

**REPUBLIC OF SOUTH AFRICA**



**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: YES

DATE: 5 June 2024

SIG

**CASE NR: 90314/2019**

In the matter between:

**MARIA MATHILDA MITCHELL**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

*Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to*

*the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 5 June 2024*

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## **JUDGMENT**

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**MARUMOAGAE AJ**

### **A INTRODUCTION**

[1] This is an unopposed application for leave to appeal the order granted on 11 March 2024 by Ms Mitchell, the applicant in this matter.

[2] There are two grounds upon which an application for leave to appeal can be granted by this court in terms of section 17(1) of the Superior Courts Act 10 of 2013. First, as the judge that granted the order against which leave to appeal is sought, I should believe that the appeal would have reasonable prospects of success. Secondly, and in the alternative, I should believe that there is some compelling reason why the appeal should be heard.

[3] It was argued on behalf of the applicant that there is a reasonable prospect of success on appeal. The application for leave to appeal is sought on several grounds.

[3.1] That the court failed to make any determination on the issue of liability of the Defendant. Further, the court's failure to make such a determination means that the claims in respect of quantum cannot proceed. Thus, the court erred by making a determination in respect of

the claim for loss of earnings whilst not yet having determined the issue of liability which must precede the quantum issue. As such, the court erred in dismissing the plaintiff's claim for loss of income where a capacity loss is clearly demonstrated by the experts, for which the plaintiff must be compensated.

[3.2] That the court erred in making a finding of fact in respect of the liability of the defendant whilst not making any order in respect of the liability of the Defendant.

[3.3] The court erred in not granting an order that the Plaintiff must be compensated by the Defendant in full or at an apportioned percentage for the plaintiff's accident-related damages. The court erred in finding that there is no evidence that the plaintiff's income has been impacted in any way to the extent that she will not be able to make what she would have been able to make had the accident not occurred despite the expert evidence demonstrating the contrary.

[3.4] The plaintiff testified in court and gave her oral evidence under oath, which oral evidence was not tested or disputed by the defendant or the Court. The court was also asked to admit evidence of various experts provided in their respective affidavits and section 19(f) affidavit.

[3.5] The court also heard two versions under oath which did not contradict each other and were not inconsistent with each other. As such, there was no basis for the court to reject the oral testimony based on the fact

that it was contrary to the version stated in the plaintiff's particulars of claim.

[3.6] The inconsistency between the particulars of claim and oral as well as documentary evidence of the plaintiff contained on record does not justify a rejection of the plaintiff's uncontested oral evidence. More weight could have been attached to the plaintiff's oral evidence and section 19(f) affidavit than the pleaded filed record because it has more probative value. A particulars of claim is not evidence at all.

[3.6] Having failed to accept the plaintiff's uncontested evidence, the plaintiff's right to a fair trial in terms of section 35(3) of the Constitution was violated. The court did not take issue with the Plaintiff's evidence in Court and did not take issue with the pleadings in Court, which if the court could have raised these issues, could have been attended to by the applicant's legal representatives.

[3.7] The court erred in postponing the claims for past medical expenses and general damages without properly assessing and considering the evidence before the court. These claims were proved and confirmed by way of documentary evidence and oral evidence. The court also erred in finding that the claim for future medical expenses was not persisted with. The court also erred in not ordering the undertaking by the respondent for future medical expenses because the claim was neither withdrawn nor abandoned by the plaintiff. The court also erred in not granting costs in favour of the plaintiff.

- [4] During oral argument, the applicant's legal representative conceded that there were two versions before the court as to how the accident occurred. In terms of the version contained in the particulars of claim, it is pleaded that the accident was between a motorcycle ridden by an unknown person and the vehicle driven by the plaintiff. Surely the particulars of claim were drafted, served, and presented to the court on the plaintiff's instructions. Where did the legal representatives who drafted the particulars of claim obtain the pleaded facts?
- [5] In terms of the version presented in court, which it was argued is the same as that contained in the section 19(f) Affidavit, the plaintiff testified that the accident occurred as a result of overtaking the truck and the driver thereof swerved towards the applicant's direction to the right and collided with her car. The collision caused her car to roll.
- [6] The contradictory versions informed the approach of the court and the orders that were granted. However, indeed, the applicant was not confronted with these inconsistencies during her testimony. This is a compelling reason to grant leave to appeal. There is the possibility that a different court can come to a different conclusion.
- [7] In the premises, the following order is made:
1. Leave to appeal is granted to the Full Court of the Gauteng Division, Pretoria.
  2. The costs of this application will be the costs in the appeal.

**C MARUMOAGAE**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**PRETORIA**

Counsel for the applicant : Adv L Keijser

Instructed by : Gert Nel Incorporated

Counsel for the respondent : No appearance

Instructed by : No appearance

Date of the hearing : 8 May 2024

Date of judgment : 5 June 2024