

SOUTH AFRICA / JUDGMENT

Palayi v Road Accident Fund (25374/2020) [2024] ZAGPPHC 1085 (21 October 2024)

[2024] ZAGPPHC 1085

COURT

North Gauteng High Court, Pretoria

BEFORE

Khashane La M Manamela

CASE / FILE NUMBER

25374/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: 25374/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Date: 21 October 2024

K. La M Manamela

In

the matter between:

PAMELA
NONCEBA, PALAYI
Plaintiff
and
ROAD
ACCIDENT FUND
Defendant
DATE

OF JUDGMENT: This judgment was handed down electronically by
circulation to the parties' representatives by email. The date
and time of
hand-down is deemed to be 10h00 on 21 October 2024.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

- [1] Ms Pamela Nonceba Palayi, the plaintiff, was born 08 September 1970. She is now 54 years old. On 08 September 2017, the day she turned 47 years of age, she was injured in a motor vehicle accident. She was a passenger in one of the two motor vehicles involved in the accident. She sustained injuries to her head, right foot and right knee, and was hospitalised and medically treated. She blamed the negligent driving of the two drivers of the vehicles involved in the accident ("the insured drivers") for her injuries.
- [2] On 15 June 2020 she caused summons to be issued against the Road Accident Fund, the defendant, to recover damages suffered due to her injuries sustained in the accident and/or sequelae. The RAF is liable to compensate victims who suffered damages related to the motor vehicle accidents in terms of the Road Accident Fund Act 56 of 1996 ("the RAF Act"). The claim was initially for past and future hospital expenses; loss of earnings or earning capacity and general damages. The total claim was in the amount of R900 000, plus interest thereon and costs. In July 2022 the claim amount was amended to R13 100 000. The RAF initially defended the claim and filed a plea incorporating a special plea (of no serious injuries) in respect of general damages, but ultimately the matter proceeded without opposition for all practical purposes.
- [3] On 30 August 2024 the matter came before the Court for trial. Mr PM Leopeng appeared for the plaintiff. There was no appearance for the defendant, the RAF. After oral submissions by counsel, I reserved judgment or order but also requested that further written submissions be furnished by counsel on calculation of the plaintiff's loss of earnings or earning capacity. There were further calculations in respect of the same head of damages. Further details on this, below.

- [4] When the matter was heard and immediately thereafter, including when requesting further material, as explained above, I had intended to dispose of the matter by way of a draft order. But, this written judgment became necessary due to the need to explain the award to be made in respect of the plaintiff's loss of earnings or earning capacity.

Evidence and submissions on behalf of the plaintiff

General

- [5] I also granted orders, one in terms of Rule 38(2)[1] of the Uniform Rules of this Court for the evidence in the trial to be adduced by way of affidavits and, another, for the RAF to be held liable for 100% of the plaintiff's proven damages.
- [6] The plaintiff is a primary schoolteacher. She has been working as a teacher since 1994 after she obtained a post-matric diploma in education in 1992. She is responsible for grade 2 class. She is also the head of a department at her school after she was promoted in 2015. She still holds this position despite her involvement in the accident in 2017.

Expert medical opinion/evidence

Dr B.A. Okoli (Specialist Neurosurgeon)

- [7] On 24 March 2020, the plaintiff was interviewed or assessed by Dr B.A. Okoli, a specialist neurosurgeon. The plaintiff provided details of the accident to this expert. They included that she was a passenger in a bus on a school trip. The bus was involved in an accident. She hit her head against the roof of the bus and was dazed or confused, but had no loss of consciousness. She had no secondary neurological deterioration. She provided details of the injuries mentioned above, which according to the clinical records were: soft tissue left knee injury and fracture of four toes on the right foot. She was hospitalised for three days and received the following treatment: ORIF operation to the fractured toes and for arthroscopy of the left knee, and POP backslab on the right leg. Her medical history unrelated to the accident reflects asthma and sterilisation.
- [8] She received medical care after her discharge from hospital. The POP cast was removed after 6 weeks; wires in the toes were removed after 7 to 8 weeks when she began to use crutches to mobilise. She was back by her teaching post after 6 weeks from accident. She discarded the crutches after 2 weeks of returning to school.
- [9] Her complaints when she saw Dr Okoli were: focal pain in right foot sole; painful bunion on right big toe; painful left knee when bending (but no swelling), and generalised headaches about twice weekly treated by off-shelf analgesics. In response to direct questions from Dr Okoli, she mentioned "no disorders with her memory" and "anxiety and pain attacks whenever she is inside a vehicle". The examination by Dr Okoli also revealed, generally, a lady "in good general state of health and ... well groomed" and nothing specific from a "higher mental function"; cranial nerves; motor system (with deference to orthopaedic surgeon in respect of the right foot and left knee); sensory system; co-ordination etc. She

presented with “two parallel surgical scars on the dorsum of the right foot which is disfiguring”.

