

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No: 4041/2020

In the matter between:

Z[...] R[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BROOKS J:

[1] In accordance with the current arrangement made with the registrar of this court pursuant to the directive issued by the Judge President on 12 April 2021 (the directive), fifty-one matters were enrolled before this court on 15 March 2023. All the matters were civil claims for unliquidated damages in which the plaintiffs sought judgment by default. Remarkably, not a single matter so enrolled was presented to the court in the manner set out in the relevant portions of rule 31 of the Uniform Rules of Court (the rule). Three of the matters, all presented by the same attorney, were substantially compliant with the provisions of the relevant portions of the rule. This matter has been selected from amongst the three as a vehicle for the expression by the court of views that are applicable to all matters in which plaintiffs seek judgment by default in civil action for claims for unliquidated damages.

[2] It is appropriate to contextualise this judgment by referring to the historical position in this court relating to matters of this nature. Over the years the practice had developed that saw attorneys enrolling such matters in the motion court. They were commonly referred to as “applications for default judgment”. Even the registrar endorsed the nomenclature weekly by providing a similarly worded subheading on

the motion court roll and listing the matters thereunder. Invariably, the court was presented with a “notice of application” or a “notice of motion” supported by a so-called “damages affidavit”. It was the consistent expectation of practitioners that the outcome in such matters would be by a judgment by default. In most instances, dilatory defendants would be represented on the motion court day and seek the removal of the matter from the roll against a tender for costs and an undertaking in respect of the future conduct of the matter.

[3] For a number of reasons the directive was issued. It highlighted the fact that motion court proceedings are not suited to the prosecution of claims for unliquidated damages. It prescribed that “default judgment applications in which unliquidated damages are claimed” shall be set down on specific days on a trial roll.

[4] Some practitioners sought to avoid compliance with the directive in respect of claims for unliquidated damages against the Minister of Police. The approach they adopted was dealt with fully by a full bench in this court. The relevant judgment is *Bisha and Others v Minister of Police*.¹ Of relevance for present purposes is the content of paragraphs [19] to [22] of *Bisha*, in which the court highlighted that judgment can only be granted in favour of the plaintiff after the court has heard appropriate evidence. The court highlighted that an attempt to establish the merits of an *actio iniuriarum* by placing an affidavit before the court is in conflict with all legal principles discussed in the judgment. The reference to *viva voce* evidence could not have been clearer.

[5] The judgment in *Bisha* takes no issue with authorities² that state that normally the *quantum* of damages should be established by oral evidence, but in special circumstances the court may accept evidence on affidavit.

[6] In respect of evidence intended to establish *quantum* it must be obvious that where it is presented in affidavit form the deponent must be a person who is qualified

¹ (4144/2020, 1129/2019, 3806/2021, 4143/2020, 80/2021, 4342/2020) [2021] ZAECHMHC 24 (13 July 2021).

² See for example *New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T); *Minister of Police v Lusindiso Nongwejane* (CA&R 63/2015) of the Eastern Cape Division, Mthatha; *Havenga v Parker* 1993 (3) SA 724 (T) 726 C to I

to express the opinion set out in the affidavit. An affidavit by a plaintiff that states that the plaintiff has suffered special damages in a specific amount has no probative value.

[7] It follows that there is no place in a matter of this nature for a so-called “damages affidavit” deposed to by a plaintiff.

[8] What is required is the oral evidence of a plaintiff that addresses the merits of his or her claim and the personal aspects relating to *quantum*, such as might motivate a claim for general damages or provide the basis upon which an expert witness has formulated his or her opinion on special damages.

[9] The relevant portions of the rule read as follows:

31(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence³ grant judgment against the defendant or make such order as to it seems meet ...

31(4) The proceedings referred to in subrules (2) and (3) shall be set down for hearing⁴ upon not less than five days’ notice to the party in default: Provided that no notice of set down need be given to any party in default of delivery of notice of intention to defend.

[10] The provisions of the rule emphasise the need to hear oral evidence.

[11] It is important not to overlook the provisions of the rule that prescribe how the matter is to be enrolled. What is required is a notice of set down that contains relevant information, for example:

WHEREAS the combined summons was served on 10 November 2020; and

³ Emphasis added.

⁴ Emphasis added.

WHEREAS the defendant was offered twenty (20) days within which to deliver a notice of intention to defend; and

WHEREAS the defendant filed her notice of intention to defend on 26 October 2021; and

WHEREAS the defendant failed to file a plea and was served with a notice to demand a plea and bar on 22 March 2022; and

WHEREAS the five-day period after service of the notice to demand a plea and bar expired on 30 March 2022; and

WHEREAS the defendant remains in default of filing a plea;

NOW THEREFORE BE PLEASED TO TAKE NOTICE that the plaintiff hereby enrols the matter for hearing on a date to be allocated by the registrar when the plaintiff will seek judgment by default against the defendant as follows:

1. that the defendant be and is hereby held liable to the plaintiff for payment of the following sums as and for damages arising out of the motor vehicle accident that occurred on 9 February 2019:
 - 1.1 general damages in the sum of R 200 000.00;
 - 1.2 future medical expenses in the sum of R180 000.00;
 - 1.3 future loss of earnings in the sum of R 400 000.00.⁵
2. that the defendant be and is hereby ordered to pay the plaintiff's costs of suit, such costs to include ...

