


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 64671/2019

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|---------|---|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: NO |
| 21/5/24 |  |
| DATE | SIGNATURE |

In the matter between:

MBONAMBI MTHOKOZISI SIBUSISO

Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent

Summary: Default judgment – merits and quantum. Alleged *hit and run* action. Court not satisfied with the evidence to enable it to, in its discretion, grant judgment by default. Accordingly, the Court refuses to exercise its discretion in favour of granting default judgment. Held: (1) The application for default judgment is refused. Held: (2). There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Almost daily, this Court is faced with an avalanche of applications for default judgments against the Road Accident Fund (RAF). This Court shall, in my view, fail in its duties as guided by section 34 read with section 165(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) to simply enter default judgments against

the RAF, even if not satisfied that the RAF is statutorily liable to pay compensation. A default judgment is not entered against a party on the basis that the defaulting party is devoid of a defence in law. It is a judgment in accordance with the Rules of a Court.

[2] The present action came before this Court as an application for default judgment against the (RAF). The Plaintiff, Mr Mbonambi Mthokozisi Sibusiso (Mr Mbonambi), sought to proceed on the merits and quantum of the claim. With regard to the merits, he testified on his own without calling any witnesses. With regard to the quantum, a bundle containing reports of three experts; namely; Mr Papo, Occupational Therapist; Mr Kalanko, Industrial Psychologist; and Tsebo Actuaries was handed up. An order in terms of Rule 38(2) of the Uniform Rules was sought and granted in respect of the evidence of those experts.

Pertinent background facts to the present default action

[3] On 2 March 2019, at around 10h00 am, the highly inebriated 30 year old Mr Mbonambi was wheeled on a stretcher to the casualty ward of Mamelodi Day Hospital (Mamelodi Day) by the paramedics. Reportedly, he was hit by a motor vehicle which was not identified ("hit and run"). He presented with bruises on his face and injuries on the left side of his head. Suspecting serious head injuries, he was transferred to Steve Biko Academic Hospital (Biko) on ambulance for the purposes of performing a CT brain scan. At Biko, X-rays were performed, which revealed a left midshaft humerus fracture and a linear fracture of the skull. It was also discovered that he did not have intracranial bleeding. On return from Biko, he was stable and he was handed over to Mamelodi Day for further orthopaedic review and management.

[4] He received treatment at Mamelodi Day and was later discharged. On or about 14 March 2019, one constable Mhlalokwana stationed at Mamelodi South African Police Services (SAPS) completed an Accident Report (AR) Form. In the AR, he recorded that the alleged accident happened on 01 March 2019 at 08h45 at Hanstrydom street at Mamelodi East. The constable further recorded that the scene of the accident was not visited. With regard to the brief description of the accident, he recorded the following:

“**Pedestrian**: Alleges that he was on the pavement at BP Mahube Valley Robots when an unknown car came and hit him hard and knocked down and he couldn't notice the car's description **due to the heavy traffic flow**.” [Own emphasis]

[5] On or about 08 April 2019, Mr Mbonambi lodged a claim with the RAF seeking compensation for the injuries sustained on the left humerus and the linear fracture of the skull. On 29 August 2019, Mr Mbonambi instituted the present action against the RAF. The action was duly defended by the RAF. Ultimately, the action was enrolled for hearing on 12 February 2024. On 12 February 2024 the action was postponed to 25 April 2024.

[6] Before this Court, Mr Mbonambi testified that on 1 March 2019, he was involved in a motor vehicle accident and had sustained bodily injuries. The accident happened at Mandela Village next to BP Mahube. It was at around 20h00 -21h00 at night when an unidentified vehicle came and collided with him. The vehicle approached from behind whilst he was walking on the side of the road and collided with him from behind. He could not see nor identify the vehicle. There was no lighting since there was load shedding at that time. The place where the collision happened is a busy place next to a market. There was one person who witnessed the collision. He was hospitalised for three weeks. He reported the accident at the police station.