- [10] In Dr Okoli’s observation and opinion, the plaintiff had “no reported soft tissue wound in scalp” although she claims to have had a head injury. There is no evidence of secondary brain injury. But, Dr Okoli opined that the reported brief confusion and being dazed at the scene of the accident is consistent with a mild concussion. The plaintiff had no complaints relating to her cognition or mood, and is at maximum medical improvement. He concluded that from “a neurosurgical perspective” the plaintiff “has no impediment to her work”. Dr Okoli’s medico-legal report is dated 24 March 2020.

Dr J Preddy (Orthopaedic Surgeon)

- [11] On 23 March 2020, the plaintiff was assessed by Dr J Preddy, an orthopaedic surgeon. She complained to Dr Preddy that on her return to work, she struggled with standing for long periods of time due to pain in her right foot. Her reported duties involve occasional sitting, walking and running; and continuous standing. She reported that she still struggled with pain in her right foot when standing for long periods of time and this affects her work. She continues to experience pain and symptoms related to her left knee and right foot injuries.
- [12] Dr Preddy, among others, noted a severe “hallux valgus” under her foot; right foot bilateral bunions and sensitivity on the dorsum of the foot. The radiological examination revealed degenerative changes in the right foot. He proposed appointment of 20% to the pre-existing condition of hallux valgus in the right big toe which he opined was exacerbated by the accident. This suggested apportionment would come into consideration when calculating the appropriate award for the plaintiff’s loss of earnings.
- [13] Dr Preddy opined that the plaintiff be accommodated in a permanent sedentary working environment as determined by an occupational therapist. He, also, suggested that provision be made for the plaintiff’s retirement at earlier than her preferred age of 65 years, “should the [plaintiff] choose to retire earlier due to ongoing symptomology and progression of her degeneration”. The issue of the appropriate age for the plaintiff’s retirement is critical for the outcome of this matter. I will return to this, below.

Dr Joachim FL Mureriwa (Neuropsychologist / Clinical Psychologist)

- [14] Dr Joachim FL Mureriwa, a neuropsychologist / clinical psychologist, examined the plaintiff on 24 March 2020. He produced a medico-legal report dated 14 July 2022. According to the report the plaintiff repeated her complaints as with the other medical experts, referred to above. The reported symptoms included headaches; painful left knee and right foot (and toes); anxiety; easy distraction; forgetfulness and irritability. She mentioned that she now struggles to play and co-ordinate sports at school due to her injuries or their sequelae. Dr Mureriwa had access to the report by Dr Okoli.

- [15] Dr Mureriwa, observed no limping or visible scars. The plaintiff, when being assessed, walked normally, this expert commented in respect of plaintiff's "movement". He concluded that the plaintiff is likely to have suffered a "traumatic head injury" and that his diagnosis is one of "mild concussion".
- [16] With regard to compensation, this expert witness opined that the plaintiff would improve in her "coping skills and interpersonal relationships", with the recommended psychotherapy. However, she will "remain with psychological symptoms because of persistent pain and discomfort, and other forms of continuing accident-related stress". In his opinion emotional difficulties can negatively impact academic work, even if the intellectual status is within normal limits.

Ms Adelaide Phasha (Occupational Therapist)

- [17] On 25 March 2020, the plaintiff was evaluated by Ms Adelaide Phasha, an occupational therapist. Her medico-legal report is dated 19 September 2022. Ms Phasha had the benefit of accessing the reports of Drs Okoli, Preddy and Mureriwa for purposes of her assessment of and/or report on the plaintiff.
- [18] Ms Phasha mentioned that the plaintiff, generally, reported the same complaints to her as the other experts. She also reported obtaining a 2-year Advance Certificate in Education from North-West University in 2007 after studying on a part-time basis. She started working at a different primary school in 1994 until she was transferred to her current school in 1998.
- [19] Collateral information obtained by Ms Phasha was as follows. Ms Madela, the school principal, informed Ms Phasha during a telephone conversation on 15 September 2022 that the Plaintiff's "performance drastically dropped" after the accident. Further, her attendance of medical consultations, swelling and pain in her right foot has previously caused the plaintiff to miss work or be released early from work. She no longer coaches netball due to her injuries.
- [20] Of critical importance for current purposes is the following remark by Ms Phasha:

"it can be concluded that the accident under discussion has negatively affected Ms Palayi's occupational capacity. To avoid being a burden to the employer as well as compromising the learners' educational quality and future thereof, it is recommended that she resigns with immediate effect. Given that she has over 26 years of working as a Teacher, she is unlikely to find alternative employment within recommended work

parameters. She also has no future aspirations, suggesting that she had devoted her entire working life to teaching."

