

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED

7/10/2024
DATE

SIGNATURE

CASE NUMBER: 44674/2020

In the matter between

MKEJANA SOPHIE MTSHWENE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

- [1] The plaintiff is an adult female who instituted an action for damages that she suffered as a result of a motor vehicle collision, that took place on 30 October 2016. The insured driver lost control of the vehicle causing it to overturn. The plaintiff was a passenger in the vehicle.
- [2] The plaintiff lodged a claim against the defendant on or about 14 May 2019. The summons was issued over eighteen months later, on 27 October 2020.

- [3] The defendant filed a Notice of Intention to Defend, almost one year after the summons was issued, on 11 October 2021.
- [4] Further pleadings were exchanged between the parties, seventeen months later, on 18 February 2022 when the plaintiff served a Notice of Bar on the defendant, calling for the plea to be filed.
- [5] The defendant raised a Special Plea in respect of the claim for general damages on 22 February 2022. The plaintiff filed its Replication on 23 February 2022 (although this document is curiously dated 9 February 2022).
- [6] On 10 March 2022, the plaintiff served a notice on the defendant informing the defendant that if no objection is received, the pleadings will be deemed to have closed within five days after receipt of the notice.
- [7] The plaintiff, however, met her demise, from natural causes, on 21 January 2022, this being a month before the defendant had filed the plea, and two months before the notice of close of pleadings was served on the defendant.
- [8] The defendant submits that the plaintiff is not entitled to a claim for general damages as *litis contestatio* (close of pleadings) had not been reached at the time of her demise.
- [9] It is submitted on behalf of the plaintiff that the court should determine whether the plaintiff's claim is transferable to her estate and whether the matter falls under the common law prescripts.

- [10] The common law position is that when a person who has suffered as a result of the wrongful act of another dies before being able to recover damages from the wrongdoer, that person's estate is only entitled to claim damages from the wrongdoer if at the time of the death the injured person had instituted action against the wrongdoer and *litis contestatio* had been reached.
- [11] This court was referred to the case of *Nkala and Others v Harmony Gold Mining Company Limited and Others*¹ where the court developed the common law to allow for claims for general damages to be transferred to a deceased's estate even if pleadings had not been closed when the plaintiff died.
- [12] *Nkala's* case is clearly distinguishable from the present case. It concerned a class action about the attempts by the vulnerable mineworkers between 17 000 – 500 000 who were employed in the gold mining industry, and it was about their dependants attempts to obtain compensation because of them having contracted silicosis and / or tuberculosis (TB) while employed at the gold mines. Due to the large number of these claimants, the application for two classes (silicosis and TB) took about four years for the certification to finalise. It was for this reason that the constitutional imperatives to develop the common-law to afford the transmissibility of general damages to the deceased's estate became relevant and important.
- [13] In the case of *Oliver N.O. v MEC for Health: Western Cape Provincial Department of Health and Another* (18312/2014) [2022] ZAWCHC 2028, 2023 (2) SA (WCC) (27 October 2022), Mantame J says:

¹ 2016(5)SA240(GJ)

"[35]....The wider consequences on the proposed change on the common-law should be properly analysed. A development of law in a blanket fashion without proper consideration of other aspects like, susceptibility to abuse, sustainability on the economic sphere and the public purse, lackadaisical attitude on the part of the plaintiffs to pursue their claims and so on, in my opinion would not always prove to be the right approach to pursue. The Courts have been cautioned not to flex their muscles and develop the law at their whim. The Courts have to exercise a value judgment when deciding whether to develop the law, as each case has to be decided on its merits. However, the courts have been cautioned repeatedly not to overstep the line between incremental development of the existing legislation and the formulation of wholly new ones at its peril, even though at times it might be desirable to do so."

- [14] Mention must also be made of *Ngubane v RAF*² where the court preferred the conservative approach taken by the minority, over the majority decision of *Nkala (supra)*. The court held that the majority's approach to the development of the common law, with respect to the transmissibility of general damages prior to *litis contestation* was reached, went beyond the permissible realms of the judicial development of the common law and caused the judiciary to impermissibly infringe upon the realm of the legislature (see para [34]). The court declared itself bound to follow the generally accepted common law position.
- [15] A matter of concern in the present case is the dilatory conduct of the plaintiff. There is no explanation from the plaintiff as to why it took so long for this litigation to finalise. It remains a mystery as to why the time frames on which the pleadings in accordance with the rules were not filed. A Notice of Bar was served on the defendant three days short of a month *after* the demise of the plaintiff. And then there was a sudden burst of

pressure wherein the defendant was informed that the pleadings would be deemed to be closed a month after receipt of the plea of the defendant. No factors have been placed before the court to explain the tardiness of the Plaintiff from the date on which the summons was issued (27 October 2020) to when the Notice of Bar was served (18 February 2022). Of greater concern, however, is the conduct of the plaintiff in attaching some insistence only *after* the death of the plaintiff.

[16] In the absence of a proper and / or acceptable explanation, it would be remiss for this court to find that non-pecuniary claims for damages are transmissible to the deceased's estate at any time before *litis contestatio*. Apart from such ruling being irresponsible and irrational, it would be tantamount to rewarding the plaintiff for being passive when more dynamism was required.

[17] After due and careful consideration of what has been placed before me, I am of the view that there are no factual allegations that justify a departure from the settled principle. *Litis contestatio* had not been reached by the date of the demise of the plaintiff. For these reasons as detailed a, the plaintiff's case for the development of the common law should not succeed.

[18] All that remains is the determination in respect of the award of costs. It has regularly been emphasised that in awarding costs, the court has a discretion that has to be exercised judicially, upon a consideration of the facts of a case, to arrive at an award that results in fairness to both sides.³ A deviation from the general rule that costs follow the result requires a court to be meticulous in its assessment to arrive at a just and fair result.

³ Norwich Union Fire Insurance Society Ltd v Tut 1960(4)SA851(A) at 854D

[19] Despite the finding that the plaintiff's claim does not succeed, it is difficult to see why the Plaintiff should bear all the costs. It is rare that the fault is all on one side. The court has particular regard for the long periods of time when this matter remained dormant. I am also mindful of the efficiency with which this matter was enrolled almost a month after the demise of the plaintiff. A punitive costs order would not be just and equitable and neither would it be fair to the plaintiff to have to pay costs other than those which she has incurred in instituting this claim. The dictates of fairness and equity require that no order as to costs should be made.

[20] In the result, the following order is made:

- 20.1 *Litis contestatio* had not been reached as at the date of death of the plaintiff.
- 20.2 The non-pecuniary claims for general damages are non-transmissible to the deceased's estate before *litis contestatio* is reached.
- 20.3 The common-law rule as it stands does not offend the spirit, purpose and object of the Bill of Rights and therefore does not require development.
- 20.4 Each party is to pay its own costs.


A.K. RAMLAL AJ

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 11h00 on 7 October 2024.

Matter heard on: 14 June 2024
 Heads of Arguments Filed on: 21 June 2024
 Judgment granted on: 7 October 2024

Appearances:

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