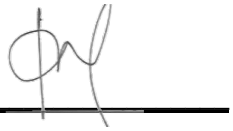
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 27752/2022

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



16 November 2022

Date **K. La M Manamela**

In the matter between:

EUNICE NELISIWE PHANGWA Plaintiff

and

ROAD ACCIDENT FUND Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **16 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff, Ms Eunice Nelisiwe Phangwa, was born on 6 December 1999. Towards the midnight of 16 November 2019 and at or near Paul Kruger Road, Dersley Park, Springs, she was involved in a motor vehicle accident. She was a passenger in the motor vehicle ('the insured vehicle'). The driver of the insured vehicle is said to have lost control and hit a bridge. The plaintiff sustained bodily injuries from the accident, including the following: mild diffuse brain injury and laceration on the forehead. Further from the injuries, the plaintiff is said to be disabled, disfigured and to have suffered pain and suffering due to the accident. She suffered loss or damages as a result of the accident. She blamed the negligent driving of the driver of the insured vehicle to have caused the accident.

[2] On 20 May 2022, the plaintiff caused summons to be issued against the Road Accident Fund, the defendant, for compensation in respect of damages she had suffered, in terms of the provisions of the Road Accident Fund Act 56 of 1996. Her claim is for compensation with regard to past and future medical and hospital expenses; future loss of earnings or loss of earning capacity or employability, and general damages and it was initially in the amount of just over R3 million.

[3] On 24 May 2022, summons was served on the defendant at the defendant's principal place of business in Parktown, Johannesburg, by the sheriff of this Court. The defendant had 10 (ten) days from date of summons to deliver a notice of intention to defend the plaintiff's claim in terms of the Uniform Rules of this Court. My calculation as to when the notice to defend was due places it on 7 June 2022. But the defendant did not serve or file such notice until 29 September 2022, when it served same on the plaintiff's attorneys. This was over 4 (four) months after the service of summons commencing the action proceedings. Also, the

failure on the defendant's part was despite the courtesy afforded by the plaintiff in terms of reminders to the defendant from the plaintiff's attorneys. The plaintiff proceeded to bring an application for default judgment. A notice of set down of the application for default judgment was served on the defendant on 22 August 2022. This was notice to the defendant that the application is set down for hearing on 4 October 2022, nearly one and half months away.

[4] The matter came before me on 4 October 2022 for purposes of default judgment. Mr T Pilusa appeared on behalf of the plaintiff. He informed the Court, among others, that the defendant had fully (i.e. 100%) conceded issues relating to liability or merits in respect of the plaintiff's claim. Further, he informed the Court that the matter was proceeding in respect of loss of income and general damages. There was nothing about the notice of intention to defend by the defendant. I reserved this judgment after oral submissions by counsel in order to further reflect on the issues for purposes of default judgment.

Events subsequent to reserving judgment

[5] I was in the process of finally determining the issues in the matter for purposes of an order or judgment, when I came across the notice of intention to defend served on the plaintiff's attorneys by the defendant. The notice had been served on 29 September 2022, three court days before the hearing of this matter, as aforementioned. I was trawling through the papers on CaseLines, which the Court ought not to ordinarily do, searching for proof of the alleged full concession of liability or the merits by the defendant, when I came across the notice to defend attached to or pasted over one of the correspondences between the parties.

[6] On 7 November 2022, through my erstwhile registrar, I caused communication to be directed to the plaintiff's attorneys drawing their attention to the following:

2.1 a notice of intention to defend was emailed on behalf of the defendant on 29 September 2022 to the plaintiff's attorneys. The defendant subsequently requested that the matter be removed from the roll and tendered costs.

2.2 the application for default judgment was pursued on the basis that the defendant was in default of delivery of notice of intention to defend.

3. Kindly submit further submissions as to why the notice of intention to defend was not uploaded at the proper place on CaseLines; why the delivery of same was not disclosed to the Court either in written or oral submissions and why should the default judgment be granted whilst the defendant has indicated that it wants to defend the matter.

4. Further, kindly furnish proof of the defendant's full admission of liability or concession of merits, alleged in paragraph 1 of the heads of argument.

5. The submissions requested above should be furnished by no later than 14 November 2022.

[7] On 14 November 2022, again through erstwhile registrar, I received submissions in response to the communication above, the material part of which reads as follows:

3. The Plaintiff hereby confirms that the notice of intention to defend was served to the Plaintiff on Friday of the 29th of September 2022 at or about the time of 18:02.

4. As the matter was set down for hearing on the 04th of October 2022 this effectively means that the notice was served two court days before date of hearing let alone that the notice was served at 18H00.

5. At the time of service, the roll was already finalised and the matter allocated to a Judge and the Plaintiff didn't have the information of the Judge allocated to the matter.

6. As per court directive all documents must be uploaded on caseline five court days before date of hearing which in this case the notice was served out time to upload such document except with the leave of the court.

