

SOUTH AFRICA / JUDGMENT

Marawanqana v Road Accident Funds (18336/2018) [2021]

ZAWCHC 115 (4 June 2021)

[2021] ZAWCHC 115

COURT

Western Cape High Court, Cape Town

BEFORE

Nziweni

CASE / FILE NUMBER

18336/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 18336/2018

In the matter between:

SIBULELE MARAWANQANA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED ELECTRONICALLY: FRIDAY, 4 JUNE 2021

NZIWENI AJ

Introduction

[1] The plaintiff, who was born on 20 October 1986, sustained serious bodily injuries emanating from a motor vehicle collision. At the time of the accident, the plaintiff was a passenger in the vehicle. The motor vehicle accident occurred on 22 September 2017 on St Helena Bay road between Vredenburg and Laingville, Western Cape Province. The

plaintiff then instituted an action against the defendant, the Road Accident Fund (“RAF”) claiming compensation damages.

Common cause issues

- [2] The merits were settled between the parties and the RAF conceded 100 percent liability in favour of the plaintiff's proven damages. As such, most of the issues have been settled between the parties and the parties agreed upon an appropriate order. After the determination of the only remaining issue between the parties, this court will incorporate the order agreed upon by the parties in this judgment.

The remaining issue

- [3] The only remaining issue for determination by this court is whether the plaintiff still has residual earning capacity. It is staunchly contended on behalf of the plaintiff that he is not capable of earning any income post-accident, as the accident has rendered him completely unemployable. The parties desire that I make the necessary factual findings in this regard, and thereafter the quantum of loss would be determined by an actuary.

Injuries sustained

- [4] Clearly, this matter stems out of an extremely tragic event. All the same, I am acutely aware that the RAF is bleeding money at a fast rate. Given the financial position of the fund, I am mindful that it is of critical importance, that appropriate payouts are made in order to safeguard the fund and its integrity.

- [5] The injuries sustained by the plaintiff as a result of the collision are not in dispute. The plaintiff sustained the following injuries:

- A compression fracture of the T9 vertebra with spinal cord injury, resulting in complete sensory and motor paraplegia;
- A bilateral haemothorax;
- Fractured ribs;
- Injury to the proximal intercostal arteries at T9-T11 levels on the right side and
- Multiple thoracic vertebral fracture.

- [6] At the commencement of the trial, counsel on behalf of the RAF confirmed that the contents of the reports, compiled by the following experts on behalf of the plaintiff could be admitted without the necessity for the experts to testify, namely:

- Dr Scriba, experienced in treating patients with spinal cord injuries;
- Ms Marion Fourie, an occupational therapist;
- Ms Elsa Wakefield, a physiotherapist;
- Ms Cheryl Inggs, a clinical psychologist;
- Dr Edelstein, an orthopaedic surgeon;

- Dr Naudé, an urologist and
- Mr. Eduardo Nunes, an architect.

Evidence

The Plaintiff's case

- [7] Doctor Edelstein, an orthopaedic surgeon, noted in his report that his final diagnosis of injuries is based on objective and subjective criteria. Regarding the future prognosis of injuries, he noted that deterioration of symptoms and function is inevitable. He stated that the plaintiff would be permanently wheel chair bound and that longevity is reduced in paraplegic people. He further states the following:

“He is confined to a wheel chair and dependant on others for some of his most basic human needs. He requires assistance everyday all day for most ADL's. In applying mindful professional judgment as to diagnosis of injuries caused by the accident and weighing the evidence and considering the list above it is fair and reasonable to invoke the narrative as this claimant severely and even catastrophically impaired and disabled as a result as a result of the accident.”

- [8] In paragraph 4.3 of Doctor Edelstein's report, the following is stated:

“Current symptoms as per Marion Fourie Occupational Therapist as at 15 September 2018 are: Paralysis of the lower abdominal muscles and those of lower limbs. Spasticity in the lower limbs. Loss of sensation in the lower limbs. Loss of bowel and bladder function.

Sexual dysfunction. Lower back pain.”

