



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED NO DATE:..... 3 April 2023 SIGNATURE:.....

Case No. 21360/2017

In the matter between:

MAKHASA, VONGANI ERNEST

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

Coram: Millar J

Heard on: 23 March 2023

Delivered: 3 April 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H30 on 3 April 2023.

Summary: Application for leave to appeal – alleged that court failed to have regard to relevant evidence reference to which was omitted from the judgment – apportionment of damages against applicant – effect of apportionment especially on statutory undertaking – compelling reason to grant leave to appeal.

ORDER

It is Ordered:

1. The order granted on 21 February 2020 is varied to include the words “limited to 20% thereof” at the end of paragraphs 1 and 2 of the order (paragraphs [193] and [194] of the judgment).
2. The application for leave to appeal is granted to the Full Court of the Gauteng Division.
3. Costs are to be costs in the appeal.

JUDGMENT

MILLAR J

1. On 21 February a judgment was handed down in this matter by the learned Judge Makhubele. The judgement was in respect of both liability as well as the quantum of damages. An application for leave to appeal was thereafter filed on 13 March 2020. In consequence of the national lockdown which commenced on 27 March 2020 and the subsequent unavailability of Judge Makhubele to hear this application, it was allocated to me for hearing in terms of Section 17(2)(a) of the Superior Courts Act.¹
2. The application was heard by me without regard to the transcript of the evidence led at the trial. Given that some three years had passed, I did not believe it in the interests of any of the parties for the hearing to be further delayed so a transcript could be obtained.
3. Before dealing with the instant application it is necessary to correct a patent error in the order made. Despite a finding that the applicants negligence accounted for 80% in the causation of the motor collision in question and that he was only entitled to 20% of the damages proven by him, the order omits any reference to this. This is clearly a patent error. The applicant conceded the error and agreed that the order requires correction.
4. The grounds upon which the application is brought are as follows:

"MERITS/LIABILITY PART

1. *The Honourable Court erred in the conduct of its inquiry into the Plaintiffs negligence, expressed/ implied or inferred and incorrectly assessing the*

¹ 10 of 2013. Section 17(2) provides "Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made, if not readily available, by any other judge or judges of the same court or Division."

Plaintiffs express/implied or inferred negligence, if any or at all, in that the Honourable Court did not its assessment of negligence or liability have regard to the fact that the plaintiff could not have been in that situation in the first place absent the insured vehicle and any consequent conduct in general is immaterial.

2. *The Honourable Court erred in its assessment of the evidence and the application of the burden of proof in that the plaintiff in respect of the alcohol allegation and by placing emphasize on the correctness of the clinical records and the plaintiffs' knowledge or absence of knowledge of the contents of the clinical records.*
3. *The Honourable Court erred in its assessment of the general duties of a motorist in the circumstances of the plaintiff in contrast to the specific circumstances of the plaintiff, more specifically in the decision making of the plaintiff in these set of facts.*
4. *The Honourable Court erred in its assessment and application of the legal principle as explained in the judgments referred at trial.*

QUANTUM PART LOSS OF INCOME ONLY

5. *The Honourable Court erred in the conduct of its inquiry into the Plaintiffs patrimonial damages and in overemphasizing personal reason for the transfer against the objective reasons for the transfer.*
6. *The Honourable Court erred in the conduct of its inquiry into the Plaintiffs problems at regarding the personality changes which affected his interpersonal relations at work as the precipitating factor for the change of branches and not that it was a promotion.*

7. *The Honourable Court erred/misdirected itself in holding that the plaintiff is generally employable in the open labour market, therefore estate not interfered with or reduced, or likely to be reduced by the injuries sustained.*"

5. The test for the granting of leave to appeal pertinent to the present matter is set out in section 17(1) of the Superior Courts Act as follows:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that

(a) (i) the appeal would have a reasonable prospect of success or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration"

6. The challenge to the reasoning of the learned judge in finding as she did in respect of both negligence and the quantum of damages is at first blush and having regard to the judgment, without a basis.

7. The judgment in question is lengthy and contains what appears to be a detailed exposition of the evidence led at the trial. On consideration of the judgment on its own – the evidence and findings together with the grounds upon which the application has been brought, I would be hard pressed to find that the test for the granting of leave to appeal² was met. This is particularly so given the way in which the grounds upon which the application was brought were phrased.

8. However, during argument, I was informed by Mr. Maphuta that he had appeared in the trial and that the learned judge had failed to either record or

² Section 17(1)(a)(i)

deal with all the evidence that had been led. In essence, so the argument went, the application for leave to appeal, although the grounds were inelegantly framed was predicated on this very issue. It was for this reason that I was urged to find that the judgment could not be relied upon by me as the full record of the evidence before the court and that leave to appeal should be granted to the full court.

9. If it is indeed so that the learned judge failed to have regard to relevant admissible evidence, then this would be a “*compelling reason*” as contemplated in section 17(1)(a)(ii) for the granting of leave to appeal. The matter is clearly one of great importance to the applicant³ given the severity of the injuries he was found to have suffered and their sequelae.
10. I am fortified in this view particularly having regard to the application of the apportionment of 80% to the statutory undertaking⁴ for future medical and hospital expenses. An apportioned undertaking is, absent means on the part of the applicant to make up the difference, no undertaking at all and tantamount to a denial of compensation for future medical and hospital expenses. The importance to the applicant of the finding on the issue of negligence because of its effect on the damages award is undoubted.
11. It is for these reasons that I am persuaded that leave to appeal to the full court of this division should be granted.
12. In the circumstances it is ordered:

10.1 The order granted on 21 February 2020 is varied to include the words “limited to 20% thereof” at the end of paragraphs 1 and 2 of the order (paragraphs [193] and [194] of the judgment).

³ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E but esp 565B.

⁴ Furnished in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

10.2 The application for leave to appeal is granted to the Full Court of the Gauteng Division.

10.3 Costs are to be costs in the appeal.

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON: 23 MARCH 2023

JUDGMENT DELIVERED ON: 2 APRIL 2023

COUNSEL FOR THE PLAINTIFF: ADV. M MAPHUTA

INSTRUCTED BY: MP MOLEFE ATTORNEYS

REFERENCE: MR. M MOLEFE

NO APPEARANCE FOR THE DEFENDANT