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

Case Number: 024405/22

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

DATE **31 AUGUST 2025**

SIGNATURE

In the matter between:

S N N M[...] obo N I M M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

This judgment and the order incorporated herein is handed down electronically by circulation to the applicant's legal representatives by e-mail and by uploading to CaseLines.

Moultrie AJ:

[1] This is an application for default judgment in an action instituted by the plaintiff on behalf of her minor daughter, N[...], against the Road Accident Fund in terms of section 17(1) of the Road Accident Fund Act, 56 of 1995 for damages arising from bodily injuries sustained by N[...] in a motor vehicle accident that occurred when she was a pedestrian who was hit by a motor vehicle in Mhluzi, Middelburg, Mpumalanga at about 14h00 on 31 October 2019. At the time of the accident N[...] was 10 years old.

The RAF's non-opposition and the separation application

[2] The plaintiff's pleaded claim encompasses the following relief and heads of damages allegedly suffered by N[...] as a result of the injuries she sustained in the accident: (i) an order requiring the RAF to furnish an undertaking as envisaged in section 17(4) of the RAF Act in respect of future medical care that N[...] will require arising from the accident; (ii) damages in the sum of R12 million in respect of future loss of earnings; and (iii) damages in the sum of R2.5 million for non-pecuniary loss (referred to as "general damages").¹

[3] The RAF failed to deliver any notice of opposition, and the plaintiff set the matter down for default judgment in terms of Rule 31(2)(a).

[4] At the commencement of the hearing for default judgment, the plaintiff's counsel sought an order that the claim for general damages be separated and postponed for later determination in terms of Rule 33(4) on the basis that the

¹ The plaintiff's claim in respect of past medical expenses to the value of R120,000 appears to have been abandoned by means of an amendment effected shortly prior to the hearing of the application for default judgment. The *quantum* of the claimed damages was originally R8 million in respect of loss of earnings and R1 million in respect of general damages, but these claims were increased by means of the same amendment, which also converted a claim of R200,000 for future medical expenses into the one for the section 17(4) undertaking.

administrative procedures and requirements prescribed under section 17(1A) of the RAF Act in Regulation 3 of the Road Accident Fund Regulations² for the purposes of obtaining a determination that N[...] suffered a “serious injury” (which is a jurisdictional requirement for an award of damages for non-pecuniary loss in terms of the proviso to section 17(1) of the RAF Act) had not been completed. Since a separation on this basis is commonly convenient in circumstances where the plaintiff is able to establish the RAF’s liability on ‘the merits’ in terms of the RAF Act (i.e. that she suffered “bodily injury ... due to the negligence of the driver of the motor vehicle”),³ I provisionally indicated that I was minded to grant such an order. However, in view of the conclusion that I have reached in relation to the merits and the order I have decided to make in relation to the default judgment application, I do not consider that would be appropriate to grant any such separation.

[5] Furthermore, in view of the conclusion that I have reached below in relation to the merits of the matter (i.e. that no admissible evidence has been adduced before me in this application capable of showing that the accident in which N[...] sustained her injuries was indeed caused by any negligence) and in view of my decision that the application for default judgment should be dismissed, it is unnecessary for me to deal with the remaining elements of the plaintiff’s claims.

The merits

[6] Rule 31(2)(a) provides that where a defendant fails to defend an action and the claim is not for a debt or liquidated demand (as is the case here), a plaintiff may apply for default judgment, upon which “the court may, after hearing evidence, grant

² RAF Regulations, published under GN R770 of 2008 in GG 31249 of 21 July 2008, as amended.

³ Road Accident Fund Act, 56 of 1996, s 17(1).

judgment against the defendant or make such order as it deems fit", including an order dismissing the application for default judgment or granting absolution from the instance, and an appropriate order as to costs.⁴

[7] It is well established that the grant of default judgment in terms of this rule is a matter that falls within the discretion of the court.⁵ In considering the exercise of this discretion, it is important to recognise that default judgment does not follow any finding of law or fact that the defendant against whom it is granted does not have a defence to the action, but primarily arises because the defendant has failed to exercise its rights to defend the action in circumstances which are unknown to the court. It is for this reason that before a Court exercises its discretion in favour of granting default judgment, it should be satisfied that a valid claim (both factually and legally) exists upon which a judgment against the defaulting party may be justified.