- [9] Dr Naudé, a neurologist states in his report that during examination, the plaintiff just looked at the floor and answered questions in a whisper. The neurologist also mentioned that the plaintiff gave him the impression of being profoundly depressed. The following also appears in the doctor's report:

“Mr. Maqwanqana's[IB1] (sic) gives an impression of being an intelligent young man, whose studies were interrupted by his injury. He should be given opportunity of being trained in a skill compatible with his confinement to a wheel chair, as this could give meaning back to his life. . .Mr. Marwanqana intends returning to the rural Eastern Cape, where the management of spinal cord injured patients, is suboptimal.”

- [10] The plaintiff's industrial psychologist, MrCrous (“Crous”) stated the following in his report:

“Mr. Mrwanaqana[IB2] will probably not be able to upskill, considering the academic requirements, his study records and his physical limitations, being wheel chair bound and his mental state. He will probably be unemployable in the open labour market.”

- [11] He testified that the plaintiff's educational training is Grade 12 and N5. It was significant to him that Dr Scriba, a general practitioner, was of the opinion that the plaintiff is unemployable. He also took into account what the Occupational Therapist said in that the chances of the plaintiff securing employment is poor. He also considered the opinion of the Clinical psychologist, Ms Cheryl Inggs, who diagnosed the plaintiff with severe depression and trauma.
- [12] It was his testimony that the plaintiff cannot upskill himself because of his lack of necessary qualifications and his injuries. According to his testimony, the plaintiff is unemployable. On 12 May 2020, he compiled another assessment report and also held an interview with the plaintiff. In 2020, he still held the same view regarding the prospects of the plaintiff being unemployable.
- [13] In April 2021, Mr Crous once again updated his assessment of the plaintiff. His April report reveals that he also interviewed the plaintiff on the 14 April 2021. Yet again, he explored the prospects of the plaintiff studying further. The 2021 report further reveals that the plaintiff's employer started upskilling the plaintiff in terms of Microsoft Office skills. The plaintiff's employer also facilitated his intake at Northlink College in order for the plaintiff to improve his marks so that he could be admitted at the Cape Peninsula University of Technology ("CPUT"). The employer intended to fund the plaintiff's studies at CPUT.
- [14] During Crous's interview with the plaintiff, the plaintiff informed him that he had to write Mathematics and Science aptitude tests at CPUT to secure a place in Electrical Engineering studies on Software.
- [15] The plaintiff also informed him that he had already started with his studies with Northlink College on a correspondence basis to try to obtain the required marks to apply for entry into CPUT. The plaintiff further informed Crous that he found correspondence courses in Mathematics and Science difficult. Additionally, because of lockdown he had to move to Gqeberha (Port Elizabeth), and as a result thereof was unable to continue with his studies. The plaintiff also informed him that he has not been to his workplace since lockdown and everything was uncertain at that juncture.
- [16] On 14 April 2021, the plaintiff told Crous that he was unable to continue with his studies. The plaintiff expressed that he does not have much support with his studies. The plaintiff was also not sure what will happen when his contract expires in August.
- [17] According to Crous, Kevin Nangle[IB3] (from the plaintiff's employment) informed him on 16 April 2021, that he did not know what would happen with the plaintiff's career. Nangle also informed Crous that they decided to give the plaintiff a chance in 2020 because of the Covid-19 pandemic. The six month contract that the plaintiff was given is expiring at the end of July 2021. According to Nangle, the plaintiff could not be given a longer contract because of the plaintiff's lack of progress.

