

SOUTH AFRICA / JUDGMENT

Chetty v Road Accident Fund (A91/21)

[2021] ZAGPPHC 848 (7 December 2021)

[2021] ZAGPPHC 848**COURT**

North Gauteng High Court, Pretoria

BEFORE

Phahlamohlaka K F, Tlhapi VV, Bokako T P

CASE / FILE NUMBER

A91/21

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****GAUTENG****DIVISION, PRETORIA****Case****No.A91/21****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE:

7 December 2021

In

the matter between:

ALVINA

CHETTY

Plaintiff

And

ROAD

ACCIDENT

FUND

Defendant

JUDGMENT

PHAHLAMOHLAKA. AJ:

INTRODUCTION

[1] The appellant instituted action against the respondent for damages suffered as a result of a motor vehicle collision which occurred on 18 July 2013. The action was not defended. Aggrieved by the order of Makhoba J of 4 September 2020 the appellant sought leave

to appeal the judgment and order. Leave was granted to the full bench of this Division. The appellants seeks that the order of the court a quo be set aside save, for the order that the respondent was liable to pay R438 028.78 in respect of past hospital expenses. Further, that the order pertaining to the loss of earnings/earning capacity and the award for general damages be substituted with the following order:

1. A determination that the appellants claim for loss of earnings/earning capacity be in the amount of R6 310 929.00 alternatively in the amount determined by the court;
 2. A determination that general damages be awarded in the amount of R650 000.00 alternatively in the amount determined by the court.
- [2] The appellant's contention is that the court a quo erred by postponing the issue of loss of earnings / earning capacity for oral evidence, that the court a quo should have determined the issue on the available evidence. The expert reports of the plaintiff were supported by affidavits in terms of Rule 38 (2) of the Uniform Rule of Court.

THE FACTS

[3] On 18 July 2013 the appellant was a driver of a motor vehicle which collided with the insured driver and sustained injuries as a

result of the collision. The respondent conceded liability for 100% of the plaintiff agreed or proven damages as well as providing a statutory undertaking for future hospital, medical and related expenses in terms section 17(4) of the road Accident Fund Act as amended.

THE ISSUES

The issues for determination in this appeal are whether the court a quo erred by postponing the determination of loss of earnings / earning capacity for evidence viva voce to be adduced. Further, whether the award of R150 000.00 in respect of general damages was appropriate.

THE LAW

Default Proceedings

- [4] In paragraph [6] of the judgment the learned Judge was informed that the Respondent was not represented and, that the legal representative had withdrawn from the matter. Counsel requested to proceed with the matter and referred the court to an affidavit which indicated that various attempts were made to engage with the defendant to ensure its representation at trial to no avail. The learned Judge made a ruling to proceed with the matter, reliance being had to the matter of *Mlatsheni v Road Accident Fund 2009 (SA) 401 (E)* which judgment was critical of the respondent and its attorneys during similar trials against the Road Accident Fund, which were adjudicated before that court.
- [5] The appellant launched an interlocutory application to compel the respondent to serve notices in terms of the Uniform Rules of Court ("the Rules"). The respondent was compelled to deliver to the appellant a notice in terms of Rule 36(2) by no later than 29 June 2020 and notices in terms of Rule 36 (9)(b) by no later than 17h00 on 13 July 2020 and further, to instruct the respondents

experts to immediately conclude and sign joint minutes including updated joint minutes to be served no later than 17h00 on 21 July

2020. An order by Maumela J dated 15 June 2020 was granted compelling the respondent to serve the notices and these were served on the attorneys of the respondent. The relevant clause relating to failure to comply by the respondents reads

"2. In the event that the respondent fails to comply with the Order set out in 1.1 to 1.3 the offending respondent's expert reports will be excluded from the trial."

The affidavit of the appellant's attorney Ms Labuschagne-Kom in the interlocutory application was referred to by counsel for the

appellant at trial to motivate why the trial had to proceed by default. The said affidavit illustrated the dilatory conduct of the respondent, which was prejudicial to the appellant at the time.

As I see it the transcript of the trial record does not reflect that the court was made aware of the order of court compelling the defendant to serve notices in terms of Rule 36(2) and 36(9)(b). On case lines I see the defendant served notices in terms of Rule 36 (9) (a) and (b).