[8] From a factual perspective, particular provision is made in Rule 31(2)(a) in relation to unliquidated claims for the hearing of evidence to satisfy the court that the plaintiff's case has been proved on a balance of probabilities. This is an important feature of the court's discretion, and I do not agree with suggestions that have from time to time been made that a court faced with a default judgment application may 'take comfort' from the fact that Rule 31(2)(b) specifically allows for the rescission of a judgment granted erroneously in the absence of a party. The rescission procedure is an exceptional one, and the fact is that default judgment (as with any other judgment) is binding and involves the undertaking of the solemn judicial function that is so important to the proper functioning of our Constitutional democracy. As the

⁴ Van Loggerenberg *et al.* Superior Court Practice. (Looseleaf, RS25) Juta, 2024 at D31-9.

⁵ *Id.*

Supreme Court of Appeal has confirmed, “where the cause of action is delictual, damages can in most cases only be determined after evidence has been led also in relation to the cause of action”,⁶ although this may be done on affidavit in terms of Rule 38(2).

[9] In the current matter, the plaintiff’s particulars of claim allege that N[...] was a pedestrian at the time of the accident, that she was injured by a motor vehicle driven by an identified driver (whom I will refer to as “the driver”), and that the sole cause of the accident, which took place “on Mandela Drive, Mhluzi”, was the negligent conduct of that driver who “suddenly veered off the road and collided with” her.

[10] The only evidence sought to be adduced before me in the default judgment application with regard to the circumstances under which the accident occurred was: (i) the plaintiff’s founding affidavit in support of the application for default judgment; and (ii) an accident report apparently completed and signed by an “official” identified as an “inspector” at 14h50 on 31 October 2019 (i.e. approximately 50 minutes after the accident took place), and which bears the stamp of the Steve Tshwete Local Municipality Traffic Services Department.⁷

[11] In the affidavit, the plaintiff states that the accident occurred “at or near Chocolate and Mandela Drive, Mhluzi... when [the driver’s vehicle] collided with [N[...]], who was a pedestrian crossing the road from East to West direction at the

⁶ *EFF v Manuel* 2021 (3) SA 425 (SCA) para 101, approving the statement to that effect in *Dorfling v Coetzee* 1979 (2) SA 632 (NC) at 635B-D, a case involving a claim for damages flowing from a motor vehicle accident. See also *Knight NO v Harris* 1962 (1) SA 317 (SR) at 318G-H.

⁷ The accident report was sought to be adduced in terms of section 6 of the Civil Proceedings Evidence Act, 25 of 1965, which provides that: “Any document purporting to bear the signature of any person holding a public office and bearing a seal or stamp which purports to be the seal or stamp of the department, office or institution to which such person is attached, shall, on its mere production, be *prima facie* proof that such person signed such document.”

time of the accident”. However, the plaintiff also states that she “was not present during the occurrence of the accident [and] thus, cannot explain further [...] how it happened”,⁸ and it is thus clear that this evidence is hearsay. No justification was tendered for the admission of this hearsay statement in terms of section 3 the Law of Evidence Amendment Act, 45 of 1988, and I cannot conceive of any basis upon which I would be appropriate for me to do so.

[12] In any event, the plaintiff’s statement is not only inconsistent with the plaintiff’s own pleaded case regarding the circumstances of the accident, as the underlined quotations above show, it contains nothing whatsoever that could remotely lead me to the conclusion that the accident was “due to the negligence of the driver of the motor vehicle”. To the contrary, it appears to indicate that the vehicle collided with N[...] on the roadway itself, and there is no indication of the speed at which the driver was travelling, or the speed at which N[...] was “crossing the road”.

[13] The content of the accident report is similarly inadmissible – and similarly problematic. It is clear that the content of the document is hearsay: the official who completed the report was not an eye witness to the accident: the hearsay statement of the driver is simply repeated as follows: “Driver ... says he was driving up with Dr Mandela Drive towards Avalon. Just saw the child running into the street. Then the accident happened”. Again, no basis was laid to justify the admission of this evidence, and I decline to do so.