- [18] Crous states in his report that Kevin Nangle[IB4] , informed him on 08 May 2020, that because the plaintiff was struggling with his studies, they secured an engineer to assist the plaintiff with his Mathematics and Science. Nangle[IB5] informed Crous that he was of opinion that the plaintiff's challenges with his studies were caused by the plaintiff's assertiveness and his ability to communicate.
- [19] According to Crous, the plaintiff has not shown academic progress since his enrolment with Northlink College in 2020. Crous also mentioned that the plaintiff did not meet the entry requirement for CPUT. Considering the plaintiff's academic requirement; his study records; his physical limitations and his mental state, Crous concludes that the plaintiff will probably not be able to upskill. According to his testimony, the plaintiff will be unemployed from 1st August 2021. He further testified that there is a difference between capacity and being able to use it.
- [20] According to Crous, the plaintiff's physical challenges and lack of qualifications, limits his chances of getting a job. He further states that, it would be beneficial for the plaintiff to get employment but the problem will be to acquire that work.
- [21] Cheryl Inggs, in her report as a clinical psychologist states that the plaintiff has limited movement in his arms and some strength in his hands. She also mentions that the plaintiff experienced difficulties with his shopping; cooking; general hygiene; catheterisation and management of his bowel regime. The plaintiff informed her that he had a number of infections.
- [22] According to Inggs, the plaintiff appeared to be despondent and dispirited. The plaintiff came late for his appointment as he battled to get dressed; washed and be ready for his appointment. The plaintiff informed her that he is motivated to try studying again as he is unstimulated and does not want to do nothing.
- [23] The plaintiff told her that he has a low mood; constant headaches; often feels anxious and worried and that he has no solution to look after himself. Inggs stated in her report, that the plaintiff is aware that his disability has made it impossible to be an artisan, but he has been unable to upskill to create other opportunities for himself.
- [24] Inggs concluded that the plaintiff is showing ongoing symptoms of trauma and severe depressive symptoms. She diagnosed the plaintiff with Post Traumatic Stress Disorder and Major Depressive Disorder.
- [25] Ms Elsa Wakefield, a physiotherapist stated in her report, that the plaintiff informed her that his bowel regime is not entirely successful and that toileting takes a long time and soiling occurs intermittently. Wakefield concluded that the plaintiff's ability to perform physical work and activities is significantly compromised. She also mentions that the plaintiff's disability imposes limitations in all areas of his life, including the work place. His ability to enjoy normal life amenities is impaired. She further states that, although the plaintiff is capable of performing daily tasks and living independently under normal circumstances, he

will however, require help with personal care activities and increased assistance with domestic chores. She further states that pressure sores; spontaneous fractures; bladder infections and general ill-health etc. will occur in future. According to her, in a longer-term view, assistance on a more permanent basis will become required in advancing years as the ability to meet the physical demands of paraplegic activities declines.

[26] Dr Scriba, in his report stated the following:

“The patient is a wheel chair user, this will make returning to his previous work very difficult practically. He will need help in most spheres of life regarding access, his travelling will be very problematic and expensive. His day- to- day functioning as a hands on person will be further complicated as he needs help transfer from the toilet. I will therefore suggests that he might be able to do some work (possibly administrative), but full return to work will not be advisable or practically possible at this stage and even in the future, given South Africa’s poor transport infrastructure and accessibility problems. . . A spinal cord injury is a traumatic event of which the psychological effects last a life time . . . Mr Mrwaqana, who is 31 years old now, is a complete paraplegic (a severe spinal cord injury [SCI] as a result of his injuries sustained in a motor vehicle accident as a passenger on 22 September 2017. This has impacted negatively on his ability to ever work again; he will be unemployable in future for all practical purposes.”

[27] Ms Marion Fourie, an occupational therapist, states the following in her report:

“14 EMPLOYMENT

14.1 Indications of the following difficulties, which will have an adverse effect on his ability to work, were evident from the assessment:

- Inability to do any form of manual/physically demanding work.
- Significantly compromised mobility in respect of speed, agility and ability to negotiate architectural barriers.
- Inability to move in small spaces, over sandy and very uneven terrain, or up steep inclines.
- Reduced physical endurance related to the extra physical demands of pushing a wheelchair and transferring.
- Inability to reach high e.g. shelves, to drawer of filing cabinet.

14.2 He is obviously capable of performing work which is sedentary in nature.

14.3 He is notionally capable of doing some type of clerical/ administrative/ managerial work should he undergo necessary training.