- [6] The facts in *Mlatsheni supra* were distinguishable in that there the defendant was represented at trial, the parties asked for an adjournment to negotiate a possible settlement and this failed. The learned Judge was critical of the defendant, that as organ of state, it was not free to litigate as it pleased. He proceeded by stating that the conduct of the defendant was tantamount to frustrating a legitimate claim of the plaintiff by raising spurious defences from the bar, which had not been pleaded and or mentioned anywhere in the pleadings and which defences were raised without adducing evidence.

- [7] In this matter the Practice Note states that the respondent withdrew its mandate to the instructing attorneys and details in that regard were not disclosed in the appellant's opening statement. Indeed, the conduct of the respondent was dilatory and prejudicial to the appellant. The respondent was served with the notice of set down on 17 May 2020. In this regard the court a quo was within its power to admonish the respondent and it exercised a discretion to proceed by default.

Did the court a quo err by postponing the issue of loss of earnings:

- [8] Counsel for the appellant contended that the Learned Judge in the court a quo erred by postponing the issue of loss of earning/ earning capacity where no separation was applied for and, without affording the appellant an opportunity to oppose the separation and or the postponement. It was further contended that the separation would not be convenient to the appellant in view of the dilatory conduct of the respondent and further, that it would entail the overlapping of evidence with the court having to determine general damages and then again separately, to determine loss of earnings/ earning capacity. It was also contended that the respondents' expert reports had no evidential status or value.

- [9] In *Baderschneider v Road Accident Fund*, (34198/2015) ZAGPHC 13 (13 May 2020) at para 22/2020 JDR 1137 (GJ) the following was stated:

"The parties agreed at a pre-trial conference that "the documents in the trial bundles are what they purport to be without admitting the truth and contents thereof..." I respectfully agreed with the approach of Sutherland J in *Thomas v BD Sarens*:

"The almost universal practice of preparing a bundle of all documents that might be referred to in evidence is a boon to ordinary litigation. However, it invariably occurs that not all in a bundle are traversed in evidence. In my view, a document not traversed in evidence is not before the court, unless a prior agreement exists that it be admitted in a fashion other than through legitimate reference in evidence by a witness competent to comment thereon. The customary mantra that 'all documents in the bundle are what they purport to be without any admission to the truth of their contents, confers no evidential status on a document unless it is introduced through a witness capable of addressing the contents, called by one or other of the opposing parties."

- [10] Two pre-trial conferences were held in terms of the provisions of Rule 37 on 5 July 2016 and 27 March 2018 respectively and, at both meetings the parties agreed that evidence adduced by way of affidavit or that any affidavit of any witness be read in terms of Rule 38(2) would not be allowed. It was also stated that the veracity of the content of the documents is still required to be proven unless otherwise agreed upon by the parties. The latter statement agrees with the principle in *Baderschneider supra*. The question is whether the agreement entered into at the pre-trial conference not to allow evidence in terms of Rule 38(2) remained binding on the parties even where the court had proceeded to hear the matter on a default basis. I am of the view that the agreement remained binding because the order to compel related to non-compliance to file the notices 36 (2), 36(9) (b) and joint minutes would

only result in the respondent's expert reports being rejected. Nothing was mentioned in respect of Rule 38(2). It is also from the joint Practice Note where an inference can be drawn that the appellants considered the agreement to be binding.

- [11] In the joint Practice Note (not endorsed by the respondent) the appellant alludes to the failure by the officials of the respondent despite numerous requests to comply with the Judge President's directive of 17 April 2020 as revised on 24 April 2020 to arrange a special pre-trial before the trial. In my view compliance could have been achieved by an interlocutory application to compel compliance to hold a pre-trial before trial failing to address issues outstanding and pertinent to the conduct of the trial.

Again, the appellant stated in the joint Practice Note that the respondent was requested to agree to the handing up of its expert reports "to be admitted as the truth of the contents or to furnish the plaintiff with its views to determine if there are any real disputes" and further, the appellant reserved the right "to admit the evidence of the plaintiff's experts remotely by either video conference or teleconference." The appellant further had no objection to the trial being conducted by video conference via Microsoft Teams. There was an understanding therefore that in the absence of an agreement from the respondent the appellant reserved its right to call for viva voce evidence. In my view even if the respondent's expert reports were not admitted in terms of Rule 38(2), the respondent was not excluded from the trial and could still have had the opportunity to cross examined the witnesses of the appellant.