7. The Plaintiff replied to the Defendant's email on Saturday the 30th of September 2022…

8. Parties are liable to serve and file by uploading their own notices which on caseline.

9. On the 3rd of October 2022 both parties agreed that they will address the court in the matter if settlement is not reached on how to best dispose matter.

10. The Plaintiff raised few questions with the Defendant regarding notice to defend served as it has been a norm that the Defendant has been filing their notices on the last hour just for the matter to be removed from the roll with no intention to properly defend or litigating in the matter.

11. It is common cause that the Defendant has been using only Plaintiff's experts' reports to settle matters as they have not been appointing experts to give deferent opinion, the Plaintiff had served at all the quantum documents to the Defendant on 17 June 2022…

12. On the 4th of October 2022 the Defendant's Attorney was aware that the matter was on the roll but opted not to attend court or address the court, by such conduct the Defendant didn't object to the court dealing with the and further claiming that she was not properly briefed in the matter, and she was of struggling to get instructions from the handler…

13. Considering the late filing of the notice to the defend the and the failure by the Defendant's Attorney to attend court it became practical impossible for the Plaintiff's Attorneys to consult with the Plaintiff's Counsel as the court had already started.

14. The Plaintiff's Attorneys only uploaded the email correspondence just to bring to the attention of the court what has transpired not that there was any intention to mislead the court.

15. It is the duty and responsibility of both parties to file and upload their respective notices on caseline and in this matter it was the Defendant's duty to file and upload its notices on caseline and comply with the directives and rules of the Honourable Court.

16. On the 10th of October the email was received requesting a copy of the order which is a confirmation that the Defendant does not have an issue with the court entertaining which also confirms that the notice was filed for sake of filing not that the Defendant intend defending the matter.

17. The Plaintiff hereby submit that the Honourable court can deal with the matter despite the served notice on grounds that the Defendant only served the notice for the sake of complying with the rules not that it had intention to defend the action and the Defendant has been served with all the settlement documents on in June 2022, wherefore the Defendant had all the time to attend to the matter however it chose not to.

18. The Plaintiff further submit that the court has a duty to curb to any form of a prejudice or delaying tactics, till to date the Defendant has not filed the plea which confirms that it does not have defence.

[8] To put matters in proper perspective, it is material that it be mentioned that the submissions above, are by the plaintiff's attorney, Mr KC Mamogobo. To understand the approach taken by Mr Mamogobo to the issues above one need only look at paragraph 18 thereof, which audaciously reminds the Court of the so-called 'duty to curb to [sic] any form of prejudice or delaying tactics'. Nowhere, does Mr Mamogobo refer to the duty of ultimate disclosure to this Court of all material facts at all times on his part as an officer of this Court. He does not even bother disclosing to the Court whether or not he had instructed counsel in the matter of the existence of the notice of intention to defend. With respect, he cunningly skirts the issue by mentioning that on 3 October 2022 the plaintiff 'raised few questions with the Defendant regarding notice to defend'. But yet 'the late filing of the notice to the defend' made

it practically impossible for him 'to consult with the Plaintiff's Counsel as the court had already started'. One wonders why it was impossible from 29 September 2022 to communicate this simple - but yet crucial - aspect to counsel, when it was possible for him to hold conference with functionaries of the defendant about the notice to defend and possible settlement of the matter. Further, how would he have been able to communicate any settlement proposal received from the defendant to counsel, if the line of communication between his office and counsel was non-existent, as he would like everyone to believe? With respect, Mr Mamogobo appears to have excuses for his excuses, including that it was impossible to upload the notice of intention to defend at its proper place or conspicuously on Caselines, but yet it was possible to place the relevant correspondences on the same platform on 4 October 2022. This was possible despite his other assertion that '[a]s per court directive all documents must be uploaded on caseline five court days before date of hearing'. There is clearly no sense of responsibility displayed here and that is disconcerting coming from the officer of this Court.

[9] Viewed objectively, what appears above may constitute professional conduct worthy of an inquiry by the professional body to which the involved professional(s) belong(s). However, I am swayed by the fact that there is some semblance of integrity in the fact that the correspondences to which the notice was attached were uploaded on CaseLines even though the attention of the Court was not drawn to this during the hearing or after judgment was reserved. Also, there is credence to the assertion that the defendant equally had a duty to bring its intention to defend the matter to the attention of the Court, including by ensuring that the notice containing same is properly uploaded on the electronic filing system (i.e. CaseLines).

[10] On matters of substance, the plaintiff's attorneys begrudge the conduct of the defendant, including generally in other matters. It is said that the defendant has the tendency to file notices

to defend belatedly in order to delay judgment or determination of the matter whilst not harbouring serious intention to defend the material matters. But this, in my view, does not detract from the need to comply with the practice directives and the Uniform Rules guiding proceedings before this Court by any litigant, including plaintiffs in matters where the Road Accident Fund may be guilty of the alleged conduct. For the letter and spirit of our law, as borne in this instance by the rules of practice of this Court, are very clear in this regard.