KINDLY ENROL THE MATTER ACCORDINGLY.

[12] In the present matter, the plaintiff's attorney set out the sequence of the relevant events that occurred since the issue of the combined summons, much like the illustration set out in the preceding paragraph of this judgment. However, the

⁵ Figures are purely illustrative examples.

document is erroneously headed “Notice of Application for Judgment by default in terms of rule 31(2)(a) of the Uniform Rules.” It is preferable to style the appropriate document as “Notice of Set Down”. However, the document stands head and shoulders above many others that were to be found on the relevant roll. Some were styled “Notice of Motion” and others “Notice of Application”, still echoing the misguided history when such matters were enrolled in the motion court.

[13] Regrettably, the present matter is no different from any of the other matters on the roll in that it was burdened by a so-called “damages affidavit” in which the plaintiff repeats the history of the matter, describes the merits of his case and addresses the *quantum* of his case. There is no place for such an affidavit. Since the matter was clarified in the Bisha judgment, practitioners ought not to persist in the bad habit of introducing “damages affidavits”. They have no probative value and simply run up the costs of litigation in a manner that neither the defendant nor the plaintiff should be expected to meet. For this reason, an appropriate costs order will be made.

[14] Two aspects of special damages were dealt with in this matter. They were appropriately dealt with by the presentation of a fully motivated medico-legal report and opinion compiled by an appropriate expert witness who had examined the plaintiff and come to a well-reasoned opinion. In each instance the expert report was covered by an affidavit deposed to by the relevant expert and confirming the accuracy and appropriateness of the medical opinion offered in the report. This is compliant with the *dicta* in the *Havenga* judgment⁶ and, in my view, constitutes an acceptable manner for placing expert evidence on *quantum* before the court when a plaintiff seeks judgment by default on a claim for unliquidated damages. Such evidence, of course, must still be based upon the *viva voce* evidence given by the plaintiff. It can also be led orally from the expert concerned.

[15] Although the origins of many of the bad practices referred to in this judgment are difficult to identify, perhaps one of them may be attributable to the wording of subrule (5) of the rule, which deals with claims for a debt or liquidated demand. Here the subrule requires a plaintiff to “file with the registrar a written application for

⁶ Note 2 *supra*.

judgment". The subrule has nothing to do with claims for unliquidated damages and accordingly its prescript should not be followed. In at least one matter on the relevant roll, reference was made to rule 31(5)(a), so the speculation of the court is not entirely misplaced.

[16] In a few matters that served on the relevant roll, reference in a misnomered notice was made to rule 6(11) of the Uniform Rules of Court, sometimes in conjunction with a reference to the rule. Rule 6(11) reads as follows:

Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.

In seeking judgment by default in accordance with the provisions of the rule, a plaintiff is not pursuing an "interlocutory" application or an "application incidental to pending proceedings." The invocation of, or reference to, rule 6(11) of the Uniform Rules of Court has no place in a matter such as the present.

[17] In two matters on the relevant roll, plaintiffs sought an order in terms of rule 33(4) of the Uniform Rules of Court, separating merits and *quantum*, suggesting in the so-called "damages affidavit" that because the claims for unliquidated damages were so large, they could be dealt with more conveniently at a later date. In my view, such an argument does not address the concerns of a judge who may be called upon to make such an order. Practitioners would be well advised to re-read the Bisha judgment that expresses the pertinent view of the full court in this regard.⁷

[18] When the matter was called, Ms Swartz, who is a member of the professional staff of the Office of the State Attorney, appeared on behalf of the defendant. It became apparent that the parties had reached agreement in respect of the further conduct of the matter as a defended action. In such circumstances, it was not necessary to adjudicate upon the merits or *quantum* of the plaintiff's claim.

⁷ At para [21]

[19] The following order will issue:

1. The application for judgment by default is withdrawn with the leave of the court.
2. The bar is uplifted.
3. The defendant is directed to pay the costs of the application on a party and party scale.
4. The defendant is directed to file its plea within twenty days of the date of this order.
5. No costs shall be recoverable from either the plaintiff or the defendant in respect of the “damages affidavit” prepared in the name of the plaintiff.

R W N BROOKS
JUDGE OF THE HIGH COURT

Appearances

For the plaintiff:

Instructed by:

Mr Jika

Mjulelwa Inc. Attorneys

45 Leeds Road

MTHATHA

For the defendant

Instructed by

Ms Swartz

Office of the State Attorney

Sisson's Street

MTHATHA

Date heard

15 March 2023

Date delivered

17 March 2023