- [12] Given these facts stated in the joint Practice Note I see from the transcript that none of the issues raised therein were taken up with the Learned Judge. On case lines 029 -597 to 029-598 in his submission counsel refers to the expert reports of the appellant which were supported by Rule 38 (2) affidavits and seeks permission to present the experts reports in terms of the said Rule. This in my view is a complete about turn on what was agreed upon at two pre-trial meetings or what is reflected in the joint Practice Note, and the agreement in the pre-trial minutes is not mentioned. In the heads of argument Counsel addresses the joint minutes of both the appellant and the respondent for example Dr Versveld and Dr Vlok (orthopaedic surgeons), Dr Edeling and Dr Okoli (neuro-surgeons). In his address to the court he proceeded to refer to the joint minutes of the orthopaedic surgeons of the appellant Dr Versfeld and of the respondent Dr Vick.and their points of disagreement, and again changes tune as reflected below:

Mr Grobler: " In the joint minute which was filed by the experts they disagreed on that point... "

Judge: " Mr Grobler your arguments are contained in the Heads"...you don't have to them because I will read the Heads and then we have got almost about 15 minutes left...the Zoom is going to switch off."

Mr Grobler: "My Lord I will take your Lordships cue on that, My Lord suffice to say then that the expert reports are discussed. Then the experts of the plaintiff do not agree with the expert of the defendant, I submit that your Lordship can reject the defendant's expert of the defendant, I submit that your Lordship can reject the defendant's expert reports, there is no evidence for the defendant's experts before your Lordship and your Lordship can accept the plaintiff's expert evidence."

[13] Counsel contends that the appellant was in a position to proceed with viva Voce evidence if the court a quo was not inclined to allow the appellants evidence to be admitted on affidavit. That in my view is not the point because, the record does not reflect that Learned Judge's attention was drawn to the issues raised regarding the agreement in the pre-trial minute and joint minute. By saying so, this does not absolve the Learned Judge because, these issues could have been noted before handing down judgement since he had a better opportunity to go through the papers. My view therefore is that the court a quo misdirected itself by determining the matter on the papers when it was evident that there was an agreement not to adduce evidence by way of Rule 38(2) and where the experts were available to testify. I would recommend that the matter be referred to the trial before another Judge to hear evidence of the experts.

[14] I now turn to the aspect of general damages. As a result of the accident the plaintiff sustained the following injuries:

14.1 An injury to her left arm;

14.2 An injury to her lower back;

14.3 A neck injury.

[15] Dr Versval completed an RAF 4 form and qualified the Plaintiff's injury as a serious injury on the narrative test in terms of section 17(1) of the Road Accident Fund Act 56 of 1996 (as amended). The obligation of the Road Accident Fund to compensate a Third Party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in section 17(1) (A) and shall be paid by way of a lump sum.

[16] Compensation for non-pecuniary loss or general damages is governed by section 17(1) (A) of the Road Accident Fund Act.

"(1)

(a) a third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioners in accordance with the regulation.

(b) The Medical practitioner shall assess whether the third party's injury is serious in accordance with the following method:

(ii) If the injury resulted in 30% or more impairment of the Whole person as provided in the AMA Guides, the injury shall be assessed as serious.

(iii) An injury which does not result in 30% or more impairment of the Whole Person may only be assessed as serious if that injury:

(aa) resulted in a serious long-term impairment or loss of a body function;

(bb) constitutes permanent serious disfigurement;

(cc) resulted in severe long-term mental or severe long-term behavioural disturbance or disorder;
or

(dd) resulted in loss of a foetus...

(2)

(c) the Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an Agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these regulations.

(d) if the Fund or an agent is not satisfied that the injury has been correctly assessed, the fund or an agent must:

(i) reject the serious injury assessment report and furnish the third party with reasons for the rejection; or

(ii) direct that the third party submit himself or herself, at the cost of the Fund or agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by the medical practitioner designated by the Fund or an agent."