[11] The underlying rule in this matter is Uniform Rule 19 which reads in the material part:

> (1) Subject to the provisions of section 24 of the Act, the defendant in every civil action shall be allowed 10 days, after service of summons on such defendant, within which to deliver a notice of intention to defend …
>
> …
>
> (5) Notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after expiration of the period specified in the summons or the period specified in subrule (2), before default judgment has been granted: Provided that the plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the plaintiff had lodged the application for judgment by default.

[underlining added for emphasis]

[12] And this Court's Judge President Revised Practice Directive 1 of 2021 of 8 July 2021 is applicable to the current circumstances of this matter, including in the following part:

> Where the **Defendant is the RAF and** fails or refuses to file a notice of intention to defend, a plaintiff must apply to the registrar for a date in the **Special Interlocutory Court** in

terms of chapter 8 of this directive, to make **application** to obtain **a referral by that court to seek** Judgment by default as contemplated in Chapter 6 of this directive…[1] [and]

…

17. This chapter requires, from a Plaintiff, full compliance with the duty of disclosure as would be expected in an *ex parte* application and any failure shall imperil an Order being granted and may also result in punitive costs Orders against practitioners, a referral of the infraction to the Legal Practice Council and the professional representative Societies/Associations.[2]

[13] It is clear from both Uniform Rule 19(5) and the extracts from the Judge President Revised Practice Directive 1 of 2021, appearing above, that the horse does not bolt, so to speak, upon failure of a defendant, such as the Road Accident Fund, to deliver a notice of intention to defend a claim within the timeframe stipulated in Uniform Rule 19(1). There is a clear objective why this is so. The sword of justice cuts both ways in this regard in protection of the rights or interests of both the plaintiff and the defendant.

[14] Obviously, the plaintiff's attorneys must have been aware of the above rule and practice directives. They should be. It appears to me – with respect – that they were holding on hope for a settlement offer from the defendant, but to no avail. Compliance or observation of the rules of practice and ethical considerations, in my respectful view, was not paramount in their minds. The correspondences from which the notice to defend was extracted bear this. But this is not the most concerning part.

[15] The prime concern is the non-disclosure of the notice to defend when the matter was heard by this Court. It appears that, for some reason, the plaintiff's attorney chose to upload the notice to defend on CaseLines on the date of hearing. It is not clear whether this was before,

[1] Chapter 3 par 5.5 of the Judge President Revised Practice Directive 1 of 2021 of 8 July 2021.
[2] Chapter 5 par 17 of the Judge President Revised Practice Directive 1 of 2021 of 8 July 2021.

during or after the hearing on 4 October 2022. But, it appears, when I reviewed the material filed in the matter a day or so before the hearing when preparing for the hearing, there was no indication the action has become defended. Also, counsel appearing did not mention anything about the notice to defend. This is not surprising as from his instructing attorney's explanation, appearing above, he was not instructed accordingly. There was no time for this, the attorney has explained.

Conclusion

[16] But it will simply come to this. Default judgment cannot be granted in this matter under the current circumstances. And it will not be granted. What will be granted is costs of the application for default judgment up to and including 29 September 2022. One may imagine a higher sanction than this, but such may only serve to inadvertently countenance the conduct of the defendant in this matter, which is equally deplorable. I say this whilst considering that the plaintiff's attorneys - to their credit - tried to engage the defendant's functionaries beforehand but to no avail. I would have meted out an even stronger sanction as to costs against the defendant should the notice to defend have been disclosed to me when it should have, being at the hearing of this matter.

[17] Therefore, I will grant an order in terms of which the application for default judgment is removed from the roll with costs only up to 29 September 2022. I shall also add to the order that a copy of the order is to be served upon the defendant within a prescribed timeframe and, to avoid doubt, that the application shall not be brought again without compliance with the prescripts of the practice directives. One hopes that the plaintiff's legal representatives heed what is stated above and henceforth do their earnest to ensure the preservation of ethical practice of the law and open administration of justice, which everyone should strive towards.

Order

[18] In the premises, I make the order, that:

a) the application for default judgment is removed from the roll;

b) the defendant is liable for costs of the application for default judgment up to and including 29 September 2022;

c) the application for default judgment shall not be enrolled for hearing without compliance with the practice directives of this Court and proof of service of the notice of set down of such application on the defendant, and

e) a copy of this order shall be served on the defendant within 10 (ten) days from date hereof.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing	**:**	**4 October 2022**
Date of Further Submissions	**:**	**14 November 2022**
Date of Judgment	**:**	**16 November 2022**

Appearances:

For the Plaintiff	:	Mr T Pilusa
Instructed by	:	Mamogobo Attorneys, Johannesburg
For the Defendant	:	No appearance