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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 20392/2018**

- |     |                                     |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO                |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED.                            |

.....

**Date**

.....

**ML TWALA**

In the matter between:

**B: S**

**PLAINTIFF**

**Versus**

**ROAD  
DEFENDANT**

**ACCIDENT**

**FUND**

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## JUDGMENT

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**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 2<sup>nd</sup> of July 2020.

### TWALA J

- [1] Before this Court is an application for default judgment brought by the plaintiff against the defendant whose attorneys withdrew from the matter since its mandate was terminated by the defendant. However, the defendant has failed, knowing that the matter is enrolled for hearing, to appear to state its case before this Court.
- [2] The genesis of this case arises from an accident that occurred on the 16<sup>th</sup> of June 2015 in Soweto between motor vehicles bearing the registration numbers C[...] GP and T[...] GP. The plaintiff was the driver of motor vehicle T[...] GP at the time of the collision. The plaintiff is suing the defendant for damages arising out of personal injuries he sustained in the collision.
- [3] This Court was not informed of the exact date on which the defendant's attorneys withdrew from the matter nor is the notice of withdrawal as attorneys of record filed on caselines. However, I accept that the attorneys

for the defendant have withdrawn since the saga between the defendant and its panel attorneys is common knowledge in this division. I have been given correspondence between the attorneys for the plaintiff and the claims handler of the defendant to the effect that the merits were settled in that the defendant is liable to pay 100% of the plaintiff's proven damages. Furthermore, the defendant tendered the certificate in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996 to cover the future medical expenses of the plaintiff. The general damages were settled in the sum of R650 000. The only outstanding issue for determination by this Court is the loss of earnings and to grant judgment by default. It is noteworthy that the summons has been amended on two occasions and the latest amendment was effected on the 17<sup>th</sup> of June 2020, just three days before the hearing.

- [4] Advocate Swart for the plaintiff submitted that the defendant is aware of the hearing of the matter today and all documents and bundles have been served on the defendant but it chose not to come to Court. However, so the argument went, it was agreed between the parties at the case management conference on the 12<sup>th</sup> of November 2019 that the actuarial report be admitted in evidence. Based on the actuarial calculation, it was contended, the Court need to take a median between scenario 1 and 2 and grant judgment by default in the sum of R3 124 279.50 for loss of earnings. The total sum claimed and for which judgment by default is sought is R3 768 258.50.
- [5] It was submitted further by Advocate Swart that, although the amendment of the particulars of claim to the summons to claim the amount as it appears on the actuarial report does not comply with the provisions of Rule 28, the Court has a discretion to order the amendment and grant judgment on the basis of the amended particulars of claim for the plaintiff stands to suffer

substantial prejudice as compared to the defendant if default judgment is not granted. Postponement of the matter will delay its finalisation and more costs will be incurred to the prejudice of the plaintiff.

- [6] In *Khunou & Others v Fihrrer & Son* 1982 (3) SA (WLD) the Court stated the following:

*“The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.”*

- [7] In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla & Another* (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014) the court stated the following:

*“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice,*

*to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”*

[8] Rule 27 of the Uniform Rules of Court provides the following:

*“Extension of Time and Removal of Bar and Condonation*

*(1) .....*

*(2) The court may, on good cause shown, condone any non-compliance with these Rules*

[9] I am unable to agree with Advocate Swart that I should exercise my discretion and grant the default judgment for the prejudice to be suffered by the plaintiff outweighs that of the defendant. As indicated above, I am not aware when exactly the attorneys for the defendant withdrew from the matter but certainly it was before the 17<sup>th</sup> of June 2020. However, it is apparent that the plaintiff’s application for default judgment is based on an amendment which was only served by e-mail to the defendant three days before the hearing. There is no cogent explanation proffered by the plaintiff as to why it sought to amend the particulars of claim this late when it had the actuarial report in November 2019 already. The amendment is quite substantial and the defendant will, in my respectful view, suffer substantial prejudice if judgment by default were to be entered against it without giving it an opportunity to deal with the proposed amendment.

[10] It was submitted by Advocate Swart that the minute of the conference of the 12<sup>th</sup> of November 2020 contains the agreement admitting the expert reports of the plaintiff and its actuarial report. However, the erstwhile attorney of the defendant testified in its affidavit that the report of its industrial psychologist was abandoned at that conference leaving the report of the plaintiff’s

industrial psychologist uncontroverted. Based on the plaintiff's industrial psychologist's report, the actuarial calculation in respect of loss of earnings came to a figure of R1 661 870 whereas the figure for the loss of earnings is R2 924 819 based on the industrial psychologist's report for the defendant. Default judgment is sought on the median figure between the two figures. There is a third figure that comes into the mix which is brought by the first amendment which was in September 2019 in the amount of R1.3m. I find myself in disagreement with Advocate Swart that, owing to the contradictory statements as to what was agreed upon on the 12<sup>th</sup> of November 2019, the Court should grant judgment by default on the amount of R1 661 870 because the amendment that was properly effected in September 2019 is for the sum of R1.3m and not R1.6m

[11] It is an established principle of our law that the plaintiff bears the onus to prove its damages on a balance of probabilities. In this case, the plaintiff has put forth three different figures as the amount of damages it suffered as result of the accident. I am unable to determine which of the three amounts is relied upon since there is a dispute as to what was agreed upon in the case management conference of the 12<sup>th</sup> of November 2019. Furthermore, the filing of the amendment on the eve of the hearing is suspicious in that it is served by e-mail on a defendant who is not represented by a legal representative and does not encapsulate the terms of the agreement between the erstwhile legal representatives of the defendant and that of the plaintiff. The ineluctable conclusion is therefore that the plaintiff has failed to discharge its onus of proving its damages.

[12] In *R v Hepworth* 1928 AD 265 at 277 the Appellate Division (as it then was) stated the following:

*“A criminal trial is not a game..... and the Judge’s position is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”*

[13] Furthermore, it is the duty of the Court not only to ascertain that the litigants observe the rules of procedure and that no litigant takes advantage of another but also to ascertain that the interests of justice are served in a fair manner between litigants. I hold the view therefore that, it will not serve the interests of justice to grant default judgment when it is patently clear that the plaintiff is taking advantage of the situation the defendant finds itself in. I therefore find that the application for judgment to be entered by default against the defendant falls to be dismissed.

[14] In the circumstances, I make the following order:

The application for judgment by default is dismissed.

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**TWALA M L**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

**Date of hearing: 24<sup>th</sup> June 2020**

**Date of Judgment: 2<sup>nd</sup> July 2020**

**For the Plaintiff:        Adv. L Swart**

**Instructed by:            Sonya Meistre Attorneys  
Tel: 011 432 4113**

**For the Defendants:    In Default – Non Appearance**