[17] The aforesaid is a statutory requirement and therefore the court can only deal with the issue of general damages once the provisions of Regulation 3 have been complied with. Put differently, the court may not assume the administrative duties of the Fund.

[18] This aspect was adequately dealt with in *Road Accident Fund v Duma*, *Road Accident Fund v Kubeka*, *Road Accident Fund v Meyer*, *Road Accident Fund v Mokoena* [2012] ZASCA 169 at paragraph 19 where Brand JA said the following: "in accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3(3) (c) that the und shall only be obliged to pay general damages if the Fund-and not the court-is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain a claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was

serious."

[19] Faced with the uncertainty in respect of whether the Fund had accepted the plaintiff's serious injury assessment form or not I requested the Plaintiff's Counsel to file supplementary heads of argument to address us on this aspect. Counsel for the Plaintiff duly filed the heads and we are indebted to him. It appears from the supplementary heads that the Fund had offered an amount as compensation for general damages and therefore we are satisfied that the Fund had accepted the plaintiff's injury as serious.

[20] The court a quo was therefore correct in dealing with the issue of general damages. The appellant is however, of the view that the amount of R 150 000 awarded by the court a quo as compensation for general damages is very minimal and therefore the court a quo, argued the appellant, misdirected itself in awarding that amount.

[21] Dr Versveld, the orthopaedic surgeon, assessed the appellant on 26 March 2013 and reported as follows:

"As a result of the accident she sustained the following injuries:

1. An injury to her left arm
2. An injury to her lower back.
3. A neck injury.

Following the accident she took pain killers and used heat therapy for neck and back pain.

She had physiotherapy about a week later (2 treatments).

She saw her general practitioner, who gave her voltaren injections and painkillers.

He referred him to an orthopaedic surgeon.

She saw an orthopaedic surgeon in September 2013.

An MRI scan was done of her neck, which showed a disc lesion.

She had surgery on 22/10/2013

She was admitted to the Unitas hospital for a period of approximately six days for this procedure.

Following the surgery she wore a collar for about eight weeks.

Initially this was a rigid collar and subsequently a semi-rigid collar.

She continues to wear the semi-rigid collar at time up to present times.

Her symptoms and disabilities seriously adversely affect her physical activities and social amenities.

The situation is likely to continue and deteriorate in the future.

She sustained serious pain and suffering as a result of the accident.

She has sustained long term impairment of a bodily function as a result of the accident."

[22] Counsel for the Appellant referred us to the judgment of Pickering J in *Lawson v Road Accident Fund* [2010] ZAEPEHC 6. The injuries of the Appellant in casu are distinguishable to those in *Lawson* because the plaintiff in *Lawson* sustained fractures and that is not the case in this matter. It is widely accepted that one can hardly find two cases which are similar. The court dealing with the aspect of general damages will therefore exercise its discretion guided by the nature of the injuries sustained and the sequelae.

[23] having regard to the nature and extent of the injuries sustained by the Appellant in this matter as well as the sequelae I am of the view that the court a quo erred in awarding an amount of R150 000 as compensation for general damages. In the circumstances I propose an amount of R 450 000 for general damages.

Consequently I propose the following order:

- (a) The appeal succeeds.
- (b) The order of the court a quo is set aside and replaced with the following
 - (i) The defendant is ordered to pay the plaintiff a sum of R 450 000.00 (Four hundred and fifty thousand rand) as compensation for general damages.
 - (ii) The matter is referred back to the court a quo for trial on loss of earnings before another judge.

PHAHLAMOHLAKA K F

(ACTING JUDGE OF THE HIGH COURT)

I agree,

TLHAPI VV

(JUDGE OF THE HIGH COURT)

BOKAKO T P

Delivered: This judgement was prepared and authored by the 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 Case Lines. The date for hand-down is deemed to be 07 December 2021.

MATTER HEARD ON

: 21 July 2021

JUDGMENT

RESERVED ON

: 21 JULY 2021

ATTORNEYS FOR THE APPELLANT : Friedman Attorneys

ATTORNEYS FOR THE DEFENDANT : No Appearance

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