

SOUTH AFRICA / JUDGMENT

Hassen v Road Accident Fund (25336/2009) [2025] ZAWCHC 111 (17 March 2025) [2025] ZAWCHC 111

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

25336/2009

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)

Case

number: 25336/2009

In the matter between:

SHEREEN
HASSEN
Plaintiff
and
THE
ROAD ACCIDENT
FUND
Defendant

JUDGMENT

DELIVERED ON 17 MARCH 2025

VAN ZYL AJ:

Introduction

1. The plaintiff is a 49-year-old woman who was born on 15 August 1975. She was involved in a motor vehicle accident in Athlone on 31 December 2008, when the taxi in which she was a passenger collided with another vehicle.
2. This action was subsequently instituted pursuant to the provisions of the Road Accident Fund Act 56 of 1996. The matter has taken an inordinately long time to reach this Court. On the morning of the hearing the parties indicated that the defendant was about to make an offer of settlement, and the hearing stood down for that purpose. By midday, however, no offer had been forthcoming, and the trial proceeded in the afternoon. Although counsel for the defendant indicated that the defendant still intended to make offer in the days following the hearing, more than a week have since gone by without a proposal – hence this

judgment.

3. The defendant has conceded the merits of the action, and accepted liability to compensate the plaintiff for 100% of her proven or

agreed damages. The only issues that remain in dispute are the quantum of the plaintiff's claims for past loss of earnings and for loss of earning capacity,[1] as well as whether the plaintiff is entitled to a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act for the payment of the costs associated with future hospital, medical and related treatments required as a result of the injuries sustained in the collision.

4. At the outset, the plaintiff made application under Uniform Rule 38(2) for the evidence of various expert witnesses,[2] namely Dr P. Olivier (orthopaedic surgeon), Ms C. Bell (occupational therapist), Ms E. Auret-Besselaar (industrial psychologist), and Mr W. Boshoff (actuary at Munro Forensic Actuaries) to be led by way of affidavit. The relevant expert evidence is contained in the following reports:

4.1. Dr Olivier: report dated 15 September 2015 and addendum report dated 20 January 2025;

4.2. Ms Bell: report dated 7 September 2010 and addendum report dated 23 January 2025;

4.3. Ms Auret-Besselaar: report dated 11 February 2020 and addendum report dated 22 November 2023; and

4.4. Munro Forensic Actuaries: actuarial report dated 8 April 2022.

5. The application was unopposed, and was granted.

6. The plaintiff gave oral evidence at the hearing. The defendant did not present any evidence, expert or otherwise.[3]

The injuries sustained by the plaintiff

7. The injuries sustained by the plaintiff and the consequences thereof are not in dispute.

8. As indicated, the plaintiff was a passenger in a taxi on the day of the collision. She was sleeping when the taxi turned over onto its right-hand side as a result of the impact. She was seated next to the window on the right-hand side of the taxi, and sustained injuries to her right shoulder and cervical area.
9. The plaintiff was taken by ambulance to the Vanguard day hospital. She had an abrasion wound which required dressings, and an X-ray of her shoulder was performed and reported as normal. She was treated for a soft tissue injury and abrasions (there was glass in her arm), as well as a possible rotator cuff injury to the right shoulder. She was discharged on the same day with pain medication and a sling to support her arm, and had regular dressings and physiotherapy for about three weeks thereafter.
10. The plaintiff currently complains of pain which is present in the right shoulder region. She says she has arthritis in the shoulder. From the medical reports it appears that the pain is present over the right scapular area, as well as over the region of the sternoclavicular joint. The symptoms are exacerbated when the plaintiff tries to perform strenuous physical activities such as carrying heavy objects. She also experiences pain when she sleeps on the right shoulder.
11. The plaintiff says that she is aware of a virtually continuous pain which is present in the right side of her neck radiating to the right shoulder since the accident. She is aware of pain in her cervical area when she attempts to turn her head to look behind her. Despite physiotherapy, analgesics and anti-inflammatories, the symptoms have become progressively worse over the past few years.
12. The following appears from Dr Olivier's[4] report: Dr Olivier examined the plaintiff on 15 September 2014, and again on 20 January 2025. His examination indicates paravertebral muscle spasm of the cervical area, tenderness to palpation over the spinous process of the mid-cervical region, and painful and mildly to moderately restricted passive range of flexion, extension, lateral flexion and rotation of the cervical spine. Movement causes pain over the right side of the neck as well as over the scapular region.
13. Examination of the right shoulder indicates tenderness to palpation over the medial aspect of the sternoclavicular joint, with signs present of the rotator cuff tendonitis situated in the supraspinatus portion of the rotator cuff.
14. Dr Olivier's examination is consistent with pathology in the right sternoclavicular joint as the medial aspect of the sternoclavicular joint is less obvious when compared to the normal opposite side and is suggestive of posterior subluxation of the medial aspect of the right clavicle. The findings are consistent with a posterior dislocation of the medial aspect of the clavicle in respect with the sternum. The plaintiff experiences discomfort over the right sternoclavicular joint during the passive range of movement. X-rays taken on 15 January 2025 indicate paravertebral muscle spasm of the cervical spine with significant narrowing present of the disc between C5 and C6, and retrolisthesis of C5 in respect with C6.

