

REPORTABLE: NO/  
BECCA M  
INTEREST TO  
OTHER JUDGES:  
REVISED.



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

(1)	REPORTABLE: NO/ <b>YES</b>
(2)	OF INTEREST TO OTHER JUDGES: NO/ <b>YES</b>
(3)	REVISED.
	21/08/2020
DATE	SIGNATURE

ACCIL  
CASE NO: 4677/2017

In the matter between:

REBECCA MOKGADI MABYE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

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JUDGMENT

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MG PHATUDI J



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**Summary:** Civil procedure- a defendant who participated in litigation- filing a plea but fail to appear in court to proceed with his/her defence, and absent himself/herself from the remainder, of trial must be accounted a defaulter – if by withdrawal of or termination of attorney's mandate without substitution of a new attorneys of record – such party in default if on trial date there is no appearance at all on the defendant's behalf – *in casu*, there was no consent by parties that the matter be either removed or postponed.

**Held-** defendant in default – plaintiff awarded general damages and claim for loss of earnings with costs.

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[1] The plaintiff in this matter issued a combined summons against the defendant on 28 June 2017. The claim arises from a motor vehicle accident that occurred on 26 September 2015 along Ga-Mushi public road, Limpopo Province. At the time of the collision, the plaintiff was a passenger in a motor vehicle driven by one Mr.Mabula, (the insured driver) which collided against a motor vehicle with an unknown plate registration numbers (the insured motor vehicle).

1.1 The Plaintiff in this action claims damages against the defendant for the bodily injuries incurred as a result of the accident. The said injuries were medically described as head injury, multiple scalp lacerations and chest pains.

1.2 In her particulars of claim, the plaintiff alleged that the collision referred to was caused by negligence on the part of the



insured driver whose details were to her unknown. The particulars of the alleged negligence were set out in paragraph 5 of the particulars of claim<sup>1</sup>

1.3 It was further alleged that as a result of the aforesaid collision, the plaintiff's damages includes past and future medical expenses, loss of earnings and general damages being for pain and suffering, loss of amenities of life, permanent disability and disfigurement, the total whereof amounted to R5 Million. This figure, however, was a mere estimation prior to involvement of the experts' report.

[2] I remark at this point that the defendant in resisting the action filed a Special Plea and a Plea which was delivered on 18 August 2017 on plaintiff's attorneys. Subsequent thereto and on 27 September 2017, the parties' legal representatives held a pre trial meeting in Polokwane the minutes whereof were jointly signed on even date.

[3] Notice of set down was delivered on 05 March 2020. Prior to the delivery thereof, Muller J certified the matter trial ready on 07 February 2020 both on merits and quantum. In the same breath,

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<sup>1</sup> Index to pleadings – P5-6



the learned Judge directed the parties to submit the signed joint minutes ("JM") by 28 February 2020.

[4] The plaintiff on 16 April 2019 brought an interlocutory application in terms of which she sought an order directing the defendant to deliver its discovery affidavit within ten (10) days from the date on which the order granted is served on the plaintiff's attorneys. In the same breath, an order was sought that failing compliance with the said order, the plaintiff (applicant) shall be entitled to approach the court on the same papers, for the striking out of the defendant's plea and the granting of judgment by default in the main action. The relevant application was set down for hearing before Ledwaba AJ on 20 June 2019, at which occasion, the relief sought was granted by default.

[5] Subsequent thereto, and after passage of some 4 months down the line, Kganyago J granted absolutely an order on 12 November 2019 that the defendant's plea (respondent) in the main action be struck out. Additionally, an order was granted that the main plea be dismissed as "**the matter is undefended**". The said order was issued pursuant to a second interlocutory application launched on 09 September 2019.

[6] I must point out early in this judgment that, Counsel for the plaintiff, adv. Mojamabu informed this court at the hearing of the matter



seeking default judgment that the defendant has to date made no effort either to seek a rescission of the latter order/s nor sought to appeal against the same.

[7] The present proceedings were as already shown enrolled for hearing on 01 June 2020 as per notice of set down delivered on 05 March 2020. When the matter was called on 01 June 2020 it was rolled over to 05 June 2020. There was no appearance for the defendant on the two days on which trial was due to commence. In other words, the defendant remained in default and no written explanation was advanced for its default. The claim was therefore heard on uncontested basis.

[8] As directed and in compliance with the court order made on 01 June 2020, plaintiff's counsel, Mr. Mojamabu, submitted written concise heads of argument to substantiate the plaintiff's claim. This document was identified and marked exhibit "C". In it, he submitted that the issues for determination are general damages and loss of earnings or earning capacity.

[9] At the hearing, the plaintiff's counsel submitted an Ophthalmologist's report dated 23 January 2019 (annexure "A") for consideration by the court. This document, in my view, does not take the plaintiff's claim any further. It merely restates the nature



and extent of the injuries sustained as recorded in medical records. What matters, of course, is that according to this annexure, "there is no significant change in general function (sic) as vision is concerned. In addition, "there was no significant ocular injuries sustained" from the accident, so concluded the eye specialist, Dr H.L Letsoalo in her/his report.

