

SOUTH AFRICA / JUDGMENT

Rabalao v Road Accident Fund (83107/2014) [2021] ZAGPPHC 417 (7 June 2021) [2021] ZAGPPHC 417

COURT

North Gauteng High Court, Pretoria

BEFORE

D Pick

CASE / FILE NUMBER

83107/2014

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IN

THE HIGH COURT

OF SOUTH

AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 83107/2014

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

RABALAO,
MABE
REGINALD
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 07 JUNE 2021 AT 12H00

Introduction:

1 " To be, or not to be: that is he question".

- famous quote by William Shakespeare, (1546 to 1616) from the opening speech of Hamlet Act 3, Scene 1, in the years between 1599 and 1602.

2 The Plaintiff instituted a claim against the Defendant for general damages, loss of income and past and future medical expenses in the amount of R 8 976 501, 00. The matter came before me as a civil trial on 08 March 2021. The Plaintiff rejected the Defendant's offer in settlement. At the time the matter came before me; the Defendant was unrepresented. I was addressed by the Plaintiff's counsel, Advocate Frosch. Judgement was reserved.

The Plaintiff's case

3 The Plaintiff was involved in a motor vehicle accident on 22 May

2012. He claims that another vehicle drove into the back of his vehicle.

He was transported to One Military Hospital by ambulance and discharged 4 days after the accident.

4 Plaintiff was employed with the SANDF as a sports officer in the South African Airforce (SAAF) at the time of the motor vehicle accident. He has the following qualifications: grade 12, a BA degree with specialisation in Human Movement Sciences, Kinesiology, sports and physical education and a higher diploma in education. He could not perform at his pre-accident level on returning to work after the accident and his contract with the SAAF was terminated at the end of March 2013. Apart from having a couple of teaching positions, he has since been unemployed.

5 Merits was settled 90/10 in favour of the Plaintiff on 08 March

2018. On 27 November 2019 an amount of R 900 000, 00 was paid to the Plaintiff as part of the quantum settlement for part loss of income. The remainder of quantum was postponed sine-die. Three RAF4's were completed by the plastic surgeon, the neurologist and a DR J Schutte. General damages were referred to the HPSCA for determination. The HPSCA concluded that the injuries were not serious.

6 In the Practice Note filed by the Plaintiff's legal representatives it was said that this Court was to decide on three issues: (i) future medical expenses,

(ii) loss of earning as a result of the injuries resultant from the accident and

(iii) general damages.

The Expert Reports:

7 The Orthopaedic Surgeons, Drs. Oelofse and Bogatsu agree in their joint minutes that he incurred the following injuries:

Head injury - deferred to Neurologist

Neck Injury - soft tissue, disc injury C5/6; C6/7

Back Injury - soft tissue, Ls/S1 intervertebral disc space

Left knee injury

- soft tissue, medial meniscus

Dr Oelofse also diagnoses the following injuries:

Right shoulder - soft tissue, with rotor cuff injury

Chest injury

8 Dr Oelofse foresees surgery for the neck and the lumbar spine and arthroscopies for determination of the seriousness of the injuries in the Plaintiff's right shoulder and the left knee. Dr Bogatsu foresees that conservative treatment for Plaintiff's injuries will suffice. Dr Bogatsu reports Plaintiff's restrictions will improve significantly following soft tissue healing. He does not foresee the injuries resulting in significant losses of his employability, learning capacity, amenities or independence.

9 Dr Oelofse reports the injuries will get better with successful treatment, but will have a lifelong effect on his quality of life as the injuries in Plaintiff's back and neck again degenerate over time. Plaintiff's injuries rendered him an unfair competitor in an open labour market. If accommodated in a spine friendly working environment, 5 years early retirement is foreseen, else Dr Oelofse foresees 10 years early retirement. Plaintiff's head injury is referred to a neurosurgeon by agreement and Plaintiff has no complaints about chest injuries on 22 July 2019.

10 Plaintiff did not suffer general damages, as the whole person impairment is less than 30%. Dr Oelofse remarks that Plaintiff qualifies for general damages in terms of the narrative test. Dr Oelofse notes the hospital records refer to a left shoulder injury. Plaintiff however insists he injured his right shoulder in the motor vehicle accident.

