

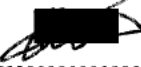


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE

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

1 July 2025
DATE


SIGNATURE

CASE NO: 2019-19802

In the matter between: -

CHRISTOPHER MTIKA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

CAJEE AJ

1. This matter came before me as a Default Judgment Application in which the Applicant sought an order for payment in the sum amount of R3 373 408 (Three million three hundred and seventy three thousand four hundred and eight rand only), which, having regards to the heads of argument uploaded by counsel is made up as follows:

1.1. Past Loss of Earnings - R 320 012

1.2. Future Loss of Earnings – R 2 673 408

1.3. General Damages – R 700 000

In addition the Plaintiff seeks a statutory undertaking for his future hospital and related expenses.

2. Despite how the amount claimed is computed in the heads of argument there is also a prayer in the draft order that the claim for general damages be postponed sine die.
3. There is no indication that the Defendant ever conceded liability for general damages or that the HPCSA ever found that the Plaintiff is entitled to same. In the circumstances this claim has to be postponed as a court has no jurisdiction to determine liability for general damages in the absence of

these factors. See in this regard Knoetze obo Malinga and Another v Road Accident Fund (77573/2018 & 54997/2020) [2022] ZAGPPHC 819 (2 November 2022).

4. The uploaded heads of argument and draft order also do not mention the fact that there was a settlement in respect of the issue of negligence as discussed hereunder. In the premises whatever order I make in respect of quantum has to be reduced by 50%.
5. The Plaintiff is from Malawi. He was in possession of a temporary asylum seeker permit at the time of the accident. This permit expired in December 2018. He allegedly has not applied for an extension of this permit pending a final determination in respect of his application for asylum. His stay in South Africa is thus illegal and he runs the risk of deportation should he ever be caught. It appears that the Applicant applied for and was granted a temporary asylum seeker permit solely in order to legalise his stay in South Africa. According to the report of the Industrial Psychologist and the other expert reports there is no indication that he left Malawi for political reasons or that he was being persecuted there for any reason. I will return to this aspect later in the judgment.
6. In his heads of argument Adv. Tshungu sets out the injuries the Plaintiff sustained in the accident, his alleged pre and post-accident employment history and the expert opinion in respect of the medico-legal assessments he attended.

7. The plaintiff was involved in an accident that occurred on the 12th of September 2018 in Fourways. He was 31 years old at the time. He was the driver of a motorcycle that collided with a white BMW motor vehicle. The issue of negligence only was settled between the parties on a 50/50 apportionment, as per an offer and acceptance uploaded to caselines. It is not explained why this was not brought to my attention in the uploaded heads of argument or draft order. The Plaintiff is thus entitled to only 50% of his agreed or proven damages save for the issue of non-pecuniary general damages which are to be postponed sine die. In addition, the Plaintiff is required to prove compliance with the provisions of the Road Accident Fund Act 56 of 1996 and its attendant regulations.
8. The Plaintiff was transported to the Helen Joseph Hospital after the accident where he was admitted and received medical treatment. According to the hospital records he sustained a midshaft fracture of his left tibia and fibula which was treated with an open reduction and internal fixative surgical procedure. He developed a fat embolism as a complication. He was admitted for one week before being discharged. He used two crutches for one and a half months and thereafter used only one for an undisclosed period thereafter.
9. At the time of the accident the Plaintiff was working as a delivery driver for Mr. Delivery. He has a standard seven level of education obtained in Malawi.

10. The Plaintiff was examined by several experts prior to the hearing of this matter. One of these is Dr. Steyn, an orthopedic surgeon. In his report following an examination he carried out on the 19th of November 2018, only some ten weeks post- accident he noted that the Plaintiff complained of pain in his left lower leg, and limped when he walked without a crutch. At the time of the assessment the Plaintiff could only allegedly walk with one crutch for 500m and two crutches for longer distances. He had not yet returned to work at the time. He could allegedly only stand for less than half an hour. He wasn't using painkillers and allegedly had no previous fractures or hospitalisations. Upon examination the doctor found that the leg lengths were normal, and the hip had a good range of motion. There was no sign of muscle wasting but there was a 3cm swelling of the left lower leg. As far as his examination of the left knee was concerned the doctor noted that there the fixatives in the form of screws were still in place and there were scars on the leg. There was no joint swelling and no patella-femoral crepitus. There was pain around the left knee on palpation and movement which was decreased. The cruciate and collateral ligaments were stable as best as could be determined.
11. Dr. Steyn obtained an X-Ray report which showed that the tibia and fibula were uniting and there was no sign of arthritis. He found the prognosis regarding the orthopedic injuries to be reasonable and opined that the Plaintiff would need another few months for union of the tibia and fibula to occur. He opined that the internal fixatives would need to be removed in a

year or two. This would mean that this should have occurred at the latest by the end of 2020. There is no evidence that this was done, and if not, why not. Dr. Steyn also deposed to an affidavit dated the 17th of September 2024 in which he confirms that he carried out the examination on the Plaintiff almost six years earlier. We can thus accept that there was no further orthopedic examination in that time. Had one been carried out we would have known if there had been union of the tibia and fibula, if there had been any improvement in mobility, and if the fixatives had been removed. This in turn would have informed the further prognosis of the injuries suffered by the Plaintiff and his current functioning.

