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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: **23457/2022**

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO
DATE: 24 JULY 2025
SIGNATURE OF JUDGE:

In the matter between:

ZENGENI RUFURO N. O Plaintiff
EXECUTRIX obo
ESTATE LATE NYAMUTSAHUNI ZVIKOMBORERO HILLARY

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

FLATELA, J

Introduction

[1] This is an application for a default judgment by Ms Zengeni Rufuro in her capacity as executrix of the estate of Nyamutsahuni Zvikomborero Hillary. On 03 May 2022, Nyamutsahuni Zvikomborero (the deceased), an adult male Zimbabwean national who resided and worked in Johannesburg, Gauteng Province, instituted a third-party claim against the Road Accident Fund for personal injuries sustained in a hit-and-run pedestrian accident involving a motor vehicle that occurred on 28 June 2021. At the time of the accident, the deceased was a self-employed motor mechanic. He passed away on 19 June 2023 due to natural causes and was substituted by his wife, Ms Rufuro. Notice of substitution was filed on 9 April 2024.

[2] The applicant seeks default judgment due to the defendant's failure to defend the action.

[3] Both liability and quantum remain in dispute. Only the loss of earnings claim will be determined. The Fund has not yet assessed the seriousness of the injuries, as required by Regulation 3(3)(dA) of the Road Accident Fund Act 56 of 1996; therefore, the general damages claim is postponed *sine die*.

[4] On the date of hearing being 23 May 2024, the State Attorney filed a notice to defend via email to the plaintiff's attorneys at approximately 7:00 a.m. on the morning. The defendant was represented in court and made submissions from the bar regarding the late filing of the intention to defend. I granted the defendant an opportunity to submit written reasons why the court should not set aside the notice of intention to defend.

[5] On 27 May 2024, the plaintiff filed a Rule 30 application seeking to set aside the late filing of the notice of intention to defend as an irregular procedural step. The plaintiff's attorneys contended that the defendant filed the notice of intention to defend on the day of trial only to frustrate the claim. It was further contended on behalf of the plaintiff that the defendant filed the notice for an ulterior purpose to delay the proceedings. The Plaintiff's attorney argued that it would not be in the interest of justice to allow the notice, considering that the matter is being prosecuted by the deceased's widow and the clogged court roll.

[6] The defendant did not file any affidavit but submitted heads of argument aimed at rebutting the plaintiff's assertion that submitting the intention to defend on the day of the hearing constitutes an abuse of the court process. The defendant acknowledged that they had not filed any pleading following the summons but refuted the assertion that the notice to defend constituted an abuse of the court's process.

[7] The defendant argued that the drafters of the rule did not intend to exclude a litigant who, for one reason or another, failed to deliver its notice of intention to defend within the prescribed time frame.

[8] Interestingly, at paragraph 8.4 of their heads, the defendant makes the following submission

“ I can even venture to say, I submit, the Applicant had no intentions of shutting the door on the respondent either because, it is clear from how the applicant conducted this matter, even when the rules and directives allowed them to bar and strike out the respondents defence, it did not do so, and this is inefficient, when considered together with the sub rule 5”

[9] This submission is quite perplexing. The defendant has failed to file a notice of intention to defend, despite multiple requests to do so. Consequently, it remains ambiguous which specific defence the plaintiff should have struck off, given the absence of any pleadings from the defendant.

[10] It was further submitted on behalf of the defendant that the defendant's electing to make use of this sub-rule should not be construed as an abuse of process, but rather a necessary step in the administration of justice. Reliance was placed on **Lawyers for Human Rights v Minister in the Presidency and Others 2017 (1) SA 645 CC on par 20** [In Beinash, Mahommed CJ stated that “there could not be an all-encompassing definition of ‘abuse of process’ but that it could be said in general terms ‘that an abuse of process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the trust are used for a purpose extraneous to that objective”.

[11] The defendant contends that there are unresolved questions regarding the merits of the case, noting that they are not certain if there was indeed an accident caused by a motor vehicle, as the deceased was a pedestrian at the time of the incident. Moreover, the defendant submitted that the absence of independent witnesses, along with no statements from the insured driver or an accident reconstruction expert, raises doubts about how the accident occurred.

