

SOUTH AFRICA / JUDGMENT

Dube v Road Accident Fund (21827/2017) [2025] ZAGPJHC 289 (18 March 2025)

[2025] ZAGPJHC 289**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Minnaar

CASE / FILE NUMBER

21827/2017

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****Number: 21827/2017****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED:**

In

the matter between:DUBE,
PRISKA
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT

MINNAAR AJ:

- [1] The plaintiff, an adult female born on 28 October 1968, has instituted action against the defendant for injuries sustained and damages suffered as a result of a motor vehicle accident which occurred on 29 February 2016 on the M1 South near the Grayston offramp in Johannesburg. The plaintiff was a passenger.
- [2] On 12 March 2018, by order of this court, the plaintiff was awarded 100% of her proven damages. The defendant was also ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("RAF Act") regarding the plaintiff's future medical expenses.
- [3] Before me is a claim for general damages and loss of income. The plaintiff claims:
- a. R900 000.00 in respect of general damages.
 - b. R190 000.00 for past loss of earnings; and
 - c. R1 000 000.00 for future loss of earnings.
- [4] It is the plaintiff's pleaded case that she suffered severe bodily injuries, which included:
- a. Head injury with loss of consciousness;
 - b. A comminuted and segmental fracture of the left clavicle; and
 - c. Unsightly scarring.
- [5] Following the accident, the plaintiff was hospitalised and subsequently discharged. On 12 April 2016, the plaintiff was readmitted for an open reduction and internal fixation of the left clavicle. This procedure was unsatisfactory, and on 15 April 2016, the process was redone. The plaintiff was discharged after 3 (three) days. The plaintiff was left with unsightly scarring, and she will need future intervention to remove the plate from the left clavicle, neurolysis of the involved nerves and surgical revision of the unsightly scar. The plaintiff would also need to undergo an arthroscopic release of the left shoulder.
- [6] In terms of Rule 38(2), the following affidavits from the plaintiff's experts were admitted into evidence:
- a. Dr Breytenbach – Orthopaedic Surgeon.
 - b. Dr Braun – Plastic and Reconstructive Surgeon.
 - c. Kelly Cumming – Occupational Therapist.
 - d. Shuaib Jeewa – Industrial Psychologist.

e. G A Whittaker – Actuary.

[7] With the exclusion of the actuary, joint minutes were filed by all the other experts.

[8] Despite various attempts by the plaintiff's legal representatives, the defendant was not represented on the day of the hearing.

General damages:

[9] On 3 November 2016, the plaintiff submitted the RAF4 form, completed by Dr Biddulph, an orthopaedic surgeon. There is no evidence before the court that the defendant accepted or rejected the RAF4 form.

[10] Counsel for the plaintiff referred the court to paragraphs 5.1 and 5.2 of the RAF4 form and pointed out that, according to the narrative test the plaintiff suffered serious injuries with permanent disfigurement. It was submitted that the plaintiff's injuries were serious enough to qualify for general damages. From a perusal of the joint minutes filed by the orthopaedic surgeons, the plaintiff qualifies under the narrative test as a serious injury with a total WPI of 12% and she has reached MMI.

[11] It is for the defendant, and not the court, to decide whether or not the plaintiff's injuries are serious enough to meet the threshold requirement for an award of general damages. That much appears from the stipulation in reg 3(3)(c) that the defendant shall only be obliged to pay general damages if the defendant, and not the court, is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the defendant 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 defendant is satisfied, the court has no jurisdiction to entertain the claim for general damages against the defendant. Stated somewhat differently, for the court to consider a claim for general damages, the plaintiff must satisfy the defendant, not the court, that her injury was serious.[1] Regulation 3(3)(c) is clear in this regard.

[12] Regulation 3 of the Road Accident Fund Regulations of 2008, prescribes the method contemplated in s 17(1A) of the RAF Act for the determination of 'serious injury'. As a starting point, it provides in reg 3(1)(a) that a third party who wishes to claim general damages 'shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations'. In terms of reg 3(3)(a) a third party who has been so assessed, 'shall obtain from the medical practitioner concerned a serious injury assessment report'. This report is defined in reg 1 as 'a duly completed form RAF 4, attached hereto as annexure D . . . !.

[13]

[7] The RAF 4 form itself, read with reg 3(1)(b), requires the medical practitioner to assess whether the third party's injury is 'serious' in accordance with three sets of criteria:

- (a) In terms of reg 3(1)(b)(i) the minister may publish a list of injuries which do not qualify as serious. If the third party's injury falls within that description it shall not be assessed as serious. Though the minister has not yet published such list, a draft has been circulated for comment in the Government Gazette of 22 August 2012.
- (b) Conversely, reg 3(1)(b)(ii) provides that the third party's injury must be assessed as 'serious' if it 'resulted in 30% or more Impairment of the Whole Person as provided in the AMA Guides', which is defined in reg 1 as the 'American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition'.
- (c) If an injury does not qualify as 'serious' in terms of reg 3(1)(b)(ii), it may nonetheless be assessed as serious under the so-called 'narrative test' provided for in reg 3(1)(b)(iii) if that injury resulted in a serious long-term impairment or loss of a body function; constitutes permanent serious disfigurement; and so forth.

