

SOUTH AFRICA / JUDGMENT

# Kekana v Road Accident Fund (21056/04) [2005] ZAGPHC 8 (6 January 2005)

**[2005] ZAGPHC 8**

## COURT

High Courts - Gauteng

## BEFORE

JCW van Rooyen

## CASE / FILE NUMBER

21056/04

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IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) Date : 6 January 2005  
REPORTABLE Case number: 21056/2004 In the matter between MAPULE KEKANA

PLAINTIFF and THE ROAD ACCIDENT FUND

DEFENDANT Default judgment – action for damages – judgment which holds negligence to have been proved generally not appropriate where no evidence is heard in terms of Rule 31(2)(a) Van Rooyen AJ[1] This is an application for a default judgment against the Road Accident Fund. The Court was requested to grant an order in the following terms: 1. That the issue of quantum and merits be separated; 2. That defendant is liable to compensate Plaintiff for the damages proven as a result of an accident dated 10 April 2003; 3. That the issue relating to quantum be postponed sine die; 4. That costs of suit be awarded against the defendant. [2] When the Court was already in session and the matter was called, counsel for the Defendant, Mr. Meintjies, requested that the matter be removed from the roll and tendered costs. A notice to defend had, at this stage, been filed. Mr. Snyman, for the Plaintiff, argued that the notice had not been properly served and was, in any case, out of time. This would require me to condone the irregular serving and, in the absence of cogent reasons for such filing, I should not condone the late and irregular filing. [3] Before I deal with the irregular filing, the primary issue is whether this kind of default judgment is proper in the circumstances. Rule 31(2)(a) provides as follows: “Whenever in an action the claim... is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention or of a plea, the plaintiff may set the action down... for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.” [4] In *NCP Havenga v SM Parker* (unreported 28 February 1993, TPD) Van Dijkhorst J, in an application for a default judgment, allowed the presentation of a sworn affidavit of an orthopaedic surgeon in regard to the injuries suffered by the plaintiff in a shooting incident. This judgment was discussed by Marius van Staden in 1993 *De Rebus* 483 (see Erasmus Superior Court Practice B1-200, note 12). The author welcomed the innovative approach to the Court in the light of past practice where such evidence had to be led  *viva voce*. The learned author also referred to The

New Zealand Insurance Company v Du Toit 1965(4) SA 136(T) where the Court came to the conclusion that, although it would be dangerous to allow this type of practice, it would err if it did not allow the sworn statement concerning the quantum in the circumstances of the matter before the court. The damages were obviously much more than the R5000. Van Staden points out that this judgment had, for some inexplicable reason, not found general application in our courts. The presiding Judge in the Havengamatter had, however, stated that he had discussed the matter with some of his brother judges and the Judge President. Of course, the admission of such evidence would not exclude the power of the court to require viva voce evidence in an appropriate case.

[5] In Mashifane v Suliman and Another 1931 TPD 328 Maritz J (as he then was), in dealing with an application for default judgment on a claim for damages arising from the death of the plaintiff's husband as bread-winner, stated as follows at 331: "So even if Mr. Niemeyer is correct in contending that though your action be based on tort you need not necessarily prove the cause of your action when the defendant is in default (a point on which it is not necessary to express an opinion in these proceedings), the Court still has a discretion and may order that evidence be placed before it proving the plaintiff's cause of action. So... I certainly think that in this case I should exercise my discretion and refuse to entertain the question of the amount of damages before I have satisfied myself, by evidence, that negligence has been proved entitling the plaintiff to claim damages."

[6] In Venter v Nel 1997(4) SA 1014(D & CLD) Broome DJP also had an undefended action for damages before him. He states as follows at 1016A: "The practice in this Division is to hear some evidence on claims for damages, but inevitably the inquiry is not as detailed or controversial as it would be were the matter defended, were the defendant be defended by counsel and were the evidence of the witnesses who testified for the plaintiff tested by way of cross-examination and by the defendant leading countervailing evidence. In this particular matter I have heard evidence from the plaintiff herself, from her counselor, Mrs Towell, and from Dr Andrew Clark, who is well acquainted with the facts of this case and is an expert in this field of medical science... I am asked simply to fix a figure for damages and, in doing so, I stress that, the matter being undefended, the inquiry is inevitably not as detailed as would otherwise be the case."