[14] What is more, even if it were to be admitted, the statement by the driver also

⁸ Much the same version is advanced in the plaintiff’s section 19 affidavit (which was placed into evidence at the hearing), the only difference being that that affidavit specifies the road that Ntando was crossing as being Mandela Drive.

contains no suggestion of negligence conduct on his part, for example of excessive speed or a failure to keep a proper lookout. To the contrary, it is suggestive that he was not in a position to have avoided the accident by taking any evasive action when N[...] ran into his path of travel. The accident report also states that: (i) neither liquor nor drug use was suspected on the part of the driver (although it also records that no testing was done in this regard); (ii) the position of the driver's vehicle before the accident was "correct road lane"; and (iii) the "manoeuvre" that the driver was performing was driving "travelling straight" (i.e. not "veering", as pleaded in the particulars of claim).

[15] In the circumstances, I am not satisfied that there is any evidence before me upon which I may reach the conclusion that the accident was, even in part, caused by any negligence on the part of the driver, let alone in the specific respects pleaded in the particulars of claim. I am not willing to exercise my discretion to grant default judgment.

Appropriate relief, costs and order

[16] It will be recalled that Rule 31(2)(a) affords the court a discretion to grant any order that "it deems fit". It appears that such an order could include one for absolution from the instance, for which the test is "not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff".⁹

[17] Although I am not satisfied that the plaintiff's legal representatives have not

⁹ *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G–H.

adduced any such admissible evidence in this application, I do not consider that it would be in the interests of justice (i.e. “fitting”) to exercise my discretion to grant absolution from the instance in this case. I say so because I found certain features of the hearsay accident report (which I declined to admit into evidence) to be confounding, and which might well be clarified should the author of the accident report (or the driver himself) be subpoenaed to give evidence at a trial, even an undefended one. In particular, I refer to the following:

- a. although it does not contain any compass direction indication, the “accident sketch” contained in the accident report shows the point of impact where the vehicle struck N[...] as being on the verge of the roadway across the oncoming lane to the driver’s lane of travel, which is consistent with the plaintiff’s pleaded version and inconsistent with the hearsay statements in the founding affidavit and the accident report referred to above; and
- b. there are indications in the traffic report that there was nothing particularly unusual regarding the circumstances of the accident that could potentially have exculpated the driver if indeed that was the point at which the impact occurred. For example, the report indicates that: (i) the “light condition” was “daylight”; (ii) the “weather conditions and visibility” were “clear”; (iii) the “road surface type” was “tarmac”; (iv) the “quality of the road surface” was “good”; (v) the “road surface” was “dry”; (vi) the “road marking visibility” was “good”; (vii) there were no “obstructions”; (viii) the “traffic control type” was a “barrier line”; (ix) the road signs were “clearly visible”; (x) the “condition of the road signs” was “good”; (xi) the “direction of the road” was “straight”; and (xii) the road was “flat”.

[18] In those circumstances, it seems to me that the order that would be most appropriate and which I “deem fit” would be to simply dismiss this application for default judgment.

[19] As to costs, in the absence of any opposition to the application for default judgment, there is no justification for any award of costs in favour of the RAF. On the other hand, it also seems to me that the plaintiff and N[...] should not be left out of pocket as a result of the manner in which their legal representatives sought to present the application in the absence of any admissible evidence as to the circumstances of the accident. I thus consider it appropriate to make an order forbidding their legal representatives from recovering the costs involved in preparing and moving this application, either in terms of any contingency fees agreement or otherwise.

[20] I make the following order

1. The application for default judgment is dismissed;
2. The plaintiff’s representatives shall recover no costs from their client(s) in relation to the preparation and presentation of the application for default judgment, whether pursuant to any contingency fees agreement or otherwise.

RJ MOULTRIE

ACTING JUDGE

Appearance: For the plaintiff: B Tsabedze of Marisana Mashedi Inc., (012) 321 0510; buhle@mmashediattorneys.co.za