Analysis

[7] Rule 31(2) of the Uniform Rules provides that in an action claim where a defendant is in default of their obligations to deliver a notice of intention to defend or a plea, a Court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit. In terms of this rule, a Court possesses discretion whether to grant judgment against the defendant or make such order as it deems fit. It is important to state that a default judgment is granted not because the defendant against whom it is granted does not have a defence to the action but it is one granted in terms of the rules with the discretion of a Court¹. In my view, before a Court exercises

¹ See *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para 27; *Denel (SOC) Ltd v Numsa obo Petersen* (2022) 43 ILJ 2303 (LC) para 17; and *Zuma v Secretary for Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC) para 63

its discretion, it must be satisfied that a valid claim has been presented to justify a judgment against the defaulting party. The purpose of hearing evidence, is to enable the Court to reach a decision that a valid claim in law existed. If that is not the purpose, the Court shall be required to enter default judgment as a matter of course once a party appears without the defendant. Such shall be inconsistent with the constitutional duties of a Court of law. Taking into account that section 165(5) of the Constitution dictates that an order or decision issued by a Court binds all persons and organs of state, a Court should not willy-nilly, as it were, dispense with orders or decisions, even in the circumstances that the evidence before it does not justify an order or decision. In my view, it is unhelpful for Court faced with a default judgment application to take comfort from the fact that the rules do allow a rescission of a judgment granted erroneously in the absence of a party. It is accepted that section 23 of the Superior Courts Act² does provide that a default judgment may be granted and once so granted is deemed to be a judgment of a Court. However, section 23 do provide that such a judgment has to be granted in the manner and in the circumstances prescribed in the rules. As indicated above, a Court, as enjoined by rule 31(2), is only allowed to grant default judgment after hearing evidence. Section 16 of the Civil Proceedings Evidence Act³ provides that judgment may be given in any civil proceedings on the evidence of any single competent and credible witness. This simply means that only credible evidence shall be sufficient to enable a Court to give a judgment.

[8] In this action, the evidence of Mr Mbonambi does not satisfy this Court. The hospital records suggest that the injuries he presented to Mamelodi Day, were presented at 10h00 am. On his version before this Court, the alleged collision happened between 20h00 and 21h00. The AR records that the accident happened at 08h45 am. Mr Mbonambi testified that he was hospitalised for three weeks. This means that from 1 March 2019 up to and including 21 March 2019, he was hospitalised. The AR bears a date of 14 March 2019. In his testimony, he is the one who reported the accident at the police station. Curiously, how did he do so when he was hospitalised? He testified that the alleged collision was witnessed by someone. The evidence of the said eye witness was not tendered before this Court, nor was

² Act 10 of 2013 as amended.

³ Act 25 of 1965 as amended.

there any explanation provided as to why such evidence was not presented. The evidence of the constable who completed the AR was not presented.

[9] There was no indication as to whether the paramedics who wheeled Mr Mbonambi with a stretcher at Mamelodi Day were traced or not. Such information is crucial in an instance where the identity of the driver and the offending motor vehicle has not been established. No evidence was led to demonstrate efforts made to obtain the identity of the vehicle and the driver thereof. In terms of the section 19(f) affidavit, under oath, Mr Mbonambi testified that the collision happened at 08h45 whilst he was sitting on the pavement at the side of the road. This version contradicts his *viva voce* evidence before this Court, which was to the effect that he was walking on the side of the road. The medical records from both Mamelodi Day and Biko state that Mr Mbonambi was intoxicated. The Biko records reveals that he was "heavily intoxicated".

[10] This Court pointed out to counsel for Mbonambi that the state of the hospital records is not satisfactory. The records included information related to other patients. To this, in retort, counsel submitted that, such occurred because the records were obtained after invoking the provisions of Promotion of Access to Information Act (PAIA).⁴ In my view, this is, with respect, a lame excuse. It is the duty of a party that presents documentary evidence to ensure that authentic evidence is presented. It was also pointed out to counsel that this being a hit and run accident, the Court ought to have heard from the constable who drew up the AR, particularly in the circumstances where, Mr Mbonambi testified that for a period of three weeks, he was indisposed. That accepted, how did he manage to report the accident at the Mamelodi SAPS in the middle of his indisposition?

