

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2023-074860

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE: 07 May 2024

WEIDEMAN AJ

SIGNATURE

In the matter between:

THEMBEKA NCAMISILE EJIKE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

WEIDEMAN AJ

- [1] This matter was on the default judgment roll for the 26th March 2024. There was no appearance for the defendant and the matter therefore proceeded unopposed. It was first stood down until 11h30 at the request of the

plaintiff's representative and thereafter again to 14h00 before proceedings commenced.

- [2] The plaintiff's representative indicated that they want to lead evidence by way of affidavit and other documentation filed of record and proceeded with an application in terms of Rule 38(2). As there was no obvious reason to call for *viva voce* evidence, the application was granted.
- [3] I was advised that the matter would be proceeding both in respect of negligence and quantum. The aspect of negligence was dealt with first.
- [4] The accident from which this claim arose occurred on the 10th April 2021. According to the particulars of claim the plaintiff was stationary at a stop sign when an unknown driver ignored the stop sign and collided with her. The same allegation in respect of a collision from behind is also found in paragraph 4 of the plaintiff's section 19(f) affidavit and which affidavit is to be found at CaseLines 12-134. This version is again recorded in the Accident Report Form, albeit that the sketch plan suggests that both vehicles were in the through road and not at the stop sign.
- [5] Careless pleadings and preparation of documents resulted in the following being placed before court: Paragraph 1 of the particulars of claim suggests that the plaintiff is "an adult female". [CaseLines 02-4]. Whereas in paragraph 1 of the section 19(f) statutory affidavit, the plaintiff swears, under oath, "I am an adult male person". [CaseLines 12-134] Neither paragraph 4 of the statutory affidavit nor paragraph 4 of the particulars of claim indicates where the accident occurred [CaseLines 02-4]. One gathers from the Accident Report Form that the accident occurred in Berea, Johannesburg. [CaseLines 12-137]. The final issue is the grounds of negligence. The particulars of claim contains only the "standard template" grounds of negligence and it is of no use in determining what exactly the insured driver is alleged to have done wrong. [CaseLines 02-4]
- [6] If there was opposition to the action, there would have been legitimate reasons for the defendant to feel aggrieved. However, for whatever reason, the defendant opted not to defend the matter. As the only version before

court is that of the plaintiff it creates a *prima facie* case of negligence on the part of the unknown insured driver. To the extent that there is no evidence to gainsay the plaintiff's version and the version is not inherently improbable, the only possible outcome is an order that the defendant is 100% liable for such damages as the plaintiff may be able to prove.

- [7] According to the particulars of claim [CaseLines 02-5] the plaintiff sustained the following injuries:

"Pelvic fracture

Fracture of the ankle

Other serious injuries"

- [8] In respect of these injuries she claimed:

"Past hospital and medical expenses	R520 000.00
Future medical treatment	Undertaking
Estimated loss of earnings and earning capacity	R388 366.00
General damages	R1 500 000.00"

- [9] The orthopaedic surgeon's medico-legal report, prepared by Dr Peter T Kumbirai listed the plaintiff's injuries as:

"Fracture right ankle.

Abrasion right flank."

There is no mention in his report of the pelvic fracture that is listed in the particulars of claim.

- [10] Dr Kumbirai records that the plaintiff has a full range of movement of the right ankle, without pain. [CaseLines 06-13] He further states under "Prognosis and Future Mobility" that the plaintiff sustained a fracture of the right ankle that was treated by open reduction and internal fixation. The

fracture had united with the screws *in situ*. The ankle mortise is normal. He recommends that the screws be removed. [CaseLines 06-14]

- [11] The only other medical report that had been obtained is that of the occupational therapist, Ms. D Mathebula. She confirms the same injuries as the orthopaedic surgeon.
- [12] Prior to the accident the plaintiff allegedly had a business transporting children to school. According to Ms Mathebula the plaintiff's reported work duties falls within the category of light duties. The plaintiff reported to her that the vehicle with which the children were transported broke down whilst she was recuperating. [CaseLines 06-63]. This is clearly not the vehicle that she was driving at the time of the accident as she was driving a Mercedes Benz whilst the children were transported with a Mazda.
- [13] According to Ms Mathebula, based on the plaintiff's physical ability, she was suited to work as a short distance driver with reasonable accommodation. She expressed the opinion that the plaintiff would be better suited to drive an automatic car with pedal shift to the left. This would then accommodate the limitations of the right ankle.
- [14] The industrial psychologist's report is on CaseLines from 06-19. The plaintiff reported to her that she worked at a business called Legal Tax from 2010 to 2014 earning approximately R10 000 per month. During 2015 she was unemployed and in 2016 she started a business transporting children to school. She was still engaged with this business in April 2021 when the accident occurred. She reported that she made R3 000 per month profit.
- [15] It is regretful that a report such as this was served and filed. The industrial psychologist's primary function is to address the plaintiff's employment prior to, and at the time of the accident, as well as her capabilities after the accident. Expressing an opinion based purely on the verbal information conveyed by the plaintiff is not of assistance as it is no more than speculative hearsay. In the current matter the plaintiff allegedly conducted her own business. By implication she should have had a set of accounting books. She should have had bank statements, tax returns, both her own and for the business, if it was

