



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO: 11918/2016

In the matter between:

**AVIS RENT A CAR, A DIVISION OF BARLOWORLD
SA (PTY) LTD**

PLAINTIFF

and

**KIRK HIMUNCHUL
KURT LUBBE**

**FIRST DEFENDANT
SECOND DEFENDANT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 10 March 2026 at 12:30am.

ORDER

1. By consent between the plaintiff and the first defendant:
 - (a) The plaintiff is granted leave to withdraw its claim against the first defendant;
 - (b) Each party shall pay their own costs in respect of the claim.
2. The plaintiff's claim for judgment against the second defendant is adjourned *sine die* to open court for evidence to be led in respect of the quantification of plaintiff's claim.

3. The hearing of the plaintiff's claim for judgment against the second defendant must be preceded by personal service on the second defendant of the notice of set down.

4. There is no order of costs against the second defendant in respect of the adjourned proceedings set down from 16 to 19 February 2026.

JUDGMENT

CHETTY J

[1] The plaintiff (Avis) instituted action against the first and second defendants, who were employees of the plaintiff. The claim instituted by Avis arises from the employees' breach of their employment contract in circumstances where it is claimed that the first and second defendant engaged in the excessive consumption of alcohol after which the second defendant took possession of a 2010 BMW 125i, bearing registration number ZBV693 GP, belonging to the plaintiff, drove it at excessive speed resulting in a collision. Avis proceeded to sue the defendants, jointly and severally, for the damages sustained, being the replacement costs of the vehicle.

[2] According to the particulars of claim the first defendant was employed as a manager of Avis' car sales division in Balito, KwaZulu-Natal, with the second defendant employed as a sales representative. It is alleged that the second defendant drove the vehicle while under the influence of alcohol and at an excessive speed. He failed to keep the vehicle under his control, causing him to collide with an immovable property in the vicinity of Blackburn and Umhlanga Rocks Drive, Durban.

[3] As a result of the collision, the BMW vehicle was damaged beyond repair, causing the plaintiff to suffer damages in the amount of R216 000 being the replacement value of the vehicle. Avis further contends that the cause of action is based on the breach by the first and second defendants of their respective contracts of employment in that they committed gross misconduct by failing to exercise care for

the plaintiff's property, and wilfully and negligently caused damage thereto. In light of their wrongful conduct, Avis claimed payment of R216 000 from the first and second defendants, jointly and severally, the one paying the other to be absolved.

[4] Upon service of the summons, the first defendant (Mr Himunchul) entered an appearance to defend and in due course filed a plea in which he denied that he was in breach of his contract of employment, and further alleged that the second defendant (Mr Lubbe) had stolen or unlawfully removed the keys to the said BMW motor vehicle, and drove the vehicle without his permission or knowledge. In the circumstances he denied the negligence attributed to him and disputed liability for the amount of damages claimed.

[5] The second defendant proceeded to file a notice to abide, dated 4 June 2017, in which he acknowledged that he was solely responsible for having caused the damage to the BMW motor vehicle owned by the plaintiff and of 'having caused any or all consequent damages suffered by the plaintiff in the above action'.

[6] The plaintiff proceeded with its action against the first defendant, which eventually proceeded to trial in 2019, after which it became part-heard. It was again set down for trial in February 2026. On the first day of the part-heard trial, Mr *Shapiro* SC, who appeared on the behalf of the plaintiff, informed me that the matter had become settled after discussions between the plaintiff and the first defendant.

[7] The first defendant was present in court at the time with his attorney and confirmed that the action had been withdrawn against him on the basis that each party would be liable for their own costs. I was not presented with a copy of the settlement agreement although I was advised by counsel for the plaintiff that the settlement agreement would be made available.

[8] At the time of moving for the withdrawal of the action to be recorded by the court, Mr *Shapiro* informed me that the plaintiff was seeking an order in the following terms:

- '1. By consent between the plaintiff and the first defendant, it is ordered that:
 - 1.1 the plaintiff is granted leave to withdraw its claim against the first defendant.

