

SOUTH AFRICA / JUDGMENT

Maseko v Passenger Rail Agency of South Africa (01242/2016) [2023] ZAGPJHC 477 (15 May 2023) [2023] ZAGPJHC 477

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

01242/2016

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE NO: 01242/2016
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
NOT REVISED
15.05.23

In the matter between:

MBALI
TEMPERATURE MASEKO
Plaintiff
and
PASSENGER RAIL
AGENCY OF SOUTH AFRICA
Defendant
Neutral
Citation: Mbali Temperature Maseko v
Passenger Rail Agency of South Africa (Case
No. 01242/2016) [2023] ZAGPJHC 477 (15 May 2023)

JUDGMENT

YACOOB J:

1. On 17 July 2015, at about 06h00, the plaintiff, Ms Maseko, was in the act of boarding a train at Pollakpark Station, Springs, to travel to Park Station, Johannesburg in order to go to work. The train began moving off with the doors still open, while the plaintiff had one foot on the platform and one on the train. She was unable to remove herself from the train because of people around her, and eventually fell under the train when the train sped up. She suffered injuries which resulted in, among other things, the amputation of her right arm, which is her dominant arm, above the elbow. She now seeks general damages, loss of earnings and future medical expenses for a total amount of R18 million from the defendant ("PRASA").^[1]
2. The parties have agreed that an apportionment of negligence is appropriate, and that PRASA will pay 60% of the damages found to be proved. The matter is then before me only to determine quantum.
3. The parties have also agreed on the facts relevant to the quantum of damages, and have filed a statement of agreed facts. The parties' expert witnesses have filed joint minutes, and there is no substantive dispute among the expert witnesses.
4. Ms Maseko gave evidence about what happened to her and how the sequelae have affected her life. Ms Nomvula Maseko, the plaintiff's cousin who is a sister to her, and with whom the plaintiff lives, also testified.
5. The plaintiff was born on 5 February 1994. She was 21 years old at the time of the accident. She was a temporary worker at Edgars, apparently in sales. In the summons she is described as a "Brand Ambassador". She was earning just over R2200 per month, and had been working there just for a few months. She was invited to resume her employment after the accident and declined.
6. Although the plaintiff obtained low marks in her matric, she intended to apply to NSFAS for funding to study for a diploma. She has not done that after the accident, nor had she taken steps towards doing so before the accident.
7. Before the accident, the plaintiff was an independent person, however after the accident, she is unable to do anything for herself. It has impacted on her self esteem and dignity. She is unable to cook, wash herself or properly dress herself. When she menstruates she is forced to ask someone to clean her soiled underclothing for her because she cannot do it.
8. She feels that her self confidence is not the same and she cannot interact with the opposite sex as easily. However, she did enter into a new romantic relationship with an old friend after the accident, and conceived and bore twins in 2017. That relationship ended because the father of the children moved to Cape Town.

9. The plaintiff cannot do things for her children, when they were babies she had trouble breastfeeding, and changing nappies. Now she cannot cook for them or dress them properly.
10. The plaintiff's version was confirmed by her sister.
11. It is common cause that the plaintiff requires a prosthesis to be able to live a more dignified and valuable life. She also requires training to help her use the prosthesis, and to use her left hand more effectively. She will need revision of her stump, and a replacement of the prosthesis every five years for the rest of her life. There is no basis to believe that her life will be shorter than average, and the actuarial report (dated over a year ago) indicates that she will live for approximately 49 years more. The plaintiff will need occupational therapy, assistance in the home and special equipment. All of this is common cause.
12. There are three points of dispute between the parties. One is the manner in which the future medical expenses are paid. The second is the basis on which and manner in which the plaintiff's loss of income is calculated. The third is the amount of general damages to which she is entitled. I deal with each in turn

FUTURE MEDICAL EXPENSES

13. The defendant does not take issue with the needs of the plaintiff. However, it was submitted that, taking into account that the future medical expenses are required for the remainder of the plaintiff's life, the future medical expenses should be provided for by way of an undertaking. This was suggested for the first time in the defendant's argument. It was not pleaded.
14. I do not think there is anything in principle against the providing of an undertaking. Certainly orders have been made requiring government entities to provide undertakings for future medical expenses where, unlike the Road Accident Fund, there is no statutory basis for such an order. However, in my view the issue has to be properly pleaded and ventilated. It has not been in this case.
15. In any event, it may well be that the provision of an undertaking is more appropriate where there is either no apportionment, or when the apportionment is of a lower percentage against the plaintiff. Where the plaintiff is responsible for 40% of the expenses, and the expenses include high value items such as prostheses, there is then the risk that the plaintiff is unable to cover the 40%.
16. It was then suggested that perhaps the first prosthesis could be paid for entirely by the defendant, and the amount the plaintiff has to pay towards future expenses increased by some actuarial calculation, so that the plaintiff could then use the amount she is awarded in general damages towards these expenses.
17. There was some difficulty in obtaining such a calculation from the actuary. In any event, it seems to me that the plaintiff's general damages should not be the determining factor in how the medical expenses are catered for.

