

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/3978

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

..... 11/03/2024
SIGNATURE **DATE**

In the matter between:

NTSEMBI MAMSI, (aka) CHABULE NTSEKI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

WEIDEMAN AJ:

Heard on the 16 February 2024

Judgment handed down: 11 March 2024

Background

1. On or about the 16th of December 2019 and at or near Jules Street, Malvern, Johannesburg, the plaintiff was knocked over from behind by an unidentified minibus vehicle which failed to stop. At the time she was a pedestrian walking along the pavement. She was taken by ambulance to Charlotte Maxeke Academic Hospital.
2. At the commencement of the proceedings, the plaintiff moved an application in terms of Rule 38 (2) to adduce evidence by way of affidavit. The application was granted.
3. The defendant has failed to comply with a previous order of this court (South Gauteng High Court) granted on 01 September 2023 and accordingly became *ipso facto* barred from filing its plea.
4. Both parties were nevertheless represented at the hearing of the matter, the plaintiff by Adv M Fisher and the defendant by Ms Y Ramjee.

Issues in dispute

5. The issues that remain in dispute are the determination of:
 - (i) the apportionment of liability (if any),
 - (ii) quantification of the Plaintiff's claim for General Damages,
 - (iii) quantification of the Plaintiff's claim for Loss of Earnings and
 - (iv) quantification of the Plaintiff's claim for Future Medical Expenses.

Liability

6. On or about 16 December 2019 at approximately 21h00 and along Jules Street, Malvern, Johannesburg, being within the jurisdiction of the above Honourable Court, a collision occurred between a motor vehicle of which both the registration letters and numbers as well as the identity of the owner or

driver is unknown to the plaintiff (hereinafter referred to as “the unidentified motor vehicle”), and the plaintiff who was a pedestrian.

7. The plaintiff’s version is simply that she was walking next to the road when the vehicle, which must have left the road surface, collided with her from behind. The same version is also recorded in the Officer’s Accident Report form.
8. The only evidence before court regarding the issue of negligence is the evidence as led by the plaintiff. Having this in mind, one must remind oneself that once evidence has been led, it calls for a reply. If no evidence in rebuttal is adduced, such evidence becomes conclusive proof and the party giving it discharges the onus.
9. The defendant, having been barred, did not counter the version of the plaintiff. It however became evident in court that there was no opposing version and that the plaintiff’s version was the only version before court. Accordingly, the aspect of liability is disposed of with a finding that the unknown driver was solely negligent in causing the accident. The defendant is therefore liable to compensate the plaintiff in full for such damages as the plaintiff may be able to prove.

Quantum

10. The plaintiff sustained the following injuries:

10.1 A concussive head injury with a GCS of 14/15. At the hospital, the plaintiff was examined, X-rayed and underwent multiple surgical procedures including initial debridement and stabilisation with an external fixator. This was followed by a second debridement and application of vacuum dressings. She was readmitted for secondary bone grafting of the distal tibia.

10.2 A right open Weber B3 fracture of the ankle.

11. The orthopaedic surgeon, Dr M A Scher, was of the opinion that the plaintiff’s limited qualifications and the right hindfoot fusion will render her unlikely to manage conventional work. She was a hawker/food vendor prior to the accident and has not worked subsequently.

12. The neurologist, Dr T Townsend, found the plaintiff to have reached MMI. The plaintiff has persistent post-traumatic headaches and if these persist beyond the three months mark, they are considered as being persistent (a term which has been adopted in place of chronic). He found that the plaintiff has symptoms of significant accident-related post-traumatic mood disorder. She has musculoskeletal pain and disability from her orthopaedic injury. Although the plaintiff complained of cognitive difficulties, Dr Townsend does not expect any significant persistent cognitive defects to arise from a mild head injury.
13. The clinical psychologist, Ms T Da Costa believed that the plaintiff's educational and occupational history indicates a below average level of intellectual functioning pre-accident. She is likely to have sustained a brain injury as is evidenced by cognitive deficits associated with attention and concentration, poor visual memory, as well as those related cognitive deficits mentioned in her report. She is of the view that the plaintiff will struggle to find formal employment due to primarily her neurophysical, neurocognitive, neuropsychological and neurophysiological difficulties.
14. The occupational therapist, Ms S Fletcher, held the opinion that the plaintiff's injuries have significantly affected her lifting and carrying capacity and affects her grip strength and upper limb speed and coordination, ultimately affecting her ability to perform work tasks that require physical strength and fitness. She remains suited to sedentary work however, due to a lack of education and limited marketable skills, it is highly unlikely that the plaintiff would be able to secure such employment in the open labour market. Agility and walking limitations will significantly restrict her employment options.
15. The industrial psychologist, Ms L Leibowitz, recorded in her report that the plaintiff resorted in June 2018 to self-employment, cooking and selling chicken feet and "kota" and was also working in this capacity at the time of the accident. The plaintiff reported that she ran a cash business and as such could not provide any proof of earnings. The plaintiff further estimated that she made a profit of between R350-R450 per week. Prior to the accident she was in good health and she coped with her work demands.

