IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

Case Number: 60676/2021

In the matter between:

NOMBUSO DLUDLU

PLAINTIFF

-and=

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MTSWENI AJ

INTRODUCTION:

[1] Following the disbandment of the panel of attorneys representing the Road Accident Fund, this court has been inundated with matter, wherein the Road Accident Fund was not represented, due to the attorneys having withdrawn or the Road Accident fund, having failed to file appearances to defend or failed to file a plea or failed to comply with notices or failing to appear at pre-trial conferences.

[2] In order to come to the aid of the claimants, the Judge President of this Court issued a directive on the 18th of February 2021. Over and above providing for case management of all matters brought in this court, the directive also sought to address the backlog caused by matters involving the Road Accident Fund wherein no notice of intention to defend was filed and/or plea and/or where the Fund's defence had been struck out, for one or other reason.

[3] Paragraphs 4.5 and 4.6 of the directive confers upon the plaintiff the right to approach the Registrar in circumstances where the Road Accident Fund, has failed to enter an appearance to defend to make an application for a date in order to proceed to obtain judgment by default. It provides that where the Defendant has neither enter an appearance to defend and/or failed to file an plea, after having been placed in terms of rule 26, that the Registrar shall upon being satisfied that the application is compliant, taking into account the

declaration by the attorney on behalf the attorney that service was effective, that the period provided which is provided for the request for a set down date, the Registrar shall allocate a date in the trial court and notify the parties accordingly.

[4] The procedure to be followed prior to approaching the Registrar is set out in chapters 6 of the manual. In this regard the manual enjoined the Plaintiff prior to approaching the Registrar as contemplated in paragraphs 4.5 and 4.6 of the manual, to take certain steps. That is after all the preparations to present the relevant evidence have been complied with all the medico legal reports necessary, to quantify his/her damages as required by rule 36(9)(a) and (b) and cause same to be served on the Fund. Once being notified of the date, the Plaintiff shall then cause a copy of the notice of set down to be served on the Road Accident Fund.

[5] In the present case, the summons commencing action was served on the Road Accident Fund on the 30th of November 2021 and 2nd December 2021. Despite being served with the summons timeously, the Road Accident Fund failed to take the necessary steps to defend the matter. Of importance, is that in the summons, it is plainly clear that the amount claimed by the Plaintiff was quite substantial being an amount of R13 634 788,00.

[6] Consequent to the Defendant's failure to take the necessary steps, the Plaintiff applied to this court for an order declaring the matter to be trial ready and an authorisation that it be placed on the default judgment roll. That was served on the Road Accident Fund on the 4th of April 2022. Important is that in the affidavit in support of such application, it was stated that the Plaintiff is seeking default judgment on the basis that the Fund has failed to enter an appearance to defend.

[7] The application was heard by this court as as *per* Nyathi J on the 31st of July 2022, who granted an order authorising the Registrar to place the matter on the default judgment roll. This order was served on the Fund on the 18th August 2022.

[8] Despite being alerted in April 2022, that it has failed to enter an appearance to defend, and that the Plaintiff will persist with her claim, substantial as it was, and also being served with the court order, the Fund failed to take any steps to remedy its failure, *inter alia*, by filing a notice of appearance to defend.

[9] I interpose to mention that as far back as 29 November 2021, the Plaintiff obtained the necessary reports, to wit orthopaedic report by the Orthopaedic Surgeon, Occupational Therapist, Industrial Therapist, Psychologist as well as an Actuary. In the actuary's report, the Plaintiff's loss of income amounted to R7 693 499,00.

[10] The default judgment application was served on the Defendant on the 2nd December 2022. Again, in the affidavit in support of the default judgment application, the basis for the default judgment was clearly stated as the Defendant's failure to enter an appearance to defend. Nothing was done by the Defendant to remedy its default.

[11] On the 17th of January 2023, the Fund made an offer to the Plaintiff, in respect of the merits and general damages. In this regard the Fund conceded liability for 100% of the Plaintiff's proven and/or agreed damages as well as an amount of R400 000,00 as general damages. It did not make an offer in respect of the loss of earnings and/or income. This was despite it having been in possession of the Plaintiff's medico legal reports as well as the actuarial calculations.

[12] On the 5th May 2023, the Fund was served with the notice of set down. The notice clearly and in no uncertain terms stated that the Plaintiff will proceed for default judgment on the 28th of June 2023. Again, despite being notified that the matter will proceed on default judgment, on the 28th of June 2023, nothing was done by the fund to defend the matter.

[13] On the eve of the hearing date, i.e. 27 June 2023, the Defendant through the office of the State Attorney, delivered the notice of intention to defend.

[14] The matter came before me for hearing on the 28th of June 2023. Upon being called, I was informed that the Defendant has since filed an appearance to defend and that on those bases, it sought to have the matter removed from the roll and/or postponed. This was done without any substantive application for the postponement. Upon enquiry as to why the notice to defend was filed at such a belated stage, that the State Attorney was instructed late on the 27th of June 2023.

