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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 5986/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: Yes

DATE: 25 April 2025

SIGNATURE:

In the matter between:-

NHLAMULO WITNESS VUYEKA PLIANTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

Delivered : 25 APRIL 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be 24 April 2025 at 10:00 am.

Date heard: 27 January 2025

Coram: Mashifane AJ

JUDGMENT

MASHIFANE AJ

1. This is an application for default judgment against the defendant (RAF) in which the plaintiff seek and order on both merits and quantum.
2. On the 7th of July 2023 the plaintiff served combined the summons on the defendant claiming loss of support due to death if her father arising out of motor vehicle collision which occurred on the 12nd of July 2002 on Mookersi Road, Limpopo Province. The defendant has failed to enter appearance to defend resulting with this application.
3. As at the time of accident and death of her farther the plaintiff was still a minor of about two years of age. It is not known to this court why the plaintiff's claim had to wait until she reaches the age of majority for summons to be issued.
4. The plaintiff did not call any witnesses to testify on both merits and quantum and proceedings were conducted in terms of Rule 38 (2) of the Uniform Rules.

Factual background

5. On 12 July 2002, at around 02H:00 midnight an accident occurred between two motor vehicles and both drivers lost their lives on the scene. From the documents filed on record it is common cause that the plaintiff's father (deceased) was driving a motor vehicle to wit Monza with registration number K[...] from Giyani towards Polokwane. The other motor vehicle involved in the accident was a Volkswagen City Golf with registration number K[...]2 driven by Moses Gumede (insured driver) who was travelling from Polokwane direction toward Giyani. From the eyewitness statement Hasani Rodgers Khoza who was the passenger in the insured motor vehicle and also, the owner thereof when the accident occurred, they

were travelling towards Giyani when he notice headlights of an approaching motor vehicle coming towards them and he then realised that the oncoming motor vehicle was travelling on their lane and before his driver could react the motor vehicles collided head on, and both cars caught fire. His driver and the passenger unfortunately burn inside the motor vehicle and the insured driver was flown meters away from the motor vehicles.

6. In his statement Khoza stated further that the deceased committed suicide immediately after the accident by shooting himself. In a supplementary affidavit made two years later he agree that he might have been mistaken when making the statement that the deceased shot himself as he was in a shock and further that the information he got while in the hospital to that effect was wrong.

Analysis

7. Application for default judgment involving matters of this nature is regulated by Rule 31 (2) of the Uniform Rules which provide as follows:

"Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet".

8. The Plaintiff did not lead oral evidence and opted to proceed on the strength of the papers before the court. The Counsel for the plaintiff indicated further that they were unable to secure the attendance of the of the eyewitness without elaborating on steps, the plaintiff has undertaken to trace and try to locate the witness. In support of her claim the plaintiff relied on an affidavit by her attorney of record HS Makhubela. On paragraph 6 of the affidavit the applicant states as follows:

"In as far as the issue of merits is concerned, it is the Applicant's submission that it is evident from the attached combined summons, corroborated by her

statement under oath on her affidavit dated 23rd day of September 2024 that her father was involved in an accident as a driver on the 12th day of July 2002 wherein he sustained bodily injuries. It is further evident that the accident was caused by the driver of the motor vehicle with registration letters and numbers K[...]2, hereinafter referred to as "the insured vehicle" when driven by one Moses Gumede which collided with the motor vehicle with registration letters and numbers K[...] driven by the applicant's deceased father and who died as a result of the said accident. Further legal submissions shall be advanced on the date of hearing, if need be.

See attached statutory Affidavit and the traffic accident assist reconstructed by Jaco Venter in accordance with section 212 of the criminal procedure Act 51 of 1977 as ("**annexure NWV05 & NWV06" respectively**").

10. In her particulars of claim the plaintiff alleges that the accident was caused solely by the negligence of the driving of insured driver vehicle. She alleges that the insured driver was negligent in one or more of the following respects, that he failed to keep a proper lookout; he failed to exercise proper control over the insured vehicle; he drove too fast under the prevailing circumstances; he failed to apply brakes of the insured vehicle at all, alternatively properly/ sufficiently, alternatively timeously and further alternatively he drove a vehicle of which the brakes were defective; he failed to avoid the accident when, by the exercise of the reasonable care and skill, he could and should have done so.

11. The report by Jaco Venter was not made under oath and not accompanied by an affidavit deposed to by himself. It will therefore not serve as evidence before this court. Even if the court was to take the report into account it will not take the case of the plaintiff anywhere as it is based on inference drawn from insufficient information he received from the investigation officer and documents in the document.