- 1.2 each party shall pay their own costs in respect of the claim.
2. Judgment is granted in favour of the plaintiff and against the second defendant for:
 - 1.3 payment of the sum of R216,000.00 (two hundred and sixteen thousand rand);
 - 1.4 interest thereon at the legal rate of interest of 10.25% per annum from date of service of summons to date of final payment;
 - 1.5 costs of suit on Scale B.'

[9] During the course of my exchange with Mr *Shapiro* I enquired whether the second defendant, Mr Lubbe, was aware that the matter had been set down as a part-heard trial and whether he was aware that the matter was being settled as between the plaintiff and Mr Himunchul, and more particularly that judgment was now being sought against him. The answers to all my enquiries were in the negative. As I did not have a complete set of the pleadings available,¹ I informed counsel that I had no objection to recording the withdrawal of the action between the plaintiff and the first defendant, however, I was not satisfied as to whether I could grant judgment against the second defendant in his absence, and without him being given notice that judgment was being sought against him as part of the settlement agreement between the plaintiff and the first defendant.

[10] Counsel for the plaintiff drew to my attention that the notice to abide filed by the second defendant clearly indicated that the second defendant had no intention to defend the plaintiff's claim.

[11] I accordingly turn to consider the plaintiff's request for judgment against the second defendant. I indicated to counsel that I intended to reserve judgment as regards the prayer for relief against the second defendant and requested counsel to furnish me with written submissions as to why judgment should be entered against the second defendant, in his absence.

[12] Mr Shapiro responded, advancing a similar argument to that canvassed above and submitted that the notice to abide was equivalent to a consent to judgment in all

¹ The file had been taken by the plaintiff's attorney to be indexed and paginated and had not been returned at the time of the hearing.

material respects. It was submitted that the second defendant had conceded in writing that he caused the damage to the plaintiff's motor vehicle and was responsible for all consequent damages suffered by the plaintiff. As I understood this submission, it suggested that the second defendant had conceded liability on the merits as well as the quantum of the damages claimed. On this basis, it was contended there was enough to grant judgment against the second defendant.

[13] Essentially the contention of Avis is that the second defendant has forsaken any opportunity to oppose the granting of an order for default judgment against him in light of the filing of his notice to abide. I disagree for the reasons below.

[14] The first is that the notice to abide was filed almost nine years ago. The plaintiff chose to proceed to trial against the first defendant, making no attempt at the inception of the trial on 9 September 2019 to apply for judgment against the second defendant. No explanation was advanced for why judgment was not sought earlier against Mr Lubbe and why Avis only sought to change focus after concluding a settlement agreement with the first defendant. As part of that agreement, the first defendant has agreed to testify against the second defendant in any proceedings that may arise. To grant judgment against Mr Lubbe, under these circumstances, would in my view be unfair. He has no knowledge of the arrangement between the plaintiff and the first defendant. He has not participated in these proceedings for close to nine years. At a minimum, if the plaintiff intended to proceed with a default judgment application against the second defendant, it was obliged to have given him notice. It did not.

[15] Secondly, I have had regard to the decision of Dlodlo J (as he then was) in *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning and Another*² which shed some light on the effect of the filing of a notice to abide, and whether such notice prevented a litigant from filing an "explanatory affidavit" at a later stage. I have also had regard to the recent decision in *Ngiri Auto (Pty) Ltd v Bux and Others*³ where the court considered the implications of a notice to abide in *Clairison's* case, but where the facts were somewhat different to this matter. In

² *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning and Another* 2012 (3) SA 128 (WCC) (*Clairison's*).

³ *Ngiri Auto (Pty) Ltd v Bux and Others* [2024] ZAGPJHC 968.