a separate legal entity. All of these should have been called for and the industrial psychologist should have remarked on it. There is not a single piece of evidence available to substantiate that she transported children for reward. In addition, if it is accepted that she did transport children for reward, did she require a public driver's permit and did she have one?

- [16] In addition, she earned R10 000 per month before she allegedly started transporting children for an alleged profit of R3 000 per month. There is nothing in the report to suggest that Mrs Fakir ever investigated why she could not return to the higher income earning position that she occupied earlier in her career and which, ex facie the limited information available, consisted of phoning clients, a position which would fall within the category of light duty occupations that the occupational therapist stated that the plaintiff was suited for.
- [17] Based on the plaintiff's own evidence that the vehicle used to transport the children broke down while she was recovering and that this was the reason why she did not return to transporting children, one would expect this to be properly interrogated in the industrial psychologist's report before the inability to get a vehicle back on the road is linked to the accident, as is suggested in her report.
- [18] To the extent that there is no evidence that could serve as the foundation on which the industrial psychologist's report is based none of the conclusions contained in the report can be accepted.
- [19] Considering the above the calculations of the actuary is also of no assistance and that report is also rejected.
- [20] In the occupational therapist's report it is recommended that the plaintiff be provided with an automatic vehicle as it would overcome most of the residual limitations of the right ankle.
- [21] Reference is also made to an automatic vehicle in the industrial psychologist's report, and it is also recorded in the actual report as an unquantified loss that must be added to the loss of income calculation.

[22] When this issue was debated in court it was conceded that the plaintiff is not entitled to an automatic vehicle. All that the plaintiff is entitled to is the difference in costs between a manual and automatic vehicle if there is a difference in costs and only if an automatic vehicle is more expensive than its manual counterpart. To the extent that there is no evidence before court as to whether there is a difference in cost and, if so, what that might be, this claim is equally unsubstantiated and must fail.

[23] No documentation in support of the claim for past hospital and medical expenses has been presented. Albeit that a significant claim found its way into the particulars of claim there is no reference to it in plaintiff's Heads of Argument nor are there any documents uploaded onto CaseLines that could serve to underpin this claim. It is thus unsubstantiated and must fail.

[24] The Road Accident Fund has not made an election in respect of the claim for general damages, and this head of damage is postponed.

[25] A claim for future hospital and medical expenses is supported through the medico-legal reports of the orthopaedic surgeon and the occupational therapist and the plaintiff will be entitled to an Undertaking in this regard.

[26] **In the circumstances I make the following order:**

26.1 The defendant is liable for 100% of such damages as the plaintiff has been able to prove.

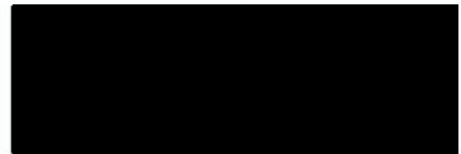
26.2 The plaintiff's claims for past hospital and medical expenses as well as loss of income are dismissed.

26.3 The plaintiff's claim in respect of general damages is postponed *sine die*.

26.4 The Plaintiff's claim in respect of future hospital and medical expenses succeeds and the Defendant is ordered to provide the plaintiff with an unlimited Undertaking in terms of Section 17(4) of the Road Accident Fund Act.

26.5 The plaintiff is entitled to her party and party costs, as taxed or agreed, and in so far as the matter was heard before the amendment to Rule 67A of the Uniform Rules of the High Court the scales contained therein is not applicable.

26.6 Given the dismissal of the plaintiff's claim for loss of income the plaintiff is not entitled to recover any costs associated with the reports of First Leap Consulting and Ekhaya Risk Services from the defendant.



WEIDEMAN AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines*. The date and time for hand-down is deemed to be 07 May 2024.

Heard on: 26 March 2024

Delivered on: 07 May 2024

Appearances :

On behalf of the Plaintiff: Ms A N Nyathi

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On behalf of the Defendant: No appearance