14.4 His chances of securing a suitable position are considered to be poor considering the following factors:

- Limited work experience

- Restricted residual marketable skills.
- Obvious nature of his disability.
- Inaccessibility of many work environments.
- Medical history of severe injury with permanent disability and likely ongoing complications.
- Complications of paraplegia will affect attendance at work during the course of his working life

14.5 Should he be successful in securing suitable employment, early retirement is likely.

The Defence's case

- [28] A.F. Kok, an industrial psychologist ("Kok"), postulates two scenarios for the plaintiff. The first scenario envisages the plaintiff working, up-skilling and changing direction into software. He agrees that the likelihood of up-skilling is limited. According to his testimony up-skilling of the plaintiff has fallen away.
- [29] On the morning of his testimony, he received information from the plaintiff's employer that they will not extend his employment. He testified that the plaintiff has capacity to work in a limited way. It is also Kok's testimony that there is an obvious risk that the plaintiff will be unemployed. He testified further that the plaintiff will struggle to secure employment and this will mean a long period of unemployment.
- [30] According to him, those risks will be addressed by applicable contingencies. He further opines that, there is quite a number of people in wheel chairs who are employed. He testified that to say that the plaintiff is unemployable is not right. The plaintiff is likely to get employment in an informal sector and earn income post-accident. The plaintiff has a capacity to do sedentary work. It is Kok's view that if the plaintiff was restricted from his neck it would have been a different situation.

Evaluation

FUTURE LOSS OF INCOME:

- [31] JJ Gauntlett SC in *The Quantum of Damages* Volume 1, Fourth edition, Juta, 1995 at page 30, stated the following:

"...disability which is likely to impair the injured person's earning capacity or to cause a loss of the amenities of life. Such disability may be temporary or permanent. Where it is temporary and has in fact disappeared at the time of trial, it is not normally of great importance as an independent factor.... On the other hand, where it is permanent or where, though temporary, it extends beyond the time of the trial, then it may cause prospective losses, such as a diminution in the injured persons earning capacity or an impairment of the amenities of life, for which compensation should be made by the award of damages. Moreover, a permanent disability may be present at the time of the trial or it may be one which will only manifest itself at some future date."

- [32] The onus to prove on a balance of probabilities, the nature and extent of the disability, as well as the permanence of the injuries and the lack of any reasonable prospect of recovering, rests with the plaintiff. It is settled that the nature and extent of the injuries and sequelae must be taken into account holistically.
- [33] The parties are diametrically opposed when it comes to the only remaining issue. The RAF contends that the plaintiff still has residual earning capacity.
- [34] As previously mentioned, the question which aptly arises in this matter is whether the injuries which the plaintiff sustained from the motor vehicle accident have left him unemployable. It is contended on behalf of the plaintiff that his disabilities have impacted on his ability to find work.
- [35] In this matter, it is not disputed that the plaintiff suffers from psychological impairments as a consequence of the collision and the injuries sustained as testified to by the medical experts, besides being confined to a wheelchair, the plaintiff has other serious debilitating health

issues.

- [36] If regard is had to the various opinions proffered by the plaintiff's experts, it emerges that, the plaintiff has both severe physical and psychological sequelae arising from the accident. The evidence establishes that the plaintiff exhibits the following disabilities: loss of bowel control; loss of bladder control; suffering from trauma and severe depression.
- [37] The plaintiff's experts also agree that the abovementioned ailments also have a major and irrevocable impact on his functioning. Palpably, the common thread through the evidence of the experts is that the disabilities of the plaintiff have occupational impairment. This was also agreed upon by the RAF expert [IB6] when he stated that the disability of the plaintiff has an impact of limiting his ability to work.
- [38] The question which I need to answer is whether the disabilities of the plaintiff render him entirely unemployable, for the rest of his life.
- [39] It is highly critical that in the determination of the employability of any individual, that each case must be considered on its own merits. Surely, there can be no blanket approach. It is thus not tenable to hold the view that, merely because there are people who are working whilst they are wheel chair bound, that is to be equated with a notion that everyone who is wheel chair bound is employable. It is my firm view, that the situation of the plaintiff presents an extraordinary disability case.
- [40] First and foremost, the evidence in this matter reveals that the move of the plaintiff to the rural Eastern Cape is inextricably linked to the motor vehicle accident. In other words, but for the collision, the plaintiff's move to the rural Eastern Cape would not have happened.