[12] This argument lacks merit. The medical records from Chris Hani Baragwanath Hospital, dated 28 June 2021, show that the deceased was admitted after he was brought by ambulance at 9:16 am on the day of the accident, having sustained injuries from a hit-and-run motor vehicle collision. Dr. Zwelibanzi Zungu attended to the deceased and recorded the injuries. Notably, these hospital records were included in the documents submitted to the Fund for lodgement. It is indeed perplexing that the Fund now seeks to challenge the merits of the accident.

[13] It was further stated that the defendant has an issue with the general damages because the deceased died before the close of pleadings, and the executor of the deceased is therefore not entitled to proceed with a claim for those general damages. The defendant, therefore, intends to file a special plea to that effect. The defendant asserted that it could not be said that a Rule 19(5) application to deliver its notice before the default judgment is granted is made for irrelevant purposes. Lastly, it was submitted that the merits of this matter cannot go unchallenged, as the respondent believes that the applicant has not properly proven their case.

[14] The defendant's submissions relied heavily on the breather given to a defendant by Rule 19(5). I disagree with the defendant's assertions in their entirety. The defendants, having neglected to engage in proceedings since 3 May 2022, now seek to re-enter the legal process through Rule 19(5).

[15] The accident occurred on 28 June 2021. The claim was lodged against the defendants on 02 December 2021. Summonses were served on 3 May 2022. Notice to defend was due on 18 May 2022, and a plea was due on 15 June 2022 if a notice

of intention to defend had been filed. The defendant failed to enter a notice of intention to defend.

[16] To expedite the claims process, the plaintiff's legal representatives dispatched multiple letters to the defendant, calling on them to plead or clarify their intention regarding defence. These correspondences explicitly cautioned the defendants that failure to respond would result in the court proceeding with a default judgment against them. The communications were sent to the defendant's counsel on 15 and 27 March 2023, and on 3 April 2023. Throughout this timeframe, there was no response from the defendant.

[17] A default judgment application was served on the defendant on 30 May 2023. There was no response from the defendant. Notice of set down was served on the defendant on 08 August 2023. There was also no response from the defendant.

[18] A notice of amendment in terms of Rule 28 was served on the defendant on 5 September 2023. There had still been no response from the defendants. Reports from the medico-legal experts were filed between 10 August 2023 and 7 February 2024. No response was received from the defendant. The defendant had not participated in the proceedings since the Sheriff served the summons on 3 May 2022.

[19] The defendant's failure to engage in these proceedings raises significant concerns. The plaintiff's attorneys have made extensive and repeated efforts to communicate with the Fund's representatives, urging them to file their intention to defend and extending multiple invitations for the defendant to participate. Throughout these interactions, the plaintiff's attorneys have explicitly warned the defendant about their intent to pursue a default judgment should the lack of response continue.

[20] Despite these clear warnings, the defendant has shown complete disinterest in the litigation process. Instead, the defendant has filed heads of argument each time they submit a late response. The defendant incorrectly claimed that the plaintiff never impeded their ability to plead and did not strike their defence. This assertion is

misleading; the defendant never filed an intention to defend in this matter. The plaintiff consistently urged the defendant to file their intention to defend to prevent the current situation. The defendant's late and reactive stance—appearing on the trial date and filing a last-minute intention to defend in accordance with Rule 19(5)—demonstrates a blatant disregard for the court's rules. Although a notice of intention to defend can be filed before the grant of a default judgment under Rule 19(5), in this case, the delayed submission, which occurs after more than a year of inaction in response to previous calls, constitutes an abuse of the court's processes and must be set aside.

[21] I now deal with the merits of this case.

Injuries and Sequelae

[22] On 28 June 2021, the deceased reported that he sustained injuries while crossing the intersection of Main Reef Road and Elias Motsoaledi Road in Cresswell Park, Roodepoort, Gauteng, after being struck by an unidentified vehicle. Following the accident, he was transported by ambulance to Chris Hani Baragwanath Hospital, where he received immediate emergency care, including comprehensive hospital treatment and radiological assessments. He was fitted with a high U-slab cast on his left arm. He was subsequently discharged on the same day to continue his recovery at home.