15. Dr Olivier is of the view that the plaintiff sustained an injury to the cervical area when she was involved in the accident. Her symptoms are compatible with the clinical findings as well as the radiological findings. The presence of significant degenerative changes is regarded to be post-traumatic in nature rather than age-related. He advises that provision should be made for the conservative treatment for future pain in the cervical area as well, because of cervical spondylosis. Conservative treatment will include follow-up visits, anti-inflammatories, analgesics, physiotherapy and occupational therapy, as well as approximately two cervical rhizotomy procedures.
16. Although the plaintiff will benefit with initial conservative treatment, provision must be made for an anterior cervical fusion in due course. Based on the radiological appearance, the fusion will incorporate the levels between C4 and C5, as well as C5 and C6.
17. Dr Olivier indicates that accelerated degenerative changes are expected in the discs adjacent to the anticipated fusion area which will probably be responsible for intermittent mechanical neck pain. This condition is permanent.
18. As to the plaintiff's right shoulder, Dr Olivier is of the opinion that she sustained an injury to the right sternoclavicular joint. She remains symptomatic and will probably develop degenerative changes involving the sternoclavicular joint on the right side. According to Dr Olivier, the plaintiff will benefit with the surgical procedure whereby a painless pseudoarthrosis is created by means of resection of the articular surface of the medial aspect of the clavicle. Although this procedure will alleviate her pain, it will not contribute towards her shoulder function, as residual instability is expected. Despite this procedure, Dr Olivier is of the opinion that the stability and therefore the functionality of the shoulder girdle will be compromised permanently.
19. According to Dr Olivier, as the plaintiff is predominantly right-handed it is anticipated that the presence of pathology in the right shoulder girdle would have a significant negative impact on her capacity to perform physical activities, especially overhead manual activities.

The plaintiff's educational and employment background

20. The plaintiff's educational and employment background is also not disputed, and no impact was made in cross-examination on the plaintiff's narrative.
21. Psychologist Ms Auret-Besselaar sets out the plaintiff's educational and work history in her initial report. The plaintiff also furnished oral evidence in this respect.
22. The plaintiff attended Arcadia Secondary School from Standard 6 (now Grade 8) to Standard 8 (Grade 10). She left school during Standard 8 at the age of 16. Her highest completed level of education is Standard 7 (Grade 9).