12. The Counsel for the plaintiff requested the court to consider the report to Mr Jaco Venter and accept that there was a one percent negligence on the part of the insured driver. For the court to arrive at that conclusion the document filed on record must amount to evidence and this one fall short of that. It does not even comply with the requirements of Section 212 of the Criminal Procedure Act.

13. The maxim 'he who alleges must prove' finds an application on facts of this case. The Court in Dorfling V Cortzee 1979(2) SA 632 (NC) remarked that 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 and whether there was contributory negligence.

14. This matter involves collision between two motor vehicles and the plaintiff prays that the court should find that the insured driver was at fault! In the absence of a direct evidence then the court can only find in favor of the plaintiff after having drawn an inference which can only be drawn from circumstantial evidence. In the absence of such evidence no reasonable inference can be drawn. As a matter of fact, the only eyewitness states that the accident happened at night, and he could only see the headlight of the oncoming vehicle and before the driver could take an action the collision occurred. It was admitted by the Counsel for the plaintiff that the point of impact was on the insured driver's lane. I cannot, with due respect, arrive at the conclusion that the insured driver was at fault or in any way contributed to the accident either by omission or commission. In any event the plaintiff pleaded that the incident occurred as a result of the sole negligence insured driver.

LOGDEMENT PROCEDURE: SECTION 24 OF ROAD ACCIDENT FUND ACT

15. Section 24 (1) of the Road Accident Fund Act provides as follow:

"(1) A claim for compensation and accompanying medical report under section 17 (1) shall-

(a) be set out in the prescribed form, which shall be completed in all its particulars;

(b) be sent by registered post or delivered by hand to the Fund at its principal branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office,

and the Fund or such agent shall at the time of deliver by hand acknowledge receipt thereof and the date of such receipt in writing."

16. The provisions of the act are mandatory that a claim should be lodged with the defendant in a prescribed manner. I have perused the court file and the pleadings and I find no evidence that claim was lodged with the defendant. It is expected of the plaintiff to satisfy the court that there was a statutory compliance before instituting the proceedings and failure to do so will result in one of the available consequence which is dismissal, absolution or refusal of the application.

17. In addition to subsection 1 subsection 6 provides as follows:

"No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent-

(a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by and to the Fund or the agent as contemplated in subsection (1); and

(b) before all requirements contemplated in section 19 (f) have been complied with:

Provided that if the Fund or the agent repudiates in writing liability for the Claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be". This section requires of the plaintiff to prove first that subsection was complied with, and I find that there is no proof of substantial compliance with the Act.

18. As I have indicated in paragraph 7 above Rule 31 (2) grants the court discretion after hearing evidence to grant judgement against the defaulting party or make such an order as it deems fit. In addition to the above Section 16 of the Civil Procedure Act 25 of 1965 permits the court to give judgment in any civil proceedings on evidence of a single competent and credible witness. This was interpreted by the

Courts to mean that only credible evidence shall Be sufficient to enable the court to give judgment.

19. I have already rejected the statement by Mr. Jaco Venter as it was found not to be an affidavit and therefore not evidence. Mr. Khoza's evidence is that of a single witness however.it is corroborated by the sketch plan which indicates that the point of impact was on the lane of the insured driver.

20. The written heads of argument by the plaintiff's counsel are also of no assistance to the Court. In paragraph three of his arguments the Counsel made the following submission "The accident occurred when the insured driver encroached on the lane of the deceased's motor vehicle and thereafter collided with it head on or side swept it." This submission is, with respect, incorrect, there is no credible evidence to support this submission.

Conclusion

21. In **Gascoyne v Paul & Hunter 1917 TPD 171 at 173**, the Court said: "At the close of the case of the plaintiff, therefore the question which arises for the consideration of the Court is evidence upon which a reasonable man might find for the plaintiff? The question for the Court would be: 'Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff.'"

22. In the light of the afore going this Court is not of the opinion that it will be fair and justifiable to exercise its discretion in favour of the plaintiff. I find no evidence upon which I could so decide. I'm also not convinced that there was a substantive compliance with Section 24 of the Act.

23.1 have considered the circumstance of this case and weight up my options. If find that it will not serve the interest of justice to dismiss the action or grant absolution from the instance. Issues in this matter can only be ventilated in a full trial and I therefore order as follows:

Order

1. The application for default judgment is refused

2. There is no order to cost.

RS Mashifane AJ
Acting Judge of the High Court
Limpopo Division, POLOKWANE

APPEARANCE

For the Plaintiff:

Counsel : M.J Petja

Instructed by : H.S Makhubela Attorneys

For the Defendant: No appearance.