11 The Occupational Therapists in their joint minute

- only signed by Ms van Rooyen - recommends Plaintiff would benefit from attending 7 hours' individual occupational therapy, 8 group sessions, and 6-8 hourly sessions each of occupational therapy after each foreseen surgery. It is reported that Plaintiff has a BA Honours in Kinesiology, sports and physical training. This is not confirmed anywhere else in the expert reports. Ms van Rooyen concludes Plaintiff is no longer fit to occupy his previous

position as sports officer and noted Dr Oelofse's report in this regard. Plaintiff could however be employed as a teacher going forward.

12 Plaintiff would benefit from psychological intervention as he represents with a high emotional component to pain and significant self-limiting behaviour. They agree that once this difficulty has been addressed, Plaintiff's productivity and physical ability would improve.

13 Ms Montwedi noted Dr Bugatso's opinion that the injuries did not result in long term bodily impairment, loss of bodily function or disfigurement. With good prognosis Plaintiff could be employable in a similar job in the open labour market and work till normal retirement age.

14 Plaintiff denies that he is running a guesthouse and says he is only renting out rooms in his house to cover his bond. An overview of Plaintiff's Nedbank bank statements shows his income over a period of 5 months, which are as follow: August 2017: R 1 300, 00; September 2017: R 7363, 00; October 2017: R 11 200, 00; November 2017: R 3 400, 00; December 2017: R 7200, 00.

15 The Plastic Surgeons, Drs Hoffmann and Berkowitz agree that the scarring did not cause a whole body impairment of 30%. Dr Hoffmann suggests dermabrasion and Dr Berkowitz scar revision as treatment. They agree Plaintiff did not suffer any loss of amenities of life as a result of the scarring.

16 Ms Samouri, the Clinical Psychologist reports Plaintiff is suffering from depressive mood, anxiety and posttraumatic stress disorder. He reports to have chronic pain. She opines he is not on equal footing as uninjured counterparts in an open labour market. Plaintiff's emotional state may cause clinically significant distress and impairment in social, psychosocial and occupational functioning. He would benefit from psychological intervention.

17 She consulted with Plaintiff on 30 August 2017 and reports he is presently employed with Chipa Tabane as a teacher in geography and social sciences. Prior, he was employed with J Kekana Secondary, teaching the same subjects. She reports four teaching position post-accident. The other experts report one of those positions prior to Plaintiff starting his career with the SANDF. Other experts reported only two positions post-accident. She also reports longer periods of employment post-accident than the other experts.

18 The Industrial Psychologists' joint minutes are dated 30 January 2018. Ms Kalanko had access to the reports of Dr Bugatso and Ms Ndzungu - cited as an occupational therapist. The report of Ms Ndzungu was not presented to this Court. Dr Fourie had access to the reports Dr Oelofse, Ms van Rooyen, Dr Hoffmann and Ms Samouri, the clinical psychologist.

19 They conclude the Plaintiff is no longer suited for his pre-accident employment and should be compensated accordingly. He was a captain at the time of the motor vehicle accident. He can however assume employment as a teacher. According to a salary advice dated 15 July 2011, his salary at the time of the accident was R 17 561, 75 per month. The Industrial Psychologists rates him as semi-skilled, on notch R 191 349, 00 in accordance with Koch's 2011 Corporate Survey Earnings of the Quantum Yearbook. The 2017 equivalent rates at R 267 683 per annum. As a teacher he would be earning R 228 984 to R518 205 per annum in 2017 value.

20 They opine as a teacher having taught more than 12 years ago, Plaintiff is at the entrance level of the aforesaid scale. At the same time they report as a temporary teacher at Zotha School for Disabled Kids in 2017 he earned R20 000 per month. Prior to that he earned R16 000 per month at J Kekana School in 2015.

21 A letter from the Human Resources Department dated 2018 proposes that Plaintiff would have progressed to the rank of major in 2013 and possibly lieutenant colonel in future. The Actuary get instructed to calculate loss of income in accordance with the aforesaid letter.