23. From 1999 until November 2008, the plaintiff was employed as a saleslady at an outfit called Choice Clothing, earning about R2 500,00 per month towards the latter part of that period. She resigned in November 2008, because new management imposed strict working conditions and she found the shift work difficult. She had young children to care for at the time.
24. The accident occurred on 31 December 2008, and the plaintiff did not return to work. She remained unemployed from 31 December 2008 until January 2010.
25. From January 2010 to March 2010, the plaintiff was employed as a lifeguard at the Bonteheuwel Municipal Pool on a 3-month contract. She testified that she was unable to do life-saving duties, because she could not swim fast enough because of the pain in her shoulder. She was thus unable to complete the training to be employed as a lifeguard due to the injuries.
26. However, the supervisor at the pool knew her well (she had been an avid swimmer prior to the collision, and had previous aspirations of working as a lifeguard), and appointed her to do patrolling and cleaning duties on the pool deck and the restrooms. The plaintiff earned about R7 500,00 to R7 800,00 per month during this time. She struggled with the duties because of the pain, however, and could not have her contract renewed.
27. From February 2010 until March 2011, the plaintiff worked as a cleaner on an ad hoc basis for two to three days per week, earning R100,00 to R150,00 per day.
28. From April 2011 until September 2011, the plaintiff remained unemployed.
29. She eventually returned to the Bonteheuwel Municipal Pool with the request of renewing her contract to earn better wages. She was unsuccessful as she was obliged to complete the lifesaver training program which required 100% physical ability and mobility. The plaintiff had to be very active to perform the required duties, and she was unable to complete the lifesaver training program due to the chronic pain and restricted mobility in her right shoulder. She was, instead, offered a job as pool patroller, which was a contract position again for 3 months only. She therefore worked from October 2011 to December 2011 at the Bonteheuwel Municipal Pool as a pool patroller, earning R6 300,00 per month.
30. After that contract ended, she remained unemployed until 2013 when she worked for 4 months at Britos Butchery in Mitchell's Plain as a cashier and packer, for a wage of R650,00 per week. She was again unable to cope due to her injuries, as she had to work in cold conditions in the freezer area. Packing meat into and out of the freezer caused the plaintiff to suffer increased pain in her right shoulder.
31. From 2013 to 2014, the plaintiff remained at home whilst searching for a more suitable job. In 2015, she worked at the Bonteheuwel Civic Centre as a cleaner of the community and town halls as an EPW contractor for 3 months.

32. After her contract ended the plaintiff did not look for more cleaning jobs due to her neck and shoulder limitations, and the increased pain that she experienced whilst doing cleaning work. She testified that she could not bear the pain anymore.
33. The plaintiff has since been remained unemployed.

The experts' views in respect of the plaintiff's ability to work

Dr Olivier

34. Insofar as the plaintiff's ability to work is concerned, Dr Olivier is of the opinion that she should be able to perform a job that entails sedentary duties, semi-sedentary duties, or light operational duties. She is not able to perform a job that requires more strenuous activities, as the functional restrictions to which I have referred earlier in this judgment are permanent. The plaintiff is not suited to perform activities that entail the lifting of heavy objects, and she must be regarded as unable to haul herself from a swimming pool during a routine lifesaving procedure. Dr Olivier concludes that the plaintiff is not suited to perform the duties of a lifesaver on a permanent basis.

Ms Bell

35. Occupational therapist Ms Bell evaluated the plaintiff on 7 September 2010, and again on 23 January 2025. Ms Bell is of the opinion that the plaintiff has reduced muscle strength in the right shoulder girdle. Her physical endurance capacity of the right upper limb is impaired, and she is restricted to very light category tasks with the right (the dominant) upper limb. Prolonged exposure to very light tasks contributes to sensory dysfunction in the right upper limb. The plaintiff's productivity in physical tasks is limited by residual right upper limb symptoms, and she suffers right-sided neck musculature which is tight with pain.
36. Ms Bell is of the view that the plaintiff's ability to manage her domestic tasks is limited to some extent by these residual symptoms. She does these tasks in a piecemeal manner, with frequent rests in between to accommodate the right upper limb.

She seeks assistance with heavier tasks at home.

37. According to Ms Bell, the plaintiff's scope of employment is restricted, and her future work capacity is restricted to very light category tasks, with accommodations required in relation to her right shoulder and neck symptoms. The problems currently experienced by the plaintiff include a restriction of the mobility of the right shoulder and shoulder girdle, particularly in sustaining a position at or above shoulder height, residual weakness of the right shoulder girdle and shoulder musculature, the impaired endurance of muscles of the right shoulder and shoulder girdle.
38. Ms Bell is of the view the plaintiff is unable to manage the physical tasks associated with lifesaving at a swimming pool or at the seaside. She can also not work productively in the cleaning tasks associated with public swimming pool maintenance.

39. As to the future, Ms Bell provides for evaluation and intervention by a biokineticist, adaptation should she drive a motor vehicle to a power assisted steering wheel, domestic assistance for medium and heavy tasks and tasks requiring agility and prolonged mobility for one day a week, a daily carer for two hours in the morning and two hours in the evening in her senior years, a wheeled tea trolley to carry things in the home, and assistance from a clinical psychologist regarding ambiguous losses associated with the injury, residual impairments, functional losses and future interventions and outcome.