[15] I then directed that a substantive application be brought, coupled with an affidavit setting out the reasons for the Fund's inaction and/or failure to defend the matter, despite numerous notices.

[16] Thus, what is before me for determination, is the Defendant's application for the postponement of the matter.

THE BASIS FOR THE DEFENDANT'S REQUEST

[17] On the reading of the affidavit filed on behalf of the Defendant, it appears that the thrust of the Defendant's request is that it seeks an opportunity to appoint its own experts to evaluate the Plaintiff, more so on the question whether the Plaintiff has indeed limited functional capacity which renders her a vulnerable employee in an open labour market.

[18] Important, is that no *iota* of evidence and/or explanation is tendered by the Defendant, for its inaction to take the steps it now seeks to take i.e to subject the Plaintiff to its own assessment, despite a substantial lapse of time. I shall deal with this failure, later herein. In this regard the Fund contents that it will be in the interest of justice, for the matter to be postponed for this purpose.

[19] Before I do so, I find it apposed to briefly pause and restate the principles underpinning an application for postponement.

The legal principles underpinning an application for postponement:

[20] The principles underpinning a request for postponement are trite. They are that (i), Postponement applications are not there for the taking; and (ii), a court is vested with a discretion, whether or not to grant the postponement.

[21] The abovementioned principles were outlined by the court in the oft-cited judgment of **Myburgh Transport v Botha SA Truck Bodies Transport**[1], and summarised by the **Labour Court in Insurance and Banking Staff Associates and Others v SA Mutual Life Assurance**[2] (2000) 21 ILJ 386 (LC) as follows:

"(44) In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:

(a) The trial Judge has a discretion as to whether an application for postponement should be granted or refused. (R v Zackey 1945 AD 505; Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 NMSC)

(b) That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.

1 1991 (3) SA 1 (NMS)
2 (200) 21 ILJ 386 (LC)

(c) The trial Judge must reach a decision after properly directing his/her attention to all relevant facts and principles.

(d) An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the Applicant. However, in cases where fundamental fairness and justice justify a postponement, the Court may in an appropriate case allow such an application for postponement, even though the application was not timeously made.

(e) The application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the Applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised." What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the Applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.

(g) The Court should weigh the prejudice which will be caused to the Respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.

(h) Where the Applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the Applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its direction might allow the postponement but direct the Applicant in a suitable case to pay the wasted costs of the Respondent occasioned to such a Respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the Applicant is allowed to proceed with the action or defence in the action, as the case may be."

[22] In **Carephone (Pty) Ltd v Marcus N.O and Others** the court in outlining the factors to be considered, when considering an application for postponement, said the following:

"*In a court of law granting an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for*

the need to postpone and the culpability of an appropriate cots order to nullify the opposing party's prejudice or potential prejudice."

[23] In **National Police Service Union v Minister of Safety and Security**[3], the Constitutional Court said the following:

"…An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. …"

[24] Furthermore, in **Madnitsky v Rosenburg** [4] the Appellate Division, as it then was in imploring upon the courts to be slow to refuse a postponement, where the following requirements had been satisfied. These are:

(24.1). Where the true reason for a postponement had been fully explained;

(24.2.). Where his non-readiness to proceed is not due to a delaying tactic;

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3 2004 (4) SA 1110 (CC)

4 1949 (2) SA 492 (AD)

(24.3). Where justice demands that he should be favoured with time for the purpose of presenting his case.[5]

[25] Against the backdrop of the aforegoing, I now turn to analyse whether the Defendant, has made out a case to be a good case for the matter to be postponed.

Whether the Defendant has made out a case for the postponement

[26] On the reading of the authorities referred, it is clear that in order to succeed with an application for a postponement, the Defendant is enjoined to demonstrate good cause. This means that the Defendant was required to provide an explanation for seeking a postponement why the application was not made timeously and to demonstrate that the Respondent will not be prejudiced thereby.

[27] The Defendant in its application woefully falls short of these requirements. This is because the Defendant has failed to tender the explanation for the inaction for the following periods:

(27.1). 2nd December 2021 when it received the summons;

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[5] **Eskom v Rademeyer** 1985 (2) SA 654 (CC); **Manufacturers Development Co (Pty) Ltd v Diesel and Auto Engineering Co** 1972 (2) SA 776 (W) at 777 E; **Persad v General Motors SA (Pty) Ltd** 2006 (1) SA 455 (SCA)

(27.2.). March 2022, when it received the Plaintiff's legal reports;

(27.3). 4 April 2022, when it received the application for authorisation to enrol the matter on the default judgment roll;

(27.4). 3rd August 2022, when it received the order authorising the set down of the matter on the default judgment roll;

(27.5). in December 2022, when it received the application for default judgment; and

(27.6). May 2023, when it received the notice of set down notifying that the default judgment had been set down for hearing.