12. In her report dated the 22nd of June 2022 following an examination and assessment she carried out on the 1st of November 2018, the occupational therapist Ms Shakoane outlines many of the same complaints related to Dr. Steyn. She describes the Plaintiff's duties as a delivery driver for Mr. Delivery Food as being light in nature. He allegedly used a rented motor bike and was employed in this capacity for about three months at the time of the accident. He held a drivers license issued in Malawi. He informed her that he was not employed at the time of her interview and assessment. It should be noted that this assessment and interview took place only six weeks post accident. However at the time of compiling her report she does appear to have had sight of the report of Dr. Steyn, as she refers to it.

13. She notes that at the time of her assessment the Plaintiff did not meet the requirements of any work capacity. This is hardly surprising as the assessment took place only six weeks after the accident when the Plaintiff was still ambulating on two crutches. She notes that his treatment was not yet optimised and he still required intensive physiotherapy and the healing process not yet completed as the union was still taking place as per Dr. Steyn's report and that the internal fixatives still had to be removed.
14. Ms. Shakoane also refers to the RAF4 form and report completed by a Dr. Scheepers, who is a general practitioner, that at the time of him completing the RAF4 form on the 23rd of October 2018 the Plaintiff had probably not yet attained MMI, or maximum medical improvement, which was only anticipated to occur in a year's time. She does however express the opinion that even with the recommended treatment there are high possibilities that he was likely to experience some impairments which would negatively affect his abilities to engage in occupations that were physically demanding. As to how as an occupational therapist she could make this assessment and the nature and extent of these anticipated impairments is not set out.
15. In her report dated the 13th of July 2022 after an assessment carried out on the 1st of November 2018 and a follow up call during July 2022 the industrial psychologist Ms. Vuyo Nako states that the Plaintiff informed her that at the time of the accident that he had completed a Grade 7 level of

education in Malawi. He was in possession of an A1 drivers license issued in Malawi which was the equivalent of a South African motorbike license. He arrived in South Africa in November 2017 seeking employment opportunities. At the time of the accident he was in possession of a temporary asylum seeker permit that expired in December 2018. He did not renew it thereafter.

16. The Plaintiff informed Ms. Nako that he obtained a job as a delivery driver for Mr. D in June 2018. He was thus employed by them in this capacity at the time of the accident. He was not getting a fixed salary. He was paid R20 for every delivery he made and was paid every second week. He was renting the motorcycle from someone else to whom he paid 40% of his earnings. He made an average of 170 deliveries every two weeks (between 120 and 220 deliveries). He also received tips averaging R425 every two weeks (between R200 and R625). This would equate to earnings of R3825-00 every two weeks. Once he had paid 40% over to the owner of the motorbike, this would thus leave him with R2295 net earnings every two weeks. This would equate to net monthly earnings of around R5000 per month. It is not stated in the report who paid for the fuel he used in making deliveries. His net annual earnings would thus equal around R60 000 per year, and not the R79 200 calculated by the expert. The Plaintiff was unable to provide documentary proof of earnings at the time of the accident.

17. Ms. Nako states that by age 45 the Plaintiff would have reached his career ceiling at the upper quartile of skilled workers as per the 2018 Quantum Yearbook compiled by actuary Robert Koch, whereafter inflationary increases would have applied. However she does concede that being a foreign national with no distinctive skills to offer he would have been an unequal competitor in a sector where there is a very high unemployment rate. In my view one should add that having elected not to renew his permit, or that even had he done so, at some point there was a likelihood that his application for full asylum may have been rejected given the fact that he on his version does not qualify for such, is a further factor that needs to be taken into account when it comes to determining contingencies. One should further note that he was only employed for some three months at the time of the accident, which is a further factor that needs to be considered in determining pre accident contingencies.
18. Prior to completing her report Ms. Nako contacted the Plaintiff by telephone who informed her that he had returned to his previous duties with Mr. Delivery four months post accident, but resigned two months later due to residual symptoms from the accident. He remained unemployed until September 2021 when he secured employment as a food delivery driver using an automatic scooter for Debonairs Pizza earning a fixed salary of R4000 per month. He remained employed in this capacity until 16 June 2022 when the scooter allegedly broke down and the employer failed to fix it. He had remained unemployed since then till the time of the

telephonic interview, save for menial gardening jobs for which he got paid between R150 and R200 at a time. He got these jobs between once or twice a week, but not all the time. Ms. Nako was however put in possession of a remittance advice dated the 31st of January 2021 which showed that the Plaintiff earned just over R 5000 every two weeks, of which some R2000 was for tips. This would be contrary to the information provided to her by the Plaintiff.