16. Ms Leibowitz was of the opinion that the plaintiff presented as a vulnerable individual. She noted that there was an agreement between Dr Scher and Ms Fletcher that it is unlikely that the plaintiff would be able to work again and she agreed with the aforementioned experts in that regard. The plaintiff will probably remain unemployed. She noted that the plaintiff has not earned any income since the accident. She is not able to return to being self-employed. The plaintiff presented as a vulnerable individual, was unlikely to be a candidate for sedentary employment and according to all the experts she would not be able to work again.
17. The actuarial report was prepared based on the findings as recorded in the industrial psychologist's report. The plaintiff's income was taken as R375 per week and the calculation makes provision for a higher-than-normal mortality factor for the reasons as contained in their report.
18. The results are as follows (all values in Rands):

Earnings had accident not occurred:

Past	Future	Total	
89 716	410 300	500 016	
4 486	82 060	86 546	Less Contingencies (5%/20%)
<u>85 230</u>	<u>328 240</u>	<u>413 470</u>	

19. I find no reason to deviate from the calculation as set out in the actuarial report and accept the accrued and prospective loss of income as per the above, i.e. accrued loss of income of R85 230.00 and a loss of R328 240.00 in respect of prospective income. The total will then be R413 470.00.
20. Mr Fisher invited the court to accept the claim for general damages and award an amount in respect thereof. He advised the court that the defendant had on a previous occasion made an offer of settlement and which offer of settlement included an amount in respect of general damages.
21. Ms Ramjee, on behalf of the defendant, argued that the offer of settlement that had been made was done without prejudice and without admission of liability and as such this court is not entitled to take cognisance of it at all.

22. Mr Fisher, in support of his argument, referred me to the matter of *AME Mertz v Road Accident Fund 2022 NGHC Case no A96/2021*, a Full Bench decision.
23. The facts of the present case are distinguishable from those of *Mertz v Road Accident Fund*, because in that matter the Road Accident Fund conceded liability for general damages at a pretrial conference held between the parties. There is no such concession in this matter.
24. I was also referred to the matter of *Chetty v Road Accident Fund (A91/21) [2021] ZAGPPHC 848*, another Full Bench decision.
25. The defendant in the *Chetty* matter had waived any privilege in respect of the offer it had made during an earlier application for a postponement, where an appropriate award in respect of an interim payment had to be decided. There is no such waiver of privilege in this matter. In the premise the facts of this case can be distinguished from those in the *Chetty* matter as well.
26. There is a third, more recent matter which also deals with this issue, the matter of *Keagen v Road Accident Fund 2024 JDR 0369 (GJ) Case no 15432/2021*.
27. This judgment was handed down on the 1st February 2024 and the summary of the judgment reads as follows:
- 'Summary: Without Prejudice offers to settle claims for General Damages by the Road Accident Fund do not constitute an admission of liability of same unless the Fund waives privilege in respect of such offers, or there is a clear indication that it conceded such liability elsewhere.'*
28. The summary neatly addresses the facts underlying both the *Mertz* and *Chetty* decisions and in respect of which there was either a formal acknowledgment of liability or a waiver of privilege in respect of the offer.
29. It would indeed hamper the process of litigation and settlement negotiations if without prejudice offers could be used against parties where privilege in respect of such tenders is not waived. In my opinion this would apply with even more force in litigation involving the Road Accident Fund, which should be encouraged to try and settle as many matters as possible.

30. There is no admission of liability, with prejudice, nor a formal waiver of rights before me and as such this matter falls to be dealt with in the same manner as the *Keagen* matter, which results in the aspect of general damages not being before me. This matter is distinguishable from both the *Mertz* and *Chetty* Full Bench decisions, and I am not bound by either.

31. In the circumstances I make the following order:

The defendant shall pay the plaintiff the sum of R413 470.00 in respect of both past and future loss of income.

The defendant shall provide the plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act to address all future hospital, medical or ancillary expenses that the plaintiff may have because of the injuries sustained in this accident.

The plaintiff's claim for non-pecuniary damages (if any) is postponed *sine die*.

The defendant is to pay the plaintiff's party and party costs, as taxed or agreed, on the high court scale.

D. WEIDEMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was prepared by Acting Judge Weideman. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on CaseLines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 11 March 2024.

Date of hearing: 16 February 2024

Date of Judgment: 11 March 2024

Appearances:

Counsel for the Plaintiff: Adv. M A Fisher

Instructed by.

Counsel for Defendant: Mrs Y Ramjee

Instructed by: Office of the State Attorney