- [41] I tend to align myself with the sentiments as expressed by Mr Crous, in his testimony that the relocation to the Eastern Cape, will also make it impractical, if not impossible for the plaintiff to get employment. Clearly, the move to the Eastern Cape will also have an impact on the plaintiff's employability.
- [42] Dr Naudé is of the view that the plaintiff should be given an opportunity of being trained in a skill compatible with his wheel chair confinement. Evidently, training the plaintiff in a skill compatible with his physical disabilities is not going to happen in the rural Eastern Cape. Particularly, if regard is had to the fact that, Dr Naudé also opines in his report that the management of spinal cord injured patients in rural Eastern Cape, is suboptimal.
- [43] Besides, the evidence in this matter reveals that attempts to up-skill the plaintiff were not successful, despite earnest efforts from the plaintiff's employer. It is evident that the disabilities, which the plaintiff has, prima facie imposes limitations on his ability to get beneficial employment. Equally, the lack of skill by the plaintiff will further render it difficult for him to obtain employment.
- [44] It was argued on behalf of the RAF that the correct approach, under the circumstances of the plaintiff, is to make a contingency allowance to cater for the difficulties. It is my firm view that the RAF wants to take a rather simplistic view in relations to the future employability of the plaintiff.
- [45] Demonstrably, the position in which the plaintiff finds himself is a very hard place to be for any individual. Certainly, it cannot be expected under the circumstances that the plaintiff or any other person in the position of the plaintiff, to simply pick up the pieces and go back to work as if things were normal. Surely, with all the ailments that the plaintiff has, it will be extremely hard to navigate his place in the world again, let alone the workplace. Little wonder he is suffering from severe depression.
- [46] In my view, the combined effect of the disabilities; lack of skill and the relocation to the rural Eastern Cape, makes the plaintiff unemployable in future. I am of the strong view that these abovementioned factors, cumulatively do not help in ensuring that the plaintiff is employable in future. In fact, they strongly work against the employability of the plaintiff.
- [47] At this juncture, the evidence before this court shows that the disability of the plaintiff is both physical and mental. I interpose by stating that, the efforts made by the current employer of the plaintiff, simply evinces in my view that the plaintiff was a valued employee and his employer was committed to invest in his development. The upshot of the generous efforts the employer put in upskilling the plaintiff in my mind demonstrates that the employer was eager to welcome and allow the plaintiff to resume work as soon as he was physically and mentally ready. The fact that the current employer of the plaintiff could not make it operationally possible or feasible to accommodate the plaintiff any longer, in my view attests to the fact that vocational possibilities of the plaintiff have been virtually affected by the accident, as such he cannot be gainfully employed.

- [48] Having regard to the length of time over which the plaintiff has been unable to upskill himself or showing significant signs of recovery, paints a gloomy picture pertaining to the determination whether he has residual earning capacity.
- [49] The tragic accident happened in 2017, the current employer of the plaintiff decided in 2021, that it was not going to extend the plaintiff's contract. The prognosis of Dr Edelstein, the plaintiff's orthopaedic surgeon is that, future deterioration of symptoms and function is inevitable. The report alludes to the fact that there will be no improvement in the future. If anything, the patient's condition will deteriorate.
- [50] The necessary implication of this is that the plaintiff's condition is going to deteriorate over time. In my mind, this suggests that the plaintiff has been permanently incapacitated, notwithstanding the fact that he still has use of his upper limbs.
- [51] The overwhelming evidence in this matter reveals that the plaintiff is not mentally or physically in a position to work. As things stand, the plaintiff's chances of being able to cope at work appear to be non-existent. It is also significant to note that in almost four years, the plaintiff does not show particular signs that he is turning the corner.
- [52] On the evidence, it is untenable to think that the plaintiff will be able to be employed in future. Unlike the testimony of the defence witness, clearly, even if the plaintiff were to look for employment, he will still be unemployable. The fact that he is a paraplegic even in a South African situation does not necessarily mean that there are employers who are queuing or scouting for disabled employees.
- [53] The defence scenario, in my mind paints a picture of an individual who is currently undergoing vocational rehabilitation, and has been given a good prognosis. The defendant cannot simply adopt a utopian approach and merely postulate an idealistic future that is impossible to happen, especially in the face of the overwhelming medical evidence and what is prevailing currently. The belief of the defendant that the plaintiff still has a residual capacity to work; in my mind is predicated on the belief that the plaintiff is going to make a recovery in future. However, there is no medical evidence to support this belief, as there is no evidence, which suggested that the plaintiff is only temporarily unable to work. It is my view, that the defendant does not appreciate the magnitude or the degree of the physical and mental disabilities the plaintiff is suffering from.
- [54] Clearly, the plaintiff's chances of recovery are bleak, particularly if the prognosis of Dr Edelstein is taken into account. It is important to note that there is no other evidence produced to rebut the evidence of Dr Edelstein. Therefore, the poor prognosis by Dr Edelstein regarding the chances of recovery by the plaintiff becomes conclusive.
- [55] Mr Kok suggests that the plaintiff would best be able to start employment in the lower quartile with the basic salary of R37 000, 00, as a semi-skilled, worker. Mr Kok even suggested that in the Eastern Cape, the plaintiff could also find administrative employment with the municipality.