Ms Auret-Besselaar

40. Psychologist Ms Auret-Besselaar assessed the plaintiff on 12 May 2011, 5 November 2019, and 21 November 2023. According to Ms Auret-Besselaar, the plaintiff had always been occupied in physically demanding jobs such as a cleaner, sales lady, cashier and packer, and patroller at a municipal pool.
41. Given her love and talent for swimming, the plaintiff would most likely have completed a qualification as a municipal lifeguard/lifesaver earning approximately R10 000.00 per month (in 2020 terms) for 3 months per year. When not occupied as a lifeguard for that period, she had other job options available, such as being a sales lady or cashier or cleaner. In this regard her income varied from R100,00 to R150,00 per day (in 2011 terms), 2 to 3 days per week as a cleaner, and R500,00 per week working 5 days per week (in 2013 terms) as a cashier, which also required of her to do manual packing duties.
42. Ms Auret-Besselaar states that it is reasonable to assume that the plaintiff's pre-accident earning capacity can be determined at the midpoint between the median of the unskilled job level, to the median of the semi-skilled job level in the non-corporate sector, that is, between R37 900,00 per annum and R86 000,00 per annum. This equates to R63 400,00 per annum (with reference to Robert Koch's "The Quantum Yearbook", in 2020 terms). According to Ms Auret-Besselaar, no further career progression would have occurred, and the plaintiff would have remained earning at this level with annual inflationary adjustments until the retirement at the age of 65 years.
43. Considering the medical evidence, the plaintiff is restricted in her physical capacity to work as a lifeguard or any other physically demanding job. Despite her attempts to find a job, she has not been able to secure a suitable role. Diven that future degeneration is evident, her pain and restrictions will never restore her to her pre-accident level of functioning. Ms Auret-Besselaar is of the opinion that the plaintiff's employability has been significantly restricted and finding a suitable job in her injured state will become more difficult, if not impossible, over time, considering the degenerative injuries of her cervical area and shoulder. Ultimately, despite attempts, the plaintiff will become unemployable, with no residual earning capacity.
44. A physical disability which impacts on the capacity to an income obviously does not, on its own, reduce the patrimony of an injured

person. There must be proof that the reduction in the income earning capacity did, and will, result in actual loss of income.[5] It is in the present matter clear from the plaintiff's work record after the collision that she is unable to maintain employment which has a physical element to it, other than very light physical duties.

45. It appears from the evidence, too, that the plaintiff could well have had a fulfilling career as lifeguard, in addition to employment opportunities encompassing her other work experience. She is not averse to working, and is otherwise healthy. She is 49 years old at present, and thus has 16 years left prior to retirement at the age of 65. As she states, however, the pain has become "unbearable". There is no indication on record – or any suggestion from the defendant
- that this situation is anything but a consequence of the injuries suffered in the collision.

The quantum of the plaintiff's claims: Munro Forensic Actuaries

46. The report of Munro Forensic Actuaries dated 8 April 2022 is based on Ms Auret-Besselaar's opinion and the figures reflected in her report.
47. Contingencies of 5% and 10% have been applied to past and future uninjured earnings respectively. The Quantum Yearbook[6] indicates, in respect of contingencies, that a sliding scale of ½% per year to retirement is usually applied. It is indicated that the defendant usually agrees to deductions of 5% for past loss and 15% for future loss – these are the so-called normal contingencies.
48. Contingencies are within the Court's discretion:[7]

"[43] It is for this reason that a trial court has a wide discretion when it comes to determining contingencies. An appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates...."

- [44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the

claimant. This court, in Guedes, relying on Koch's Quantum Yearbook 2004, found the appropriate pre morbid contingency for a young man of 26 years was 20 per cent which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point."

49. There has been no suggestion that the contingencies applied in the present matter are unreasonable, or that other contingencies should be applied. Taking these contingencies into account, the plaintiff's past loss of income amounts to R536 400.00, and the value of her future loss of earning capacity amounts to R880 560.00.

The statutory undertaking under section 17(4)(a) of the Road Accident Fund Act

Costs

51. There is no dispute between the parties that cost should follow the event.
52. It is trite that the award of costs falls within the discretion of this Court. Rule 67A(3), which came into effect on 12 April 2024, requires that counsel's fees in the context of party-and-party costs in the High Court be awarded on Scale A, B, or C, as the case may be. This amendment applies prospectively in relation to work done on a matter after 12 April 2024.[8]
53. Rule 67A(3)(b), in relation to the scale of counsel's fees, refers to considerations which may include the complexity of the matter, the value of the claim and the importance of the relief claimed. This is clearly not a closed list of considerations. In the exercise of my discretion on the available facts as a whole, I am of the view that an award of counsel's fees on Scale B is warranted in the present matter.

