

SOUTH AFRICA / JUDGMENT

Olufemi v Road Accident Fund (50498/2021) [2024] ZAGPJHC 1227 (15 November 2024)

[2024] ZAGPJHC 1227**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Weideman

CASE / FILE NUMBER

50498/2021

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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE
NO: 50498/2021**

DATE:

15-11-2024

(1)

REPORTABLE: YES / NO.

(2)

OF INTEREST TO OTHER JUDGES: YES / NO.

(3)

REVISED.

In

the matter between

AYOTUNDE SOLOMON

OLUFEMI

Plaintiff

and

ROAD

ACCIDENT FUND

Defendant

JUDGMENT

WEIDEMAN, AJ: According to paragraph 8 of the amended particulars of claim, the plaintiff sustained the following injuries:

Fracture of the right femur.

Scars on the buttock, thigh and knee.

The only aspect before this Court is the plaintiff's claim for loss of earnings or impairment of earning capacity, if any.

The plaintiff was born on 17 June 1985 one assumes in Nigeria as he holds Nigerian citizenship. The accident from which this claim arose occurred on 21 October 2019.

On case lines at 013-2 a copy of a passport from the Federal Public of Nigeria, issued on 24 August 2019 is to be found. This passport expired on 23 August 2024.

In support of his claim the plaintiff procured medical legal reports from an orthopaedic surgeon, occupational therapist, industrial psychologist and actuary.

The clinical examination by Dr Kumbirai, orthopaedic surgeon, can be found on case lines 005-6 and 005-7. It appears from his recordal that the examination reflected a completely normal individual. In other words there were no significant deviations found during the examination which could be attributed to the accident.

The only complaints recorded in Dr Kumbirai's report are those verbalised by the plaintiff. No medical evidence in support of these complaints are to be found in his report. In this regard it is of particular importance to take note of the content of paragraph 10.4 of Dr Kumbirai's report, see case line 00-11 and where Dr Kumbirai states the following:

"The claimant reports that he never went back to work as a Scooter delivery man due to pain in the right thigh / femur."

There is no indication that Dr Kumbirai supports this position. This is clear from his carefully chosen use of the word "reports" in the quoted sentence.

The occupational therapist records the plaintiff's employment details on case lines 00-50. She records the following:

Totavilla two years;

MacDonald's 13 years;

Uber Eats 13 years.

The plaintiff is currently 39 years of age. It would have been impossible for him to have worked for 28 years as is recorded in her report. Her report is wrong but one assumes she reported what she had been told and simply did not question the logic of it.

The plaintiff advised her further (see case lines 005-57) that he also sustained a head injury in the accident. These statements speak to the plaintiff's relationship with the truth.

On case lines 005-58 the occupational therapist confirms that being an Uber driver is classified as light work. Later on the same page she also states that the plaintiff has the capacity to do work of a light physical nature.

The next report of significance is that of the industrial psychologist. Contrary to the occupational therapist the employment history of the plaintiff is recorded by the industrial psychologist on case lines 005-27 as follows:

MacDonald's 2015 to 2017;

Uber Eats November 2018 to 21 October 2019 (date of accident).

In 2019 the plaintiff was 34 years of age. The above reflects four years of employment. The industrial psychologist's report suggests that this was his only employment. That implies that he was, out of a possible 16 years, only employed for four years.

The plaintiff reported his income and there is documentation available from the employer on case lines, pocket 28.

The industrial psychologist commits a fundamental error to equate the amounts reflected on the payslip as his net income. She failed to interrogate his cost structure and this failure has the result that her report is of no assistance to the Court. Before determining net income, the cost of renting a motorcycle, fuel, cell phone charges and clothing has to be deducted. Only then will the actual income be known.

Looking at the documentation that had been made available to the industrial psychologist, see case lines 005-26, as well as in the lodgement bundle, see case lines 013-12 case lines 013-85 the one document that is missing is the plaintiff's driver's licence. There is no evidence before Court whether he in fact had a driver's licence and, if so, the nature and category of licence. One would think that if you are going to assess an individual who claims to have made a living as a driver that the very first document that would be asked for is the driver's licence.

In addition to the above, if the industrial psychologist report was prepared for the assistance of the Court, one would have expected the industrial psychologist to consider and advise on the categories of visas that would be available to the plaintiff, what the process of application would be and what the possibility of a successful application would be.

One would also expect the industrial psychologist to take note of and deal with the plaintiff's contract of employment. In casu there is a contract of employment between the plaintiff and Uber's holding company in the Netherlands. See case lines 013-86. The industrial psychologist

report is silent on this aspect. The contract is not discussed. The Court engaged counsel about the significance of the fact that the contract was signed two months after the accident from which this claim arose. Counsel could not proffer an explanation and the Court is left with another unanswered

question.

The plaintiff is a foreigner. It is logical that the evaluation and consideration of the plaintiff's claim cannot be done on the same basis as if he is a South African citizen. There are three documents that an industrial psychologist must address when considering the claim of a foreigner, especially a driver:

1 Passport: Is it valid? Has it expired? What is the process and requirements for renewing it?

2 Visa: Does the plaintiff have a work visa to legally work in South Africa? If so, was the work engaged in, in accordance with the visa requirements? If no visa, why not? Is it possible to secure a visa to work? If so, what are the requirements and does the plaintiff meet those requirements?

3 Driver's licence: For which categories? Is it valid in South Africa? Does it expire and if so, what are the requirements to renew it?

When, as in the case here, the industrial psychologist is of the opinion that the plaintiff is 100 percent unemployable then the next question is whether the plaintiff is entitled to remain in South Africa and if so on what legal basis?

If the evidence suggests that the plaintiff will be obliged to return to his country of origin then the future loss of income if any, has to be determined in his own country and in accordance with the prevailing labour market in the country of origin.

The purpose of the law of delict, and in particular in personal injury matters, is, and has always been, to place the injured plaintiff in the position that he would have been, had the accident not occurred. When it comes to human beings it is not possible to undo the damage caused by the injuries sustained in an accident and all a Court can do is to compensate with an award sounding in money.

For such an award to be made a Court has to be placed in a position to be satisfied that all the elements of a delict had been proven. Once that is done the next step is to quantify what the award should be. Where possible this should be done mathematically, mostly with the assistance of actuaries. It is not possible to do so then the case law allows for the possibility of a lump sum to be awarded, the value of which will be determined by the Court's opinion of what is fair and just to both parties.

If neither is possible the Court has three alternatives, to dismiss the claim, to grant an order of absolution from the instance or to refuse the application for default judgment.

In casu there is no evidence before Court of what the plaintiff's actual net income was, before the accident. The payslips provided gives guidance as to what his gross income would have been but there is no evidence before Court as to what his net income would have been.

The claim for past loss of earnings is therefore dismissed.

There is no evidence before Court whether the plaintiff would have been able to remain in South Africa indefinitely and to legally work here. His future loss of income must therefore be determined based on what he could have earned over the remainder of his working life in his country of origin, engaging in such economic pursuits as may be available to him there. The claim will be in the currency of his country of origin and based on the case law the date of conversion from South Africa Rand would be the date of payment.

There is no evidence before Court that would enable the Court to quantify any future impairment of earning capacity and the claim for future loss of earnings is also dismissed.

Postscript: after the matter was heard and without a request to reopen the matter a driver's licence had been uploaded on case lines at 018-1. This driver's licence is for the period 2015 to 2020 and does not affect any of the aspects that the Court took into consideration in arriving at the dismissal of the claim.

WEIDEMAN, AJ

JUDGE OF THE HIGH COURT

DATE:

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Prepared on 9 October 2026 · Esheria