- [10] From a reading of the papers before court, including all expert's report, it cannot be said that the plaintiff did not establish or quantify her claim. The notice in terms of Rule 36 (9) (b)<sup>2</sup> with regard to expert notices was dispatched and threw light on the actuarial calculations made as at 07 February 2020. This report, was not negated by other evidence to the contrary.

### **C: THE ISSUE:**

- [11] The issue at stake is whether the Plaintiff succeeded to establish her claim against the defendant on a balance of probabilities.

### **D- LEGAL FRAMEWORK:**

- [12] The general principle applicable in claims of this nature is that the court is bestowed with a judicial discretion to determine the amount

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<sup>2</sup> Uniform rules of the court, expert notices attached actuarial Report, exhibit "B", by Dr. Robert Koch.



of compensation to be awarded as damages if, of course, the plaintiff's claim has merit.

[13] In the present case, the defendant had initially entered an appearance to defend and thereafter formulated a special plea, accompanied by a plea proper. The pleadings having closed, save for discoveries, and the matter being certified trial ready on both merits and quantum, the matter was heard on 05 June 2020. As already shown, (para7: supra) the defendant was despite service of the set down, in default.

[14] The reasons for the default were not advanced in court on behalf of the defendant. However, it is common cause that the defendant had previously withdrawn the mandate of its panel attorneys, *in casu*, the firm Hamman- Moosa Incorporated. Of importance is that the said firm did not formally file with the Registrar a notice of withdrawal as attorneys of record in this matter. Similarly, no formal written request was received from the defendant, its claim handlers or functionaries, seeking a postponement of the matter pursuant to the ongoing impasse between or among the panel of attorneys and the defendant (Road Accident Fund) which, in event, should not in anyway be attributable to the present litigants, particularly, the plaintiff and her attorneys.



[15] The view I took of the matter therefore was that a defendant who participated in the litigation from inception and delivered a defence, but thereafter fails to appear in court to proceed with his/her defence without any explanation proffered for non-appearance, thereby absenting himself/herself from the remainder of the proceedings must, in my view, be accounted a defaulter.

Vide: KATRISIS v DE MACEDO<sup>3</sup>

[16] If by withdrawal or termination of his/her attorney's mandate without substitution by introducing a new firm of attorneys such a party is thus in default if on trial date, there is no appearance at all on his/her behalf.

[17] In the present case, there was no indication whatsoever if the parties ever agreed or consented that the matter be either removed or postponed beyond the appointed hearing date. What therefore can safely be said as guided by the old authorities was that the defendant was in default ("verstek"- in Afrikaans, "abzentie of afwezen"-in Dutch)<sup>4</sup>

[18] That said, the court received only one side of the facts and the evidence in support of the plaintiff's claim. There was no

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<sup>3</sup> 1966 (1) 613 (A-D)

<sup>4</sup> Ibid. P618, A-B



countervailing evidence to negate the plaintiff's claim, either. In the premise, I held that the plaintiff succeeded to establish its case on a balance of probabilities.

[19] What remains to be considered therefore is the determination of the amount of compensation to be awarded. It is trite that an inquiry into damages for general damages resides in the court's discretion, while the quantum in relation to loss of earnings is, by and large, of its nature speculative. This is because is like one venturing in conjecture without the benefit of one being a soothsayer, of which courts of law are none. All that the court can embark on is to make an estimate, which is usually very rough, and seek to present value for the loss.

[20] All that is crucial is for the court to make an award based on fairness and equity to both parties, and above all, be reasonable in a given case. What the court may certainly not do for this reason, is to adopt a *non possumus* attitude and refrain from making an award at all.

[21] On a conspectus of the facts herein, I am satisfied that the plaintiff has on the evidence presented, at least suffered some monetary damage, which I am by law obliged to assess and make an award that fits the claim.



(See also, *HERSMAN v SHAPIRO & COMPANY*<sup>5</sup>)

[22] (In the circumstances, I make an order as follows:

**E. ORDER**

- (a) The defendant is ordered to pay an amount of R3 684 278.00 to the plaintiff, being for general damages and loss of earnings or earning capacity;
- (b) The defendant is liable to pay the costs of suit.
- (c) The draft order handed up and marked "X", is made an order of court.

MG Phatudi

**MG PHATUDI**

**JUDGE OF THE HIGH COURT**

**LIMPOPO DIVISION, POLOKWANE**

<sup>5</sup> 1926 (TPD) 367 at 379 – Stratford J



Date

Date

# REPRESENTATIONS:

Counsel for the Plaintiff : Adv S.K Mojamabu

On brief by : Chueu Inc, Lephale

Counsel for defendant : No appearance

Date Heard : 05 June 2020

Date delivered : 21 August 2020

Date

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