[underlining added]

[21] It is opportune to mention that the plaintiff was still working as a teacher as at the date of trial, 30 August 2024. She had, thus, managed to venture on despite the postulations of Ms Phasha. She still intends to continue working until her early retirement in 2025 when she turns 55 years of age.

Mr Ben Moodie (Industrial Psychologist)

[22] The plaintiff was seen by an industrial psychologist, Mr Ben Moodie, on 22 September 2022. His report followed a few days later on 27 September 2022. Mr Moodie had access to the reports of the other experts, already mentioned.

[23] The pertinent aspects of the report by the industrial psychologist are as follows: Ms Palayi would have retired at age 65 if it was not for the accident. Apparently, the latest retirement age is 60 years, but “non-uninformed employees who were members prior to 1 May 1996 and teachers may continue to work until age 65.

[24] As part of his assessment of the plaintiff’s “post-accident income potential”, Mr Moodie opined:

“6.10 The writer is of the opinion that, Ms Palayi is likely to continue working in her current employment position, earning the same salary, with inflationary increments as determinant factor of her increases. She's experiencing pain daily as a teacher. She stated that she must walk between all the students' desks to assist them. There is seldom time to sit and rest except between periods. She doesn't know how long she will be able to continue teaching and stated that she is considering taking early retirement when she receives compensation from the RAF. Writer advised her to try and continue until age 55 as she would then be able to go on early retirement, still receiving her pensionable

benefits. The medical experts will advise on her physical ability to work in the future and what an appropriate age she would have to retire, still considering her overall health especially after retirement. The moment she reaches age 55, when retiring or resigning from her job as a teacher, then it is unlikely for her to re-enter the open labour market in any job that she would be physically capable of doing. This would be because of her age, health, restricted knowledge in any other direction, qualification, and lack of experience in any other light, sedentary job that she might physically qualify for.

6.11 Provision must therefore be made for a total loss of income, from the time that she retires prematurely or resign, until age 65”[3]

Actuarial Calculations

[25] On the basis of the reports of Mr Moodie and pay-slips, Munro Forensic Actuaries compiled a report dated 25 October 2023. Their calculation was as at 01 November 2023 with the plaintiff at 53 years of age. In terms of this report the plaintiff was “expected to retire early at age 55”. The latter age would have been in two years from date of calculation. The capital value of the plaintiff’s future loss was calculated at R3 206 300. At the time the plaintiff earned a basic salary of R425 235 per annum. The projected salary as at July 2035 is R507

858,00 per annum, when the plaintiff is projected to retire at the age of 65 years. In paragraph 4.3 of the report the actuaries referred to the age of 60 as “normal retirement”. Ultimately, the plaintiff’s loss is stated as R3 206 300 (i.e. R7 178 000 uninjured earnings less R3 971 700 injured earnings).

[26] Despite the above report and its figures, at the hearing of the matter counsel stated that the figures mentioned above were for lost earnings projected for the next 5 years after the plaintiff’s next birthday. Counsel, however, urged me to award an amount of R5 818 940, which is calculated as per table below.

Table 26 (Future Earnings):

Pre-morbid Post- morbid Total loss Earnings if accident did not occur: R7 178 000 less R717 800 (ie 10% contingency) = R6 460 200 Earnings given accident did occur: R3 206 300 less R2 565 780 (ie 80% contingency) = R641 260 R5 818 940

[27] I requested counsel to consider preparing supplementary written submissions or heads of argument of the proposed figures.

[28] A further actuarial calculation was furnished on 02 September 2024, evidently after the hearing. It was compiled by the same actuaries and dated 30 August 2024. The calculation was done as at the plaintiff’s age of 54, with figures as at 01 October 2024. The result was as per the table below.

Table 28 (Future Earnings):

Uninjured Earnings Injured earnings Loss of Earnings R7 264 500 less 5% contingency R3 866 900 less 20% contingency R6 901 275 R3 093 520 R3 807 755

[29] On or around 23 September 2024, I requested that further calculation be furnished reflecting loss of earnings of the plaintiff if she retires at the age of 60. A further report dated 18 September 2024 was furnished on 25 September 2024, calculated as at 01 October 2024. The results are as per the table appearing below.