[28] On account of the Fund's failure, I am inclined to find that the Fund has failed to establish good cause for the grant of a postponement. Ordinarily this should be the end of the matter insofar as the Defendant's application for a postponement.

[29] I am however mindful of the fact that the Plaintiff's claim in respect of the loss of income is quite substantial and requires some investigation by the Fund. I am also mindful of the fact that the purse from which the judgment will be satisfied is the taxpayers. This in turn requires that care be taken to ensure that the Plaintiff be compensated for what she is reasonably entitled to.

[30] In the premises, I find that it would be in the interest of justice to grant the postponement to allow the Defendant an opportunity to engage its own experts with a view of determining whether the Plaintiff has suffered any limitation in her working potential.

[31] However, before I proceed to make the order, there is one more aspect which requires consideration. That is the aspect of costs and the scale thereof.

COSTS AND THE SCALE

[32] The application for postponement was opposed. Ordinarily this would mean that the Defendant, having been successful in its application for postponement, costs should follow the cause. That means that the Defendant should be entitled to the costs of the postponement.

[33] However, in the present case, I am of the considered view that there are exceptional circumstances warranting a departure from this principle.

[34] The circumstances under which a special costs order being attorney and client scale has to be made, was set out by Mogoengmogoeng CJ (as he then was) in **Public Protector v South African Reserve Bank**[6] as follows:

"[8]. Ours are courts of substantive justice. No litigant ought to be left exposed to undeserved ruination just because she did not expressly plead non-compliance with legal requirements that are very loud in their cry for the attention of lady justice. Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.[7] *As correctly stated by the Labour Appeal Court—*

"[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."[8]

[9]. In all cases where this order was made, harm, actual or potential, was apparent. And so should it be in this case. It should only be in relation to conduct that is clearly and extremely scandalous or objectionable that these exceptional costs are awarded. …"

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6 2019 (6) SA 253 (CC)

7 **Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others** 2010 (4) SA 308 (LC); **Midlands North Research Group and Others v Kusile Land Claims Committee and Others** 2010 JDR 0543 (LCC)

8 **Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA** [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC) (Plastic Converters Association of South Africa).

[35] In this case I found that the Fund has on numerous failed to remedy its default i.e file a notice of intention to defend and/or appoint its own experts to only do so on the eleventh hour right at the doorstep of the court, is in my view an abuse of the process and warrants a censure by this court.

[36] In the circumstances, although I am mindful to make a cost order *de bonis propriis* against whomsoever is responsible for the failure by the Defendant to act appropriately. To do so, would be extreme, given the systematic failures within the Defendant which are not of the employee's doings. This however, does not mean that the Defendant should not be mulcted with such a cost order.

[37] Accordingly and in my view, this is an appropriate case where the Defendant should, despite being successful with its application for the postponement be mulcted with a punitive cost order.

[38] In the result, I make the following order:

38.1. The application for removal and/or postponement of the matter is granted;

38.2. The Defendant is ordered to pay the costs occasioned by the postponement as well as the cost of opposition thereto inclusive of the Plaintiff's attorney and counsel appearance in court on the 28th, 29th and 30th of June 2023, on a scale as between attorney and client;

38.3. The Defendant is directed to deliver its plea (if any) within 10 days of the date of this order;

38.4. The Defendant is directed to deliver within 45 days of the calendar date of the delivery of its plea, file its notices in terms of rule 36(9)(a) and (b) in respect of all the experts it intends engaging;

38.5. Within 10 days of delivery of its expert summaries as set out in paragraph (38.4) above, the Defendant is ordered to instruct its experts to meet with the Plaintiff's experts with a view of compiling joint minutes, which minutes must be filed within five days after the date of the said meeting;

38.6. Within 10 days after the delivery of the experts joint minutes, the parties are directed to convene a pre-trial conference in terms of rule 37 with a view to handling the issues, including areas of disputes;

38.7. Within 5 days after the signing of the pre-trial minutes held in terms of paragraph (38.6) above, the Plaintiff is hereby authorised to approach this court in order to have the matter certified trial ready.

38.8. Should the Defendant failed to deliver its plea in terms of paragraph (38.3) above and/or its expert notices within the prescribed period in terms of paragraph (38.5), the Plaintiff is hereby authorised to approach the Registrar in order to have the matter set down on the default judgment trial roll.

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V.D. MTSWENI

ACTING JUDGE OF THE HIGH COURT

CASE NO:

HEARD ON: 29th JUNE 2023

FOR THE PLAINTIFF: ADV. MLOI

INSTRUCTED BY: MESSRS MOSHOEU MONYAI ATTORNEYS

FOR THE DEFENDANT: MS SASS

INSTRUCTED BY: THE STATE ATTORNEY, PRETORIA

DATE OF JUDGMENT: 30TH JUNE 2023