[14] [In terms of reg 3(3)(c) the Fund is only liable for general damages —

'if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in these Regulations'.

[15] If the Fund is not so satisfied, it must, in terms of reg 3(3)(d), either:

- (i) Reject the third party's RAF 4 form and give its reasons for doing so; or
- (ii) direct that the third party submits himself or herself to a further assessment at the Fund's expense by a medical practitioner designated by the Fund in accordance with the method prescribed in reg 3(1)(b).

[16] Should the defendant reject the RAF 4 form, the plaintiff has the right to dispute the rejection. The Regulations provide for further internal processes to deal with the dispute.

[17] Where no decision is taken, as in the case before this court, the plaintiff is entitled to proceed in terms of the provisions of sections 6(2)(g) read with section 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to obtain a mandamus to compel the defendant to take a decision.

[18] In the absence of a decision by the defendant on the seriousness of the plaintiff's injury, the plaintiff's claim for general damages is not properly before the court and stands to be postponed.

Loss of income:

[19] The plaintiff has undergone medico-legal examinations. Experts on behalf of the plaintiff and the defendant filed their reports concerning the injuries sustained by the plaintiff and the sequelae thereof.

- [20] At the time of the accident, the plaintiff was employed by La Concorde Bakery. According to the plaintiff's industrial psychologist, the plaintiff was employed as a manager. The defendant's industrial psychologist reported that the plaintiff was employed as a salesperson. In terms of the plaintiff's updated industrial psychologist's report, the plaintiff is currently employed as a sales manager.
- [21] The industrial psychologists agree that the plaintiff retains the capacity to fulfil the requirement of sedentary work. They further agree that the plaintiff is not unemployable but that she is functionally compromised, and will remain in this situation until she receives recommended treatment.
- [22] In the updated report by the plaintiff's occupational therapist, it is stated that the plaintiff only partially meets her job demands. While she is capable of continuing with her sedentary computer tasks, it is recommended that she make ergonomic adjustments to her workstation. It is also recommended that she reduce the stair-climbing demands of her occupation. The plaintiff's task of checking the orders in the dispatch area should be passed on to a colleague. This accommodation is considered reasonable as the plaintiff is working in a supervisory position. The plaintiff was at the time of the report 57 years old and has been working at the same employer since 1994. Her current employer appears to understand her limitations. However, if the company is sold, new

managers may not be as understanding. Therefore, if the plaintiff continues with her current employer and receives the aforementioned

accommodations, then she will be capable of working at the bakery until the retirement age of 65 years. If new management takes over or if she happens to lose her job before the age of 65 years for reasons unrelated to the accident, she will not secure alternative employment based on the combination of her physical limitations and increased age.

- [23] The actuary applied 5% on past loss of income. An 8% contingency on future future loss was applied. These contingencies were applied to both uninjured and injured state. According to the actuarial report, the plaintiff suffered a total net loss of R390 312.00.
- [24] The counsel for the plaintiff submitted that, for both injured and uninjured state, 10% for past loss and 15% for future loss should be applied.
- [25] In considering the damages herein, I rely on the well-known and much-quoted dictum by Nicholas JA in *Southern Insurance Association v Bailey* N.O. 1984 (1) SA 98 (AD) at 113G – 114A.

'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.'

[26] The stability of the plaintiff's employment and the progress she made is exemplary. Ironical as it may be, this will have an impact on the contingencies to be applied. In my view, in both uninjured and injured states, 15% on past loss and 20% on future loss would be reasonable. Applying these contingencies on the actuarial calculation, R340 0078.00 is awarded to the plaintiff for total loss of income.

[27] There is no reason why costs should not follow the outcome hereof, and as such, the defendant is liable for the plaintiff's costs. Costs shall be taxed on scale B.

ORDER:

The following order is made in favour of the plaintiff against the defendant:

- [1] The defendant shall pay to the plaintiff R340 0078.00 in respect of loss of earnings.
- [2] Interest on the aforesaid sum at the prescribed rate of interest per annum from the date of issuing of the summons to the date of payment.
- [3] The plaintiff's claim for general damages is postponed sine die.
- [4] Costs of suit, to be taxed on scale B.
- [5] It is noted that there is no contingency fee agreement in existence between the plaintiff and her attorneys.

MINNAAR AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Plaintiff: Adv C C Asar instructed by R A Seedat Attorneys

For the Defendant:

Date of Hearing:

No appearance

28 February 2025

Date of Judgment:

18 March 2025

[1] Road Accident Fund v Duma and Three Similar Cases 2013 (6) SA 9 par 19

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