22 They agree Plaintiff should be compensated for any medical expenses relating to the motor vehicle accident. They agree he was remunerated for the time he spent off work. They note his contract was terminated in March 2013 and he received his salary for a year after termination of his contract. They agree that he will struggle to find employment as his pre-accident potential was compromised post-accident. They agree that he will have to retire earlier. They agree Plaintiff's physical impairment limits his choice of occupation and agree on a future loss of income. They agree the assessment of contingencies falls within the Court's prerogative.

23 Plaintiff reports to various experts he was involved in a motor vehicle accident in 2008 and incurred the following injuries: Right forearm, right shoulder, cervical spine injury, bilateral knee injuries and a head injury. Plaintiff tells the experts that the injuries healed well and he never suffered any after effects from the injuries and could continue in his position as physical officer thereafter.

Issues

to be decided by this Court:

24 In accordance with the Practice Note, this Court is to decide upon the following issues:

- (i) future medical expenses;
- (ii) loss of earning as a result of the injuries resultant from the accident; and
- (iii) general damages.

Law applicable to the Evidence:

25 Judge Fisher in *MS v Road Accident Fund* (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019) held that the Judiciary should not be blind to the manner in which the Road Accident Fund is being exploited. She held that too often the plaintiff seeks to proof the motor vehicle accident as the causation of his injuries by filing an array of expert witness reports (at great costs), which reports are compiled by way of facts related by the plaintiff to the expert and some clinical findings. This is especially prevalent in cases where injuries are less obvious.

26 The judgement further sets out a four tier enquiry by which Road Accident Fund matters should be evaluated. Firstly and in order to justify the merits, it should be established whether the accident was caused by the negligence of the insured driver. The second and third legs of the

investigation involve establishing whether the plaintiff sustained the alleged injuries in the accident and how the proven injuries have affected the Plaintiff? Only once this has been established can quantum be addressed. The fourth leg of the investigation entails determining how the plaintiff should be remunerated for the effects of such injuries.

27 At 36 it was held that the quantum for the loss of future income to be awarded to the plaintiff is a matter of estimation to be dealt with by the Court in its wide discretion, as it is based on uncertain future events. The learned Judge remarks at 37:

" The parties routinely seek to assist the court in this assessment of the amount payable by resort to the expertise of an actuary. This is not an obligatory approach to the quantification of damages and a court should be careful not to treat these reports as if they are scientific data and the approach directive."

28 At 41 the Judge remarks on the actuarial manner of calculation of quantum and the application of contingencies as follow:

"... This mechanism should not be understood as being prescriptive or confining of the assessment that the court is called on to make. The court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, intuition and general right thinking."

29 I must align myself with Judge Fisher who at 78 cautions that the funds in the Road Accident Fund are "precious public monies". I also take heed of Judge Fishers warning that " Court should be alert to a lack of circumspection in the briefing of experts and the employment of other resources in the conduct of a case, on the basis that it is assumed that RAF will absorb all the costs as a matter of course."

The Law applied to the Evidence:

30 The identity of the Plaintiff was verified. On strength of the report of Ms Samouri and the affidavits of the Plaintiff and the investigating officer, the motor vehicle accident took place at an intersection, and it might be that the Plaintiff's vehicle was hit on the righthand side, the driver's side

- either whilst turning or proceeding straight. It is not clear. However, merits were settled 90/10 in favour of the Plaintiff on 08 March 2018 already.

31 The Plaintiff on his affidavit states his left shoulder as having been injured in the motor vehicle accident under review (hereinafter referred to as the "2012 accident"). The affidavit by the investigating officer and the RAF 1 confirm same. The hospital records indicate that numerous x-rays were taken of the left shoulder, after Plaintiff repeatedly complained of pain in his left shoulder. Notwithstanding, Plaintiff insists that he injured his right shoulder in the 2012 accident.

32 In fact, the only "new" injury Plaintiff was diagnosed with in the 2012 accident was the injury to his lumbar spine. Plaintiff reports to Ms van Rooyen having suffered back spasms in his right shoulder after the 2008 motor vehicle accident as well. Dr Oelofse and Ms Fouche remark

Plaintiff's productivity will be compromised as the degeneration of his injuries start, after the initial soft tissue healing. This Court has not been convinced the motor vehicle accident under review is the sole cause of Plaintiff's loss of physical capacity. Plaintiff already incurred the bulk of these injuries in 2008, in the previous motor vehicle accident.