[11] Was the AR created in order to meet the requirements of the Regulation 2, which requires the third party to submit, within 14 days, an affidavit to the police? The date of 14 March 2019 meets with the requirements of 14 days reporting in terms of the regulation. Regulation 2(b) requires that the third party takes all reasonable steps

⁴ Act 2 of 2000 as amended.

to establish the identity of the owner or the driver of the motor vehicle concerned, otherwise the RAF shall not be liable to compensate any third party⁵. No evidence was led as to steps taken despite the evidence that an eye witness existed. The area where the accident allegedly occurred is a busy area on the evidence of Mr Mbonambi. It being a busy area, there must have been other persons who, like the eye witness mentioned in evidence, also witnessed the alleged collision.

[12] This Court did indicate to counsel for Mr Mbonambi that it requires proper legal submissions on the issue of the liability of the RAF in the circumstances where the vehicle and the driver are unidentified. Counsel submitted further legal submissions as directed. In addressing the pertinent question of liability, counsel submitted that the regulation does not detract from the duty of the driver of a motor vehicle to observe and adhere to the rules of the road. This may well be the case, however, the starting point should be whether there was a collision or not. In order for the RAF to attract liability, the following must be present: (a) bodily injury concerned arose from the negligent or other wrongful driving of the motor vehicle; (b) the third party took all reasonable steps to establish the identity of the owner or the driver of the motor vehicle concerned; (c) the third party submitted, if reasonably possible, within 14 days after being in a position to do so an affidavit to the police in which particulars of the occurrence concerned were fully set out; and (d) the motor vehicle concerned (including anything on, in or attached to it) came into physical contact with the injured.

[13] The submission by counsel highlighted only the second requirement of taking reasonable steps, however the submission seems to be directed to first requirement of negligence or wrongfulness. No evidence was led by Mr Mbonambi as to the steps he took to establish the identity of the owner or the driver of the alleged motor vehicle. In terms of the regulation, unless all the requirements are established, the RAF shall not be liable to compensate. In support of her arguments, counsel for Mr Mbonambi placed reliance on the unreported judgment by Andrews AJ in the matter of *Maseko v*

⁵ *Dlamini v Road Accident Fund and others* (7658A/2008) [2024] ZAGPPHC 277 (20 March 2024) at para 38-39.

Road Accident Fund (Maseko).⁶ Although *Maseko* involved a section 17(1)(b) claim as well, it is distinguishable from the facts of this case.

[14] Unlike in this matter, at the trial, counsel for the defendant indicated that the defendant no longer disputed that the collision took place. At that hearing, the only issue for determination was whether the defendant is liable for the loss or damage caused by the driving of the motor vehicle. That question of liability turned on whether the driver of the vehicle was negligent and whether such negligence caused the damage suffered. Once negligence was established the defendant was liable to compensate. The evidence that Mr Maseko gave was found to be consistent with the statement he gave some six months after the collision and he explained that he went to the police once he had made a recovery. Before me, Mr Mbonambi did not tender any evidence as to why the AR recorded his statement, which is not consistent with his oral testimony, at the time when he was hospitalised. Before me he testified that he could not identify the vehicle because of load shedding (darkness). His recorded statement reflects that due to heavy traffic he could not identify the vehicle. The AR records that the collision happened in the morning, whilst his oral evidence suggested that the collision happened at night. He persisted with this version despite an attempt by his counsel to redirect him to the morning time. He steadfastly testified that he was sure the collision happened at night and he might have been admitted in the early hours of 2 March 2019.

