contacted the Metro Police Department to no avail. Mr Mdlalose instructed his employees to set up a 30% assessment appointment.

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[1] *Motswai v Road Accident Fund* [2014] ZASCA 104; 2014 (6) SA 360 (SCA).

(b) Two years passed. On 22 August 2011, a MMF form was sent to CHBH for completion by a medical doctor. On 24 October 2011, the 30% assessment report was perused. On 25 October 2011, Mr Mdlalose instructed his employee to request medical records from the Hillbrow Clinic (the Clinic). A call was also made to CHBH in order to find out the status regarding the completion of the MMF form by the doctor.

(c) On 2 February 2012, a call was made to CHBH to find out the status of the MMF Form. On 14 February 2012, a follow up call was made to CHBH. An employee at CHBH, one ‘Lucky’, informed NTM that the reference number provided was incorrect as it is a clinic reference number. On 16 of February the plaintiff informed NTM that she did not go to any clinic and that she was sent to CHBH.

(d) On 21 February 2012, NTM contacted CHBH again regarding the completion of the MMF Form. Lucky advised NTM that they had an empty hospital file. On the same day the plaintiff was contacted and she stated that she did have some documentation from CHBH and that she would provide same.

(e) On 27 February 2012, the plaintiff furnished NTM with documentation showing that she was admitted at CHBH. On the same day, a new request for the completion of the MMF was done.

(f) On 6 June 2012, a letter in preparation of the lodgement was completed and the file was lodged on 13 June 2012.

(g) On 5 November 2012, summons was issued. It was served on the RAF on 19 November 2012. On 7 January 2013, the RAF’s attorneys of record namely, Routledge Modise Incorporated, practising as Eversheds, served their Notice of Intention to Defend. Subsequent notices were exchanged between the RAF’s Attorneys and the plaintiff's attorneys. Sometime in 2013, NDM served a Notice of Bar on the RAF’s attorneys. A plea was served on 8 May 2013. The RAF changed its panel of attorneys sometime after the plea was delivered by its attorney.

(h) Five years passed. It appears NDM did nothing in this period until 20 March 2017, when they contacted the RAF in order to ascertain who the newly appointed attorneys were. On the same day, the plaintiff was informed that a trial date would be obtained once the RAF has appointed its new representatives. On 22 March 2017, an email was sent to the RAF requesting it to advise about its newly appointed attorney. On 12 April 2017, the RAF's attorneys of record namely Dev Maharaj and Associates served their Notice of Appointment as Attorneys of Record. [Emphasis added]

(i) On 29 March 2017, the plaintiff was called and informed that she was requested to avail herself for the attending of medical assessments. Such assessments appear to have taken place 18 months later, from November 2018 to June 2019. The RAF also requested the plaintiff to avail herself for its own medical assessments appointments. [Emphasis added]

(j) Mr Mdlalose stated that on 14 September 2018 (some 18 months later) NDM applied for a 'new' trial date. (There is no indication that a prior trial date was allocated). NDM was given a trial date for 23 October 2019. [Emphasis added]

(k) On 12 August 2019, the plaintiff and the RAF's attorneys attended a –pre-trial meeting where the RAF stated that it still had to appoint its own experts for medical assessments. The RAF's attorneys were asked whether they would file their reports 45 days before the trial date – as required by Practice Directive 2 of 2019. The RAF's attorneys stated that they would endeavour to do so.

(l) On 29 August 2019, a judicial pre-trial was held. The matter was not certified trial ready, as the RAF had not served its medico-legal reports. From then onwards, the plaintiff's attorneys and the RAF's attorneys were in communication discussing the possibility of settlement and the service of the reports. The RAF ultimately served its reports during September and October 2019, and some of the joint minutes were filed in October 2019.

(m) Another 15 months elapsed before NDM applied for apply for case management and such meeting was held in on 21 January 2021. On that date, a Certificate of Trial Readiness was issued. NDM also launched an

application to compel against the RAF's attorneys to attend a pre-trial meeting and to further instruct its orthopaedic surgeon to complete joint minutes. [Emphasis added]

(n) The matter was placed on the Trial Roll for 16 August 2021.

Analysis

[4] What is evident from this chronology is that there are large gaps where there is no explanation at all for the delay. These unexplained delays are emphasised above. The explanation is unacceptable. NDM's conduct deserves censure in this regard. A plaintiff who has had to wait 12 years for her matter to come to trial has not received professional, ethical, and proper treatment from her attorney. It amounts to negligence and ineptitude.

[5] In regard to why there was an amendment of the amount claimed in the particulars of claim from R350 000 to R10 000 000, Mr Mdlalose's explanation is astonishing, to say the least. He states as follows:

'It is common practice in the firm, that amendments to the Particulars of Claim are done. The goal of the amendment is to ensure that the Plaintiff receives the best possible recourse for the injuries suffered. It is common knowledge that in this particular matter, the Actuarial Calculation reflects and amount which is substantially less than what is being claimed on the Amended Pages. However, an Actuarial Calculation cannot be read in isolation as it is not exclusive evidence. An Amendment can thus be made for a higher amount in the interest of the Plaintiff. It is also common knowledge that an Amendment does not necessarily mean that the outcome by way of trial or settlement will be exactly what is claimed on the Amended Pages. The amount which the Plaintiff may receive at the finalisation of a matter may be the amount reflected on the Actuarial Calculation, an amount stated on the Particulars of Claim or an amount between what is claimed and what the calculation reflects.