[7] In Dorfling v Coetzee 1979(2) SA 632(NC) it was remarked that in motor collision cases the approach was that the evidence should not be confined to quantum, but that that the cause of action should also be established as well as whether there was contributory negligence. Basson AJ stated as follows, after considering the practice in some other Divisions: "Ek het die geleentheid gehad om die aangeleentheid met twee Kollegas... te bespreek en ek kan dit as 'n feit stel dat dit nie die praktyk in hierdie Afdeling is om in 'n geval soos hierdie die getuienis te beperk tot slegs die bedrag van die skade nie."

[8] It was argued by Mr. Snyman that on previous occasions this Court had issued default judgment in the terms which were stated in his notice of setdown. It is clear, of course, that Rule 31(2)(a) does grant a discretion to the Court as to whether to require evidence or not. I agree with what Beadle CJ said in Knight NO v Harris 1962(2) SA 317(SR) that this course should only be followed in exceptional cases: "in the normal course ... I am inclined to the view that it would be unwise for a Court to dispense with the hearing of evidence in claims (in cases of claims for damages arising from motor collisions) such as this. I have discussed the matter with the Senior Judge during recess this week, Botha J, and he has confirmed that it is not the general practice in this Division to issue a default judgment in

terms of Rule 31(2)(a) in an action for damages without hearing evidence. The Court always has a discretion to insist on viva voce evidence but it may, under circumstances, be satisfied with evidence by way of affidavit. Cf what was said by Van Dijkhorst J in *Havenga* (supra). [9] It should be added that the division of cause of action and quantum, at this stage of the litigation, would also not seem to satisfy the requirement of convenience in terms of Rule 33(4). Mr. Snyman argued that the plaintiff would at least be in a position to obtain certain payments at this stage. However, my main concern remains: is the defendant liable at all? At trial stage such a division of the matter would seem equitable, but at this stage, given the absence of any evidence, I cannot find any convenience or fairness in the division. [10] In the present matter I am, with respect, at a loss as to how I can safely find that a cause of action exists. There is no manner in which I would be able to establish from the particulars of claim whether the driver of the motor vehicle was negligent and whether the minor of eight years, who was injured in the present matter, might not have been negligent as well. It is true that a minor of eight might not have been *culpa capax* but I cannot simply accept that, without evidence being led in this regard (cf *Weber v Santam* 1983(1) SA 381(A)). [11] It is true, of course, that a default judgment may be set aside on application of the defendant. But this is beside the point at this stage: this Court cannot responsibly issue an order in a complicated matter such as the present without hearing evidence. If necessary, the expert evidence, and possibly even other evidence, might be led on affidavit. This would depend on the complexity of the case. However, in the present matter I have nothing more before me than the Particulars of Claim. It would, to my mind, be unwise to grant an order on the mere papers before me. I would require viva voce evidence in such a complex case and probably accept an affidavit from the expert medical witness. Of course, the inquiry might not be as detailed as in a defended matter. In the present matter there is, however, no evidence before me. To simply accept that the driver was negligent or solely negligent would amount to, as it were, a leap into the dark. The application is dismissed with costs. In the light of the conclusion which I have reached, I need not deal with the question as to the regularity of the notice to defend, which was brought to my attention at the hearing of the matter the day before yesterday. The application, as such, was abortive. JCW van Rooyen..... Acting Judge of the High Court 6 January 2005  
Advocate for the applicant: M Snyman  
Advocate for the defendant: Viljoen Meyer  
Attorneys for defendant: Gildenhuys Van der Merwe Inc  
Attorneys for plaintiff: Van Huyssteen & Kriel  
Attorneys  
Heard on: 4/1/05

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Advocate

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Attorneys for defendant: Gildenhuys Van der Merwe IncAttorneys for plaintiff: Van Huyssteen &  
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