18. The next submission by the defendant was that, in that case, taking into account that no one knows how long the plaintiff will live, a contingency amount should be deducted from the future medical expenses so that the amount she is awarded is fair. The defendant submitted that a 50% contingency deduction on future medical expenses would be fair. The plaintiff made no counter submission on this, nor did the plaintiff make any submission regarding how the uncertainty regarding lifespan should be dealt with.
19. I am of the view that a 50% contingency deduction would be too high. The object of the contingency deduction is not to save money for the defendant, nor is it to give the plaintiff as little as possible. It is to ensure as far as possible that the award is fair.
20. There is no evidence one way or the other of the defendant's health. Although it was submitted that there is no reason to believe she does not have average life expectancy, and the orthopaedic surgeon noted that life expectancy was not impacted from
an orthopaedic point of view, there is no evidence showing that she did not have any health concerns. It is therefore appropriate to apply contingencies.
21. The defendant is young, and therefore there is a longer time of uncertainty to provide for. In my view the appropriate deduction is, as in loss of income matters 0.5% per expected year of life. If the plaintiff has about 48 years remaining, this would amount to 24%. This contingency deduction should be applied before the apportionment is applied.
22. The calculated future medical expenses, devoid of duplicates amount to R16 066 545. Less 24%, this is R12 210 574, 20 (Twelve million, two hundred and ten thousand, five hundred and seventy-four rands and twenty cents), before apportionment.

LOSS OF INCOME

23. The two issues to be determined regarding the plaintiff's loss of income are: which of two scenarios put forward by the Industrial Psychologists is appropriate, and what contingencies should be applied.
24. The two scenarios differ only on one point, that is whether the plaintiff would have obtained a post matric diploma and therefore earned better than she would with only a matric qualification.
25. The plaintiff testified that she had intended to do so, she was going to obtain funding from NSFAS. However, taking into account that she had not yet by the time of the accident made any attempt to do so, and did not seem to have any idea what kind of diploma she would have studied for, I consider that this is the less probable scenario.
26. The appropriate scenario is therefore scenario one.
27. Taking into account the youth of the plaintiff, higher than normal contingencies ought to be applied pre-morbidly.

28. The plaintiff submitted that it would be appropriate to apply a 15% contingency to pre-morbid future loss of earnings and a post morbid contingency of 60%-70%, resulting in a contingency differential of between 45% and 55%. In my view the contingency differential should be lower. Although the plaintiff has great challenges, these will be less once she has obtained her prosthesis and training to be more independent. Certainly 15% pre-morbid contingency is too low.
29. The defendant submits that the appropriate pre-morbid contingency is 20%, and the appropriate post-morbid contingency is 25%. The resulting contingency differential is 5%.
30. I am satisfied that the appropriate pre-morbid contingency ought to be 20%. In argument the plaintiff's counsel suggested that an appropriate contingency differential would be 30%, the contingency then applied to the post morbid scenario being 50%. However in my view this is still too high, taking into account that the plaintiff's life ought to improve once she has the benefit of the additional therapy and prosthesis.
31. I am satisfied that an appropriate contingency to apply to the post morbid scenario is 40%, resulting in a differential of 20%. This is higher than usual to take into account the specific circumstances of the case but not unduly so.
32. Using the plaintiff's actuarial calculations on scenario 1, this amounts to an amount of R2 290 555 before apportionment.

GENERAL DAMAGES

33. It is well established that there is no mathematical formula for general damages. A court may refer to awards for similar injuries but the life circumstances of the injured person and other facts of the case will affect the ultimate outcome.
34. Both counsel referred the court to case law in support of their submissions with regard to an appropriate award for general damages. The plaintiff submits that between R1,8 million and R2 million would be appropriate, while the defendant submits that R850 000 is appropriate.
35. In my view the defendant's submitted amount is too low. A number of the cases referred to by the defendant with lower awards had either the amputation or injury of the non-dominant hand. Also they do not have the elements of inconvenience and indignity that the plaintiff has testified to, and which appear to me to be obvious.
36. The plaintiff's authorities, which had higher awards, also showed that there were additional injuries. Naturally one cannot expect a completely matching set of circumstances.
37. Taking into account that the plaintiff is a young woman, that her ability to take care of herself and her children physically is compromised, together with the impacts on her dignity and self-worth that this has caused, I am satisfied that an appropriate award for general damages is R1 300 000 before apportionment.

CONCLUSION

38. The plaintiff has therefore proved damages before apportionment of:

38.1. R12 210 574, 20 in medical expenses;

38.2. R2 290 555 for loss of income, and

38.3. R1 300 000 for general damages

39. This is a total of R15 801 129,20 before apportionment. Deducting 40%, an amount of R6 320 451,68, results in an award of R9 480 677,52 (nine million, four hundred and eighty thousand, six hundred and seventy-seven rands and 52 cents).

40. I have not been made aware of any contingency fee agreement between the plaintiff and her legal representatives.

41. The plaintiff has been substantially successful and is entitled to her costs.

42. I make the following order:

“The defendant is to pay the plaintiff within 30 days of this order:

1. R9 480 677,52 for both special and general damages, and

2. Costs of suit.”

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff: L Mfazi Instructed by: Z & Z Ngogodo Incorporated
Counsel for the Defendant: A M Mtembu Instructed by: Padi Incorporated

Date of hearing: 19-20 April 2022

Further submissions received: 26 April 2022

Itemised calculation received: 12 May 2023

Date of judgment: 15 May 2023

[1] This is in terms of the latest amended particulars of claim, an amendment which was allowed at the hearing.

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Prepared on 11 October 2026 · Esheria