Order

54. In the circumstances, the following order is granted:
55. Leave is granted for the evidence of the following expert witnesses to be given on affidavit under Uniform Rule 38(2):

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- 55.1. Dr P. Olivier (orthopaedic surgeon);
- 55.2. Ms C. Bell (occupational therapist);
- 55.3. Ms E. Auret-Besselaar (industrial psychologist); and
- 55.4. Mr W. Boshoff (actuary).

56. The costs of the application under Rule 38(2) are costs in the action.
57. The defendant is ordered to:
- 57.1. pay to the plaintiff the sum of R536 400,00 in respect of past loss of income;
- 57.2. pay to the plaintiff the sum of R880 560,00 in respect of loss of earning capacity; and

57.3. furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of 100% the costs associated with future medical, hospital and related expenses, including the costs relating to the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff after the costs have been incurred, and on proof thereof, and arising from the motor vehicle collision which occurred on 31 December 2008.

58. Payment of the capital payment shall be effected directly to the plaintiff's attorneys of record by means of electronic transfer into such account as may be nominated by them. The defendant shall pay the capital amount within 180 days from the date of this order.
59. The plaintiff shall not be allowed to proceed with a warrant of execution in relation to the capital amount prior to the expiry of 180 days following the date of this order.
60. The defendant shall pay interest on the capital sum of R1 416 960,00 (R536 400,00 plus R880 560,00) at the prevailing rate of interest, calculated from 14 days after date of judgment to date of final payment.
61. The defendant shall pay the plaintiff's costs of suit on the High Court scale, including the qualifying expenses of the expert witnesses in respect of whom expert reports have been delivered, as well as counsel's fees taxed on Scale B in respect of work done after 12 April 2024.
62. In relation to the plaintiff's expert witnesses, the costs shall include the taxed or agreed expenses of the experts listed below, the traveling expenses incurred by the plaintiff in consulting with the experts, the taxed or agreed costs attached to the procurement of the medico legal and other reports, including x-rays, pathology reports and addendum reports and all experts reports in respect of which Rule 36(9)(a) & (b) and Rule 36(9)(a)(i) & (ii) notices have been delivered, and all expert reports furnished to the defendant's attorney or the defendant by way of discovery or otherwise. The experts are:
 - 62.1. Dr JS Sagor, orthopaedic surgeon;
 - 62.2. Dr Brian Bernstein, orthopaedic surgeon;
 - 62.3. Dr Piet Olivier, orthopaedic surgeon;
 - 62.4. Christine Bell, occupational therapist;
 - 62.5. Esther Auret-Besselaar, industrial psychologist; and
 - 62.6. Munro Forensic Actuaries.
63. Payment of the taxed or agreed costs shall be due within 180 days following taxation or settlement, and shall be effected by electronic transfer to the plaintiff's attorney's nominated trust account.

64. The plaintiff shall serve a notice of taxation on the defendant in the event that costs are not agreed.
65. The plaintiff shall not be allowed to proceed with a warrant of execution prior to the expiry of 180 days following the date of taxation or settlement.
66. The defendant shall pay interest on the costs referred above at the prevailing rate of interest, calculated from 14 days after the date of taxation or settlement of the costs, to date of final payment.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the plaintiff:

Mr A. J. du Toit, instructed by DSC Attorneys

For the defendant:

Ms M. Mothilal, State Attorney

[1] See Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (A) at 150A-C.

[2] The plaintiff had also delivered reports from Dr J. Sagor and Dr B. Bernstein, both orthopaedic surgeons.

[3] The plaintiff was cross-examined, but no heads of argument were submitted, and no oral argument presented, on the defendant's

behalf.

[4] Orthopaedic surgeon.

[5] Rudman v Road Accident Fund 2003

(2) SA 234 (SCA) at para [11].

[6] Koch, 2023 at p 123.

[7] Road Accident Fund v CK 2019 (2) SA 233 (SCA) at paras [43]-[44]. Emphasis added.

[8] See the discussion in Wanga v Road Accident Fund (case number 4503/2021, unreported judgment of the Western Cape High Court (per Adams AJ) delivered on 19 November 2024) at paras

[7]-[11].

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