19. During her follow up interview with the Plaintiff, the Plaintiff complained to Ms. Nako that walking and sitting for long periods still caused pain in his left knee, he had difficulty riding a manual motorcycle and he struggled with the heavy work demands required of him as a gardener. He complained he could not put weight on his left leg and experienced oedema on his left ankle.
20. The difficulty I have with this case is that there is no objective evidence of whether or not the Plaintiff received treatment in the form of removal of the fixatives, nor how well he had healed. We only have his report to Ms. Nako that he had not received any further treatment post-accident. The reason for this is not explained as his internal fixatives should have been removed by now. All that we know, based on his own reporting, is that he had resumed driving a motorcycle post-accident and resumed the same employment he did pre-accident but that he had lost this job due to the employer failing to repair the automatic motorcycle he used for his

deliveries at the time. At the time of the hearing of this matter even the report of Ms. Nako was stale already. As stated, no updated orthopedic surgeons assessment or report was provided. We only have his subjective reports and complaints to rely on.

21. The fact that the plaintiff was in South Africa with a temporary asylum seekers permit at the time of the accident, even if same was obtained by false pretenses, does not disqualify him from claiming damages from the Defendant. In fact, even if he was not the holder of such a permit or any other permit, would not have affected his entitlement to claim damages. This much is clear from the full bench decision of *Mudawo and Others v Minister of Transport and Another* (011795/2022) [2024] ZAGPPHC 258 (26 March 2024). I am in respectful agreement with the judgment and in any event bound by it.
22. I am however of the view that the fact that the Plaintiff failed to renew his permit or otherwise regularize his stay in the country can and should be taken into account when determining contingencies regarding his pre accident earnings. As stated, such claimants are always at greater risk of deportation. They are also far less likely to achieve postulated career ceilings than those who are legally in the country. This would apply with greater force to people with no qualifications competing with others in an already saturated market with high rates of unemployment. They would also be more prone to exploitation by unscrupulous employers.

23. In her report Ms. Nako cites the following review by an employee regarding working as a delivery driver:

“At takealot you will not be treated with love by management, you are a slave and you are replaceable, you are expected to work whole days without rest even though you are an independent contractor and it's a part time gig or side hustle, you get threatened for not being shifted you get fined.

As a contractor at takealot/MrD you provide your own resources car, petrol, cellphone, data and airtime of your own without these you are not able to work or function but you are threatened if you don't come for a shift even though you are independent they don't provide anything but they still feel the need to threaten you when you are unable to come in or you are out of resources.

It's not a healthy environment both Sandton n Soweto branch they looking out for their own interests and you are just a skivy.”

24. If true, this would once again highlight the precarious position of delivery drivers in South Africa. As to how people employed in these positions can expect any career progression is questionable as postulated by Ms. Nako.

25. Having said this, without the benefit of fresh medico-legal report by the orthopaedic surgeon, occupational therapist and/or other qualified medical professionals it is impossible to make a determination of the plaintiff's post-accident employability as a result of the injuries he sustained.
26. In the premises I believe the best course of action would be to postpone the claim for loss of earnings.
27. I don't see any reason why the Plaintiff is not entitled to an undertaking for his future medical expenses. However, I am not willing to grant any costs at this stage due to the fact that the Plaintiff came to court with very stale medico-legal reports. Granting costs would encourage piecemeal litigation which should be discouraged. In any event I am of the view that the Plaintiff's attorneys should have waited until his injuries had settled before obtaining medico-legal reports. The RAF4 form by Dr. Schepers should have alerted them to this fact. As they stand the reports are not of much assistance to me.
28. I accordingly hand down judgment in the following terms:
 - "1. The Defendant is liable for fifty percent (50%) of the Plaintiff's agreed or proven damages.
 2. The Plaintiff's claim for loss of earnings is postponed sine die.

3. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17 (4) (a) of Act 56 of 1996 to pay fifty percent (50%) of the loss of future accommodation of the Plaintiff in a hospital/or nursing home and such treatment, services or goods as he may require as a result of the injuries that he sustained in the accident which occurred on 12th September 2018, upon proof thereof.
4. The Plaintiff shall obtain fresh medico-legal reports before proceeding further with this matter.
5. There is no order as to costs.



CAJEE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing:	23 rd September 2024
Date of Judgment:	1 st July 2025
For the Plaintiff/ Applicant:	Adv. S. Tshungu 078 610 1793