Ad loss of income:

33 In *Dippenaar v Shield Insurance Co Ltd* 1 979

(2) SA 904 (A) it was held that:

"In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed"

34 On Plaintiff's own version he is employable post-accident. On his own version he earned R 20 000 per month teaching at Zotha School for disabled kids in

2017. In 2015 he earned R 16 000 per month teaching. The occupational therapists reported Plaintiff is employable as a teacher going forward. Taking his qualifications, age and recent experience into consideration, it is doubted he will fall into the bracket of a newly graduated teacher. I am convinced he will earn the same, if not more than he did at the time of the accident. He clearly also has an ancillary income from the rooms he rents out from time to time.

35 A letter from human resources, suggesting that Plaintiff would have been promoted does not suffice. A report on his work performance by his commanding officer or direct head would have been more convincing. One does not get promoted automatically after every so many years. Promotion is dependent on one's work performance, diligence, availability of positions etc. Plaintiff was a captain at the time of the motor vehicle accident. For the purposes of judgement he will be considered as such. In respect of future loss of earnings and loss of earnings and earning capacity, I cannot agree with the submission by the Plaintiff.

36 The Plaintiff was remunerated for the period he was off work, following the accident. He was remunerated for a year after termination of his contract with the SANDF, which would be up to March 2014. Unfortunately no bank statements were made available to Court for the period. In August 2017 Plaintiff tells Ms Samouri he is employed at Chipa Tabane. He does not divulge this information to any other of the experts. This Court cannot establish on a scale of probabilities for which period following the accident the Plaintiff was employed.

37 It is conceded however, that there might be times that Plaintiff was unemployed or may in future be unemployed, following upon the motor vehicle accident. He was already paid an amount of R 900 000, 00 by the Defendant on 27 November 2019 in respect of quantum for part loss of income, which I believe would suffice for those periods he might be- or was so unemployed, which periods the Court cannot distinguish- or foretell with certainty.

38 The actuarial calculations are based upon the guidelines from the industrial psychologists, which I am not prepared to accept. Plaintiff's post- morbid income was calculated on the bottom scale of teachers with a four year qualification. The pre-morbid income was calculated with consideration of possible promotions, which are not considered to have been proven.

Ad General Damages:

39 General Damages are only payable in an instance of whole body impairment of 30% and more. Where a whole body impairment of 30% cannot be shown, the narrative test shall apply, which test involves injuries that...

- (a) Resulted in serious long term impairment or loss of bodily function;
- (b) constitutes permanent serious disfigurement;
- (c) resulted in severe long term mental or severe long term behavioural disturbance or disorder; and
- (d) resulted in the loss of a foetus.

(Regulation 3(1)(b)(iii) of the Road Accident Fund Regulations, 2008).

40 Where the Defendant rejects a claim, it shall in terms of the Regulations to the Act be referred to the HPCSA for decision on the seriousness of the injuries. The present claim was referred and so rejected by the HPCSA. The Plaintiff is highly opportunistic in requesting this Court to reconsider general damages.

Conclusion:

41 The Plaintiff's claim for any further past or future loss of income and I or income earning capacity cannot succeed. An amount of R 1 000 000, 00 was granted- and the Defendant ordered to pay R900 000, 00 to the Plaintiff on 27 November 2019 already.

42 The Plaintiff's claim for general damages cannot succeed;

43 The Plaintiff will need assistance with future medical expenses. No past medical expenses were proven.

Order:

1 The claim for the remainder of quantum in respect of loss of income and loss of earning capacity is dismissed.

2 The claim for general damages is dismissed;

3 The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund, Act 56 of 1996, which shall include the reasonable costs associated with treatment of the Plaintiff's psychological health;

4 The Defendant is ordered to pay the Plaintiff's taxed party and party costs inclusive of the costs of counsel for preparation and appearance, and the expert witnesses' reports but exclusive of the costs of their reservation for trial.

D PICK

ACTING JUDGE OF THE HIGH COURT

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