Table 29 (Future Earnings):

Uninjured Earnings Injured earnings Loss of Earnings R6 133 700 less 5% contingency R3 866 700 less 20% contingency R5 827 015 R3 093 360 R2 733 655

[30] In his supplementary written submissions or heads of argument, counsel urged for the court to accept the above calculations and the contingencies applied. Counsel also urged the court to accept that the “normal retirement age” is 65 years, as indicated by Mr Moodie, the industrial psychologist.[4] I agree that the retirement age of 65 accords with section 10 of the Employment of Educators Act 76 of 1998.[5] Counsel, perhaps as circumvention of a likely acceptance by the Court of the calculation as at the age of 60 years, also urged the court to apply a median of 62 ½ years of age between the retirement age of 60 and 65.

[31] In my respectful view the application of a median may be attractive for a speedier solution to the calculations, but would not reflect the substance or reality of the loss suffered by the plaintiff in this matter. It is simply a convenient, yet mechanical tool, divorced from the peculiar circumstances of a claimant’s damages. Therefore, I will calculate the plaintiff’s loss as per the table below.

Table 32 (Future Earnings):

Uninjured Earnings	Injured earnings	Loss of Earnings
R7 264 500 less 5% contingency	R3 866 900 less 5% contingency	R6 901 275 R3 673 555 R3 227 720

[32] Notably, a 5% contingency has been applied on the injured earnings which equals to that applied to uninjured earnings. Although the plaintiff is not being punished for her tenacity, she was able to continue doing the same job despite her injuries and their resultant deficits or sequelae. She was able to time her early retirement at 55 years of age to accord with the prevailing legislation for optimum retirement benefits. Therefore, the injuries will not be the only reason the applicant is stepping down at the age of 55 years or before 65 years of age. The injuries or their sequelae have a bearing but they did not prevent her from continuing as teacher to date despite reaching maximum medical improvement in the opinion of the experts.

Conclusion

[33] Therefore, on the basis of what is stated above the plaintiff will be awarded the amount of R3 227 720 for her future loss of earnings or earning capacity. As suggested by the orthopaedic a 20% contributory effect or apportionment for the plaintiff’s pre-existing condition of hallux valgus in the right big toe would have to be factored into the calculations for the plaintiff’s loss of earnings. Therefore, the plaintiff will be awarded an amount of R3 227 720.00 less 20% (i.e. R645 544) equaling R2 582 176.

[34] The award represents substantial success and therefore the plaintiff will be awarded the costs of the action to date as fully set out in the order below. For convenience, I have contemporaneously also made an order in terms of a draft reflecting exactly the same relief. Also because originally the order was to be in terms of the draft only and this detailed judgment only furnished to provide details and basis for the calculation, the date of the order should be deemed 30 August 2024 to accord with the draft and in fairness to the plaintiff.

Order

[35] In the premises, the following order is deemed to have been made on 30 August 2024, that:

1. The Defendant is liable for the Plaintiff’s proven damages to the extent of 100% in Plaintiff’s favour.

2. The Medico – Legal Reports of the Experts are admitted as evidence in terms of Rule 38 (2) of the Uniform rules of Court.

3.

3.1 The Defendant shall pay the Plaintiff the sum of R2 582 176.00

(two million five hundred and eighty-two thousand one hundred and seventy-six rand) in respect of Loss of Earnings.

3.2 The Defendant shall pay the total Judgment amount within 180 (one hundred and eighty) days from the Date of

Judgment.

3.3 Interest shall be charged on the Judgment amount at the current prescribed rate per annum, calculated 181 days from date of Judgment to date of payment.

3.4 The above amount shall be payable into the attorney's trust account as follows: -

Name of Bank : Standard Bank

Account Holder : Godi and Zangwa Attorneys Inc

Account Number : 0[...]

Branch Number : 0[...]

Type of Account : Trust Account

Branch Name : Silverton

REF NO : P[...]

4. The Defendant must furnish the Plaintiff with an Undertaking in terms of Section 17 (4) (a) in respect of the costs of 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 him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on the 08th September 2017.