[23] Hospital records indicate the deceased sustained a left mid-shaft spiral humerus fracture, shoulder pain, and pain in the left hand.

[24] The plaintiff asserts that the cause of the collision was caused by the negligent driving of the unknown driver who was travelling at an excessive speed, failed to keep the motor vehicle under control, failed to apply brakes timeously, adequately or at all, failed to take adequate steps to avoid the accident when by the exercise of reasonable care and diligence could and should have done so, failed to stop and inspect the injuries sustained by the deceased or summon emergency help.

[25] The deceased reported the reckless and/or negligent driving of the unknown driver at the Roodepoort Police Station. An investigation into the incident involving a vehicle was conducted by D/Sgt Dzobe and allocated Roodepoort CAS 291 in July 2021.

Loss of earnings-submissions

[26] Dr Bongobi states that the plaintiff's counsel applied terms of Rule 38(2) of the Uniform Rules of Court for the court to accept the evidence on oath. The application was granted. The plaintiff appointed several experts to substantiate the claims for damages. They are:

- Orthopaedic surgeon: Dr. Bongobi
- Occupational Therapist: Lesego Mashishi
- Industrial psychologist: Moipone Kheswa
- Actuary: Wim Loots

Dr M. Bongobi: Orthopaedic Surgeon

[27] Dr. Bongobi noted the Applicant/Plaintiff's injuries as a Left Humerus Shaft Comminuted Fracture, resulting in a Malunited previous Left Humerus Shaft Fracture with Mild Shoulder joint Motion Deficit and post-fracture chronic Pain Syndrome.

[28] The plaintiff experienced significant functional impairments and was unable to perform strenuous work for an extended period.

[29] Clinical examination revealed asymmetrical shoulders, reduced shoulder motion, and bony bridging with remodelling of the left humerus. Treatment included X-rays revealing a comminuted Mid-Shaft Fracture of the Left Humerus, conservative treatment with a U-Slab POP cast for 3 months, and physiotherapy.

[30] Dr. Bongobi rated the Plaintiff's overall WPI at 3% and noted serious long-term impairment or loss of body function.

Occupational Therapy Assessment Findings

[31] The OT assessed the plaintiff as follows:

- a. Plaintiff exhibits significant physical limitations in the left upper limb due to injuries sustained in a motor vehicle accident.
- b. He experiences pain and weakness in his left shoulder, affecting his ability to lift heavy objects and perform household chores.
- c. He struggles with activities of daily living (ADLs) that require vigorous effort, although he can manage basic tasks.

[32] His ability to work has been compromised, as he can no longer perform strenuous parts of his job and relies on his son and employees. He experiences the following:

- a. Decreased left-hand grip strength and muscle strength in the left shoulder and elbow.
- b. Difficulty handling loads over 8kg, causing additional strain on the left arm.
- c. Limitations in executing repetitive or sustained above shoulder level reach with the left upper limb.
- d. Psychosocial screening indicates accident-related fear and anxiety, necessitating clinical psychologist intervention.
- e. The plaintiff experiences sleep disturbances and limitations in daily living

Conclusion on Functional Impairments

[33] The OT concluded as follows:

- i. The plaintiff's injuries have resulted in a loss of amenities and reduced functional capacity. Physical difficulties include restricted movement in the left shoulder and decreased muscle strength. Vocational evaluation indicates inadequate capacity for previous work demands. Psychosocial aspects include accident-related fear and anxiety. The Plaintiff requires ongoing medical

and therapeutic interventions for recovery. Orthopaedic assessment indicates fair to guarded prognosis with chronic pain syndrome. Recommendations include analgesics, physiotherapy, and occupational therapy to improve strength and movement. Clinical psychologist intervention is suggested for emotional support.

Industrial Psychologist (Moipone Kheswa)

[34] At the time of the accident, the Applicant/Plaintiff was self-employed in a motor vehicle wheel balancing business and had no physical restrictions.