[15] In light of all the above, this Court is not willing to exercise its discretion and grant default judgment against the RAF. In the circumstances, this Court, in the interests of justice, is also not prepared to dismiss the action or grant an absolution from the instance. It may well be so that indeed Mr Mbonambi was involved in a motor vehicle collision, however, on the available evidence, this Court has its own doubts as to whether indeed Mbonambi was involved in a motor vehicle collision, given his state of sobriety revealed by hospital records. Regulation 2 requirements exists for a valid reason. A drunk person may fall onto a hard surface and sustain a fracture of a humerus and a linear fracture of the skull. The fact that a drunk person presenting with

⁶ (379994/17) [2019] ZAGPPHC 45 (6 February 2019).

such injuries may allege being knocked down by a vehicle do exist. The evidence of the eye witness and the paramedics that wheeled him was crucial, particularly given the conflicting times when the collision allegedly happened. Under oath in section 19(f) affidavit Mr Mbonani mentioned the morning time. Before me, under oath again, he mentioned evening time, in the circumstances where his visibility was obscured because of darkness. Since the default judgment rule authorises this Court to make an order it deems fit, this Court shall, in the exercise of its true discretion, refuse the grant of a default judgment at this stage. The evidence presented on the merits of this claim at this stage is not satisfactory.

[16] Before this Court concludes, a comment on the probity of the experts' testimony on the issue of quantum is apposite. Dr Tladi, an orthopaedic surgeon, opined based on X-rays report performed by Motheo Radiologists on 04 December 2020, that a healed humerus fracture with implants still in place was observed. Based on the records reviewed by him, Mr Mbonambi suffered a fracture on the left humerus and a linear fracture on the head. However, during examination, which occurred on 4 December 2020, Mr Mbonambi complained about left arm pain, which is intermittent in nature and comes only in cold weather. Dr Tladi further opined that Mr Mbonambi continues to suffer the discomfort of arm pain. On the employability of Mr Mbonambi, he opined that the reduced shoulder motion may limit his choice of occupations as occupations which require overhead reach will be difficult to do. This is not convincing to this Court.

[17] Dr Mpanza, a Neurosurgeon opined that Mr Mbonambi sustained mild traumatic brain injury (MTBI). On the examination date, being 25 January 2024, he observed that there was no motor deficit and suggested no further management. At the same time, Dr Mpanza stated that Mr Mbonambi suffers from chronic headaches. He then opined that brain trauma with its neurocognitive sequelae negatively impacts on activities of daily living and future employment. The difficulty with this opinion is that this MTBI is presented as one that Mr Mbonambi may not recover from. There is no indication in the report as to the possibility of recovery as most people do recover from


MTBI.⁷ This Court is convinced that age is a fact that would influence recovery, particularly in a mild injury. Lack of assessment of the possible or impossible recovery impacted on the findings of earning capacity of Mr Mbonambi. Should recovery be possible, which had not been ruled out, a conclusion that the earning capacity of the now 35 years old Mr Mbonambi is compromised to a point that his patrimony is reduced, is unreliable.

[18] In summary, the granting of a default judgment involves an exercise of discretion. If a Court, after hearing evidence is not satisfied, it is entitled to refuse the grant of default judgment. Owing to the fact that the liability of the RAF under the regulation is questionable, it seems that this is a matter that requires a full trial in order to ventilate all issues. In that way, the interests of justice would be better served. The testimony of the eye witness is crucial, since Mr Mbonambi was unable to give account of how the collision happened due to (heavy traffic on the one hand and load shedding on the other).

Order

[19] For all the above reasons, I make the following order:

1. The application for default judgment is refused.
2. There is no order as to costs.



GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal*

⁷ See TBI Recovery Guide <https://www.michigan.gov> folder 88 April 2008. According to this guide, the majority of patients with mild TBI recover completely in a week to three months. People under the age of 40 get better faster and have fewer symptoms as they get better than people over 40.

representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 16 May 2024.

APPEARANCES

| | |
|--------------------|----------------------------|
| For the Plaintiff: | Ms J Themane |
| Instructed by: | Komane Attorneys, Pretoria |
| For Defendant: | No appearance. |
| Date of Hearing: | 25 April 2024 |
| Date of Judgment: | 17 May 2024 |