- [56] I am sure the plaintiff would love to go to work for his own self-esteem. However, as agreed by both the plaintiff's and the RAF's industrial psychologists that up-skilling of the plaintiff is not possible. Surely, the plaintiff cannot simply be classified as semi-skilled because he has no chances of up-skilling. Before he can be classified as semi-skilled, regard should be had on whether he can survive in a semi-skilled environment with his mental illness and other disabilities. There is no evidence to indicate that. The question, which aptly arises, is if he is not employable in a skilled environment, what makes him suitable for the semi-skilled environment. Surely, it is not just the lack of qualification that makes him unemployable in the skilled sector.
- [57] It is critically important in my view that confusion should not be created between the ability to function in everyday life and employability. Certainly, employment demands more of a person, as it is not a protected environment. Without doubt, a semi-skilled employment means a gainful employment and does not entail a sheltered employment environment. Even the salary bracket applicable to semi-skilled workers does not suggest that it is a sheltered environment, which will fully accommodate all the disabilities of the plaintiff.
- [58] It will be difficult for the plaintiff to find employment. The plaintiff is not only a paraplegic but has also other multiple disabilities. He will thus find it difficult to do both physical and mental tasks. This was demonstrated when he could not cope with his studies.
- [59] The evidence that the contract of the plaintiff is not going to be extended, also clearly illustrates the ability of the plaintiff, with his disabilities to hold and keep employment.
- [60] The current employer of the plaintiff was willing to accommodate the plaintiff and also wanted to up-skill him. Evidently, that failed dismally. In my mind, the fact that the plaintiff's contract could no longer be extended, notwithstanding opportunities provided by his employer to up-skill him, evinces that he is unable to realistically function in the workplace. How much more with a new employer.
- [61] On the probabilities, as set out above, in this matter, it is perfectly clear that the version of the facts produced by the plaintiff are more probable. The evidence in this matter strongly indicates that the most probable inference which can be drawn from the facts of this matter and which is consistent with all proven facts is that plaintiff would be unable to acquire any form of employment in future due to his disabilities.
- [62] I am thus of the strong view that the injuries sustained by the plaintiff and the consequent effect thereof, left the plaintiff with long term physical and mental impairment limits which have a direct negative impact on his chances of gaining employment. The disabilities of the plaintiff will certainly prevent him from finding a job and keeping it. This will have an appreciable effect on the plaintiff's earning capacity, as he is unemployable. Consequently, in my view the plaintiff does not have any residual income earning capacity. He should therefore, be compensated for loss of a lifetime income.

ORDER

In the result, I make the following order:

1. The plaintiff has no residual income capacity.
2. The draft order marked “A” attached hereto is made an order of court.

CN NZIWENI

Acting Judge of the High Court

APPEARANCES:

Counsel for the Plaintiff : Adv P Corbett SC

Counsel for the Defendant : Adv C Bisschoff

[IB1]Check the spelling of the plaintiff’s name.

[IB2]Check the spelling.

[IB3]Is it Nangle or Nagle? See paragraph below as well.

[IB4]Check proper surname. Is it Nangle or Nagle?

[IB5]See comments above.

[IB6]Whose the RAF expert? Maybe include his or her name here.

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