In addition, at the time the Amendment was served on the Defendant. The Defendant was still represented by its panel attorneys. I believe that the panel attorneys act in the best interest of their client. Furthermore, the Defendants Attorneys did not object to the amendment. I thus believe that the amendment should not be an issue of contention.'

[6] The damages claimed in the particulars of claim were:

6.1 Estimated future medical & hospital expenses: Undertaking:

6.2 General damages for pain and suffering, loss of amenities of life, disability and disfigurement: R150 000.00;

6.3 Estimated future loss of earnings and earning capacity: R200 000.00

TOTAL: R350 000.00'

[7] The damages claimed pursuant to the amendment were:

7.1 Estimated future medical & hospital expenses: Undertaking

7.2 General damages for pain and suffering, loss of amenities of life, disability and disfigurement: R4 000 000

7.3 Estimated future loss of earnings: R6 000 000

[8] It is to be noted, that the claim for future loss of earnings was originally the sum of R200 000. In the amendment a sum of R4 000 000 was claimed. The claim was settled in the amount of R139 209. The amended claim was thus totally unrelated to the actual damages suffered by the plaintiff. This conduct is egregious, grossly unprofessional, deceitful, and worthy of censure.

[9] In regard to why Mr Mdlalose should be entitled to fees under the Contingency Fees Act 66 of 1997 (the 'Act'), he responded as follows:

'I have entered into a Contingency Fee Agreement (CFA) with the Plaintiff and I believe that same should be effective for the following reasons;

1. The Plaintiff was successful in her claim notwithstanding the delay.

2. The firm conducted investigation on behalf of the Plaintiff in order to attain reports from the Hospital and Medical Practitioners;

3. The Plaintiff consulted with medical and other experts at the expense of the firm;

4. The Plaintiff's Attorney has perused, completed research and drafted documents not limited to legal documentation.

5. The firm has incurred costs in attending telephonical consultations;

6. Travelling costs have been incurred in order to ensure that the client attends assessments and that documentation pertaining her file is attained from the relevant body. For example, Accident Report.

7. The firm has incurred costs in instructing counsel who have been attending court appearances.

I wish to confirm that the list above is not exhaustive'.

[10] This explanation is unsatisfactory and fails to explain the considerable delays and the fact that the plaintiff has had to wait 12 years for her matter to be heard.

[11] For the future progress in this matter, it is recorded that s 4(1) of the Act provides that, when a matter has been before court, any offer of settlement made to any party who has entered into a CFA, may be accepted only after the legal practitioner has filed an affidavit with the court, setting out:

'Settlement

(1) …

(a) the full terms of the settlement;
(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;
(c) an estimate of the chances of success or failure at trial;
(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
(e) the reasons why the settlement is recommended;
(f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and
(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.'

[12] Section 4(2) provides that:

'(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating—
(a) that he or she was notified in writing of the terms of the settlement;

(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and

(c) his or her attitude to the settlement.'

[13] Section 4(3) provides that:

'Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.'[2]

[14] Thus, if this matter becomes settled, Mr Mdlalose is required to abide strictly by the compliance requirements set out above.

[15] As stated above, in my view, Mr Mdlalose's conduct in this matter is unprofessional and I am therefore referring this matter to the LPC for investigation.

In the premises the following order is made:

1. This order must be uploaded on CaseLines and served on

    a. the RAF;

    b. the claims handler, Helmie Kirsten helmik@raf.co.za;

    c. GugulethuS@raf.co.za;

    d. Bammym@raf.co.za;

    e. charlotte@raf.co.za;

    f. DinahM@raf.co.za;

    g. donalds@raf.co.za;

    h. eurolls@raf.co.za;

    i. SmangeleM@raf.co.za.

    j. the Taxing Master of this division.

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[2] *Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter* [2021] JOL 50051 (GJ)

2. This judgment is to be brought to the attention of the Judge dealing with this matter in future, either to decide on the general damages payable and/or on the order as to costs and /or in making a settlement agreement an order of court.

3. The costs incurred in the drafting of this affidavit of Mr Mdlalose shall not be claimable from the plaintiff.

4. A copy of this judgment is to be served on the Legal Practice Council and the conduct of Mr Mdlalose is referred to the LPC for investigation.

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S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 12 January 2022.

Date of hearing: 16 – 17 August 2021

Date of judgment: 12 January 2022

Appearances:

Counsel for the plaintiff:	L Molope
Attorney for the plaintiff	N T Mdlalose Incorporated
Counsel for the defendant:	No appearance
Attorney for the defendant:	N/A