Clairison's the applicant sought to review a decision to refuse an application to change the land use of certain property. The municipality filed a notice to abide and only after the applicant filed its replying affidavit, did the municipality seek to file an explanatory affidavit, in essence siding with the applicant. This was objected to on the basis that the municipality clearly conveyed the intention earlier not to enter the fray, similar to the position by Mr Lubbe in the current matter. However, unlike the municipality in *Clairison's*, Mr Lubbe did not seek to enter the fray from the time he filed the notice to abide. Dlodlo J however allowed the municipality to file its affidavit, noting that he could find no rule or reason of principle, precluding any party to the litigation from filing an affidavit and placing its position on record. Likewise, it appears to me that no prejudice can be claimed by the plaintiff if the request for default judgment were to be postponed to enable proper service of the notice of set down to be served on the second defendant.

[16] There is a further reason why judgment should not be granted against the second defendant as matters stand. The plaintiff's claim for R216 000 is an unliquidated amount, based on the vehicle being damaged beyond economical repair. The amount of damages suffered by the plaintiff is the replacement value of the BMW. The particulars of claim do not disclose any further details as to how the amount is arrived at. It is a well-established rule that where damages are claimed, judgment (even in default) will only be granted where evidence has been led or the amount of damages has been quantified to the satisfaction of the court.

[17] In as much as it is contended that the notice to abide constitutes a confession to judgment, a perusal of the said notice reveals that it does not meet the formal requirements of a confession to judgment as contemplated in Uniform rule 31(1). There is no verification of the second defendant's signature by means of an affidavit (rule 31(1)(b)). Having regard to the date when the purported "confession" was forwarded to the plaintiff's attorney, it is not clear to me why the attorneys did not seek to obtain judgment at that stage rather than wait almost nine years, and after withdrawing its claim against the first defendant.

[18] There is yet a further reason why I am not persuaded that it would be in the interest of justice to grant judgment in favour of the plaintiff, in the absence of notice

to him. The particulars of claim refer to a “further claim” arising in the event of third parties, whose property was damaged as a result of Mr Lubbe colliding with an immovable property as well as the consequent damage to four other vehicles parked on the property. The amount claimed by the insurer on behalf of the third parties was approximately R193 000. It is not clear whether payment of such further damages will be claimed against the second defendant, in addition to the amount of R216 000.

[19] Lastly, the usual purpose for a party filing a notice to abide is to signify to all other parties that he or she has no intention to enter the fray and will respect the outcome of the court’s determination. It is also done to avoid the risk of costs escalating and being granted against it. The draft order presented to me however seeks costs and interest against Mr Lubbe. His notice cannot be interpreted as consenting to these aspects of the order prayed.

Order

[20] Accordingly, I am of the view that the interest of justice would be best served by the following order being made:

1. By consent between the plaintiff and the first defendant:
 - (a) The plaintiff is granted leave to withdraw its claim against the first defendant.
 - (b) Each party shall pay their own costs in respect of the claim.
2. The plaintiff’s claim for judgment against the second defendant is adjourned *sine die* to open court for evidence to be led in respect of the quantification of plaintiff’s claim.
3. The hearing of the plaintiff’s claim for judgment against the second defendant must be preceded by personal service on the second defendant of the notice of set down.
4. There is no order of costs against the second defendant in respect of the adjourned proceedings set down from 16 to 19 February 2026.

CHETTY J

Appearances

Counsel for the Plaintiff	:	W Shapiro SC
Instructed by	:	Macgregor Erasmus Attorneys Inc
Address:		1 st Floor, Bond Square 12 Browns Road
Tel:		031 201 8955
Ref:		JM Klingbiel/sv/BAR4/0028
Email:		justin@meattorneys.co.za sandra@meattorneys.co.za
Counsel for First Defendant	:	Mr Kirk Himunchul (In person)
Address:	:	10 Yellowfin Crescent Newlands East
Cell:		083 786 9146
Email:		Kirk.himunchul@gmail.com
Date of Hearing	:	16 February 2026
Date of Judgment	:	10 March 2026