

**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.

CASE NO: 38754/2018

27/6/2019

In the matter between:

MILLICENT ITANI RAKHAV

Applicant/Plaintiff

and

ROAD ACCIDENT FUND

Respondent/Defendant

JUDGMENT

KUBUSHI J

[1] This matter served on the unopposed motion court roll of 6 June 2019. The plaintiff applied for default judgment against the defendant for payment of an amount of R1 429 655, being for damages for loss of support incurred by the plaintiff and her minor child emanating from the death of her husband and father of her minor child ("the deceased"). The death is alleged to have been occasioned by the negligent driving of a motor vehicle by one T.A. Mtheto ("the insured driver").

[2] The plaintiff was married to the deceased during his lifetime in community of property as *per* the marriage certificate annexed to the application for default judgment. The two are said to have been the legal guardians and parents of one minor child, E[....] J[....] R[....]. The plaintiff is, thus, in this matter, claiming in her personal capacity as the wife of the deceased, as well as, in her representative capacity, as the mother and guardian of the minor child.

[3] There is no birth certificate attached to the papers as proof that the minor child was the biological child of the deceased. It appears, however, that when the deceased paid *lobola* for the plaintiff, she already had a child and it was agreed during the *lobola* negotiations by the deceased's family and the plaintiff's family that the deceased marry the plaintiff together with the said child. This appears from the affidavit of the deceased's mother annexed to the application for default judgment. It is on this basis that the plaintiff is claiming that the deceased had, during his lifetime, the legal duty to maintain the minor child.

[4] The question that arises is whether in such circumstances, the deceased was legally liable for the maintenance of the child. When I prepared judgment, the plaintiff's counsel had not addressed me specifically on this issue. I then opted to request him to prepare heads of argument in respect of this issue and to provide relevant case law.

[5] In the heads of argument, counsel contends that the deceased had the legal duty to maintain the minor child because he had adopted the minor child by customary law. When concluding and/or finalising the customary marriage between the plaintiff and the deceased, their respective families undertook the customary adoption of the minor child by the deceased. The plaintiff and the deceased were, as such, the legal guardians and parents of the minor child. The handing over of the minor child to the deceased was done simultaneously with the *lobola* celebration as a fulfilment of the requirements of adoption in customary law. In this regard, counsel relied on the authority of Professor Maithufi (an expert in African Law) in Maithufi, I "Adoption according to customary law - *Kewana v Santam Insurance Co. Ltd* (4) SA (Tk) Followed" (200) 34 *De Jure* 390 at 391 - 392.

[6] It is trite that adoption in customary law is recognised in our law.¹ The requirements for a valid customary adoption have been held to be -

6.1 An agreement between the families; and

6.2 Publicity in the traditional areas that the parties were living together.

[7] It is evident from the facts in this matter that the adoption was performed as confirmed by the deceased's mother and was celebrated together with the *lobola* celebration, as an indication that it was announced. At the time of the deceased's death, the minor child was staying together with the plaintiff and the deceased. In *Centre for Child Law v Minister of Social Development*,² the Gauteng Division of the High Court, Pretoria issued an order and declared on 29 October 2013 *inter alia* that s. 230 (3) of the Children's Act³ does not preclude a child from being adopted in instances where the child has a guardian and the person seeking to adopt the child is the spouse or permanent domestic life-partner of that guardian. The deceased was the spouse of the plaintiff who is the guardian of the minor child and he was, thus, entitled to adopt the minor child.

[8] The plaintiff instituted proceedings against the defendant on 5 June 2018. The summons was duly served on the defendant on 11 June 2018. The *dies* for the defendant to enter appearance to defend expired on 26 June 2018 and to date

hereof no appearance to defend has been entered. As such, when the matter served before me almost twelve months had expired since the summons was served on the defendant.

[9] It is the practice of this court, where a long time (usually more than six to twelve months) has expired since the service of the summons had taken place without the plaintiff taking further steps, to order that such summons be served again. However, in this instance, from the record, it appears that there was email communications and telephonic conversations between the plaintiff's previous attorneys of record and one of the officials of the defendant in regard to

¹ See *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (AD).

² 2014 (1) SA 468 (GNP).

settlement of the claim. I would in such circumstances assume that the defendant is aware of the summons served on it and failed, neglected and/or has no intention to defend the matter.

[10] The defendant is, in terms of the Road Accident Fund Act 56 of 1996, liable to compensate people injured in motor collisions due to the negligence of the driver of a motor vehicle involved in such collision ("the insured driver"). The plaintiff in her evidence contained in the affidavit filed with the application for default judgment, states that a collision occurred on 28 March 2017 between a certain Toyota Quantum Mini Bus bearing registration numbers [...], there and then driven by the insured driver and a VW Polo bearing registration numbers [...], then driven by one Mahlangu Phumzile. The deceased was a passenger in the VW Polo at the time of the collision. The deceased is said to have died as a result of the multiple injuries he sustained in the collision, thus rendering the defendant liable to compensate both the plaintiff and her minor child for loss of support.

[11] In her evidence, the plaintiff attributes negligence to the insured driver in one or more of the following factors:

- 11.1 He failed to keep a proper look-out; and/or
- 11.2 He failed to keep the motor vehicle of which he was a driver under proper control; and/or
- 11.3 He failed to apply brakes of the motor vehicle of which he was the driver timeously or at all; and/or
- 11.4 He failed to avoid the collision when, by the exercise of reasonable care, he could and should have done so; and/or
- 11.5 He failed to pay due regard to the rights of other road users and in particular the rights of the deceased; and/or
- 11.6 He failed to stop at a stop sign.

[12] The plaintiff in this default judgment application has not separated the merits from *quantum*. She is thus asking for default judgment on both merits and

³ Act 38 of 2005.

quantum. In support of the amounts she claims as *quantum*, the plaintiff has attached an actuarial report prepared by Johan Sauer Actuaries & Consultants. The report is, however, not confirmed as the true report authored by the experts involved and can, as such, not be admissible as proof of the *quantum* claimed.

[13] In conclusion, I am satisfied that the defendant has not entered appearance to defend this matter even though he was duly served. I am also satisfied that the deceased was legally responsible for the maintenance of the plaintiff and the minor child during his lifetime and as such, they are entitled to be compensated for the loss of support sustained as a result of the death of the deceased.

[14] The plaintiff must, however, still prove *quantum* and I, as a result, have to postpone the issue of *quantum*.

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

1. The plaintiffs claim on the merits succeeds;
2. The defendant is 100% liable;
3. *Quantum* is postponed *sine die*.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicant	: Adv. M. Mphahlele
Instructed by	: Sathekge Muliti Inc. c/o B Rikhotso Attorneys
Date of hearing	: 06 June 2019
Date of judgment	: 27 June 2019