[35] The industrial psychologist evaluated the Plaintiff's potential earnings before and after the accident, highlighting significant losses. Pre-accident potential earnings included work as a fitter and turner and self-employed motor mechanic. Post-accident, the plaintiff's ability to work has been severely compromised due to injury sequelae.

[36] Past loss of earnings incurred during the two months post-accident when the plaintiff was unable to work. Future loss of earnings anticipated due to ongoing limitations from the accident injuries.

[37] Industrial Psychologist Moipone Kheswa noted that the "Applicant/Plaintiff" was healthy prior to the accident and did not undergo any psychological or psychiatric treatment. Following the accident, he returned to his pre-morbid occupation after two months of recuperation. He has therefore been rendered an unequal competitor in the open labour market when compared to his uninjured counterparts.

[38] The plaintiff reportedly passed away on 19 June 2023, with the cause of death unspecified.

Collateral documents

[39] Affidavits from several individuals, including Chizapari Zebediah, a spare parts shop owner engaged in the buying and selling of the vehicles involved in the motor vehicle accident, stated that he had commissioned the deceased to perform welding work on their vehicles. Mr. Mehlomakhulu corroborated that he had collaborated professionally with the deceased. Each affidavit is intended to substantiate the plaintiff's income and personal circumstances relevant to the case.

Work Potential and Earning Capacity Analysis

[40] Ms Kheswa stated that the plaintiff's earning potential has been compromised due to his injuries. Pre-accident income ranged from R6,400 to R9,400 per month; post-accident income reduced to R4,200 to R7,200. The plaintiff was now functioning at a diminished level and requires workplace adaptations.

[41] He is deemed an unequal competitor in the labour market due to physical limitations.

Actuarial Calculation of Losses

[42] Mr Loots quantified the plaintiff's financial loss as follows:

- Past loss of earnings calculated at R81,206.00 based on pre-and post-accident income.
- Present value of earnings without the accident: R192,396.00, with the accident: R111,190.00.
- No cap on loss of earnings applicable as annual losses did not exceed the legal limit.

[43] Considering the unrefuted evidence presented by the Plaintiff, it has been demonstrated, on a balance of probabilities, that the accident resulted from the negligent driving by the unidentified driver. I accept the Plaintiff's evidence. Based on the factual matrix before me, I am of the view that the Defendant bears full liability for any damages that may be substantiated.

[44] As a result, I make the following order:

1. The defendant's notice of intention to defend delivered in terms of Rule 19(5) on 23 May 2024 is set aside.
2. The issue of general damages is postponed *sine die*.
3. The defendant is ordered to pay the plaintiff the sum of R 71,586.20 (Seventy-One Thousand Five Hundred and Eighty-Six Rands and Twenty Cents only) in respect of the plaintiff's past loss of earnings, which amount shall be paid into the trust account of DD Kotlolo Attorneys, with bank details:

Account Holder:	DD KOTLOLO INC
Trust Account Number:	4[...]
Bank Name:	ABSA BANK
Code: 632005	ABSA UNIVERSAL CODE
Type of Account:	CQ CHEQUE ACCOUNT
Our Ref:	D[...]

5. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, which payment shall be effected no later than 14 days following when agreement relating to the costs above is reached between the parties or the stamped allocator (following taxation) is served on the defendant, whichever comes earlier.
6. Interest shall accrue on the capital after the expiration of 180 days from the time the order is provided to the defendant as contemplated in the paragraph above.
7. Costs of Counsel, Adv B.R Matlhape for the 23rd and 24th of May 2024 on scale B.
8. There is a valid contingency fee agreement.

L FLATELA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Plaintiff: Adv BR Matlhape
Instructed by: DD Kotlolo Attorneys

For the Defendant: Mr L Lebakeng
Instructed by: State Attorney Pretoria

Date of the Hearing: 23 and 24 May 2024
Date of the Judgment: 24 July 2025

MODE OF DELIVERY: This judgment is handed down by circulation to the parties' legal representatives by email, and by being uploaded on CaseLines and released to SAFLII. The delivery date and time are deemed to be 24 July 2025, at 10:00 a.m.