5. The Defendant shall pay the Plaintiff's agreed or taxed High Court costs subject to Scale C as between party-and-party, such costs to include, but not limited to the following:

5.1 The actual costs for obtaining medico – legal reports, which include travelling, accommodation, and subsistence fees as well as the reservation, qualifying and court attendance fees, 28th August 2024 and 30th August 2024, if any, for all the experts that the Plaintiff has attended to if any:

5.1.1 Dr LF Oelofse – Orthopaedic Surgeon

5.1.2 Dr BA Okoli - Neurosurgeon

5.1.3 Dr JFL Mureriwa - Clinical Psychologist

5.1.4 Dr SS Selahle – Plastic and Reconstructive Surgeon

5.1.5 Adelaide Phasha - Occupational Therapist

5.1.6 Dr JJ Schutte – General Practitioner

5.1.7 Ben Moodie – Industrial Psychologists

5.1.8 Munro Forensic Actuaries

5.1.9 Burger Radiologists Inc.

5.2 Costs of counsel on Scale C including attending court on the 28th August 2024 and 30th August 2024.

5.3 The Plaintiff's reasonable travel and accommodation costs for attending expert appointments.

5.4 The Plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the Defendant's attorney of record, and shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs, after service of the taxed

bill of costs.

6 There is no contingency fee agreement signed between the Plaintiff and her Attorney.

7 The issue of General Damages and Past and Future Medical Expenses are postponed sine die.

Khashane La M. Manamela

Acting Judge of the High Court

Date of Hearing

: 30 August 2024

Date of Last Further Submissions : 26 September 2024

Date of Judgment

: 21 October 2024

Appearances:

For the Plaintiff: Mr PM Leopeng Instructed by: Godi & Zangwa Attorneys Inc, Pretoria For the

Defendant: No appearance

[1] Rule 38(2) of the Uniform Rules reads: "The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the

attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.”

- [2] Medico-legal report compiled by Ms Adelaide Phasha, an occupational therapist, par 7.7.14: CaseLines 008-95.
- [3] Medico-legal report compiled by Mr Ben Moodie, an industrial psychologist, pars 6.10-6.11: CaseLines 008-110.
- [4] Pars [23]-[24] above.
- [5] Section 10 of the Employment of Educators Act 76 of 1998 reads: “(1) (a) Subject to the provisions of this section, an educator shall have the right to retire, and shall be so retired, on the day on which the educator attains the age of 65 years. (b) An educator who attains the said age after the first day of a month shall be deemed to have attained that age on the first day of the following month. (2) Notwithstanding the provisions of subsection (1), an educator who was in employment immediately before 2 September 1994 in terms of a law repealed by the Educators’ Employment Act, 1994 (promulgated under Proclamation No. 138 of 1994), shall have the right to retire on or after attaining the retirement age applicable to the educator immediately before the said date. (3) (a) Notwithstanding the provisions of subsection (1) or (2), an educator shall have the right to retire on or after attaining the age of 55 years. (b) Notwithstanding the absence of any reason for discharge in terms of section 11 (1), the employer may, at the request of an educator,

allow the educator to retire before attaining the age of 55 years, if the employer is of the opinion-
(i) that a sufficient

reason exists therefor; and (ii) that the retirement will be to the advantage of the State.

- (4) Notwithstanding the provisions of this section, an educator- (a) who was in employment immediately before 1 May 1996; and (b) who, without interruption of service, has completed a period of ten years continuous pensionable service in terms of the pension law applicable to the educator; and (c) who has attained the age of 50 years, shall have the right to retire.” [underlining added]
- [5] Section 10 of the Employment of Educators Act 76 of 1998 reads: “(1) (a) Subject to the provisions of this section, an educator shall have the right to retire, and shall be so retired, on the day on which the educator attains the age of 65 years. (b) An educator who attains the said age after the first day of a month shall be deemed to have attained that age on the first day of the following month. (2) Notwithstanding the provisions of subsection (1), an educator who was in employment immediately before 2 September 1994 in terms of a law repealed by the Educators’ Employment Act, 1994 (promulgated under Proclamation No. 138 of 1994), shall have the right to retire on or after attaining the retirement age applicable to the educator immediately before the said date. (3) (a) Notwithstanding the provisions of subsection (1) or (2), an educator shall have the right to retire on or after attaining the age of 55 years. (b) Notwithstanding the absence of any reason for discharge in terms of section 11

- (1), the employer may, at the request of an educator,
allow the educator to retire before attaining the age of 55 years, if the employer is of the opinion-
(i) that a sufficient
reason exists therefor; and (ii) that the retirement will be to the advantage of the State.
- (4) Notwithstanding the provisions of this section, an educator- (a) who was in employment immediately before 1 May 1996; and (b) who, without interruption of service, has completed a period of ten years continuous pensionable service in terms of the pension law applicable to the educator; and (c) who has attained the age of 50 years, shall have the right to retire.” [underlining added]
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