

SOUTH AFRICA / JUDGMENT

Shongwe v Road Accident Fund (902/23)

[2023] ZAMPMBHC 60 (17 November 2023)

[2023] ZAMPMBHC 60**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Mazibuko

CASE / FILE NUMBER

902/23

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Source record**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****MPUMALANGA DIVISION,****MBOMBELA****CASE NO: 902/23****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****DATE:**

17 November 2023

SIGNATURE

In

the matter between:

SHONGWE

ZODWA HLOBISILE

Plaintiff

and

ROAD ACCIDENT

FUND

Defendant

JUDGMENT

Mazibuko AJ

Introduction

1. On 24 August 2019, the plaintiff, 38 years of age, a Data capturer, was a passenger in a motor vehicle travelling along Buffelspruit Road, Mpumalanga Province, which got involved in an accident with another unknown vehicle. She sustained injuries and was treated at Shongwe Hospital.
2. She lodged a claim for damages with the defendant and later instituted an action for damages suffered due to the injuries sustained by her in the said motor vehicle accident. The action was defended. The merits were conceded at 100%, and an undertaking by the defendant regarding the future medical expenses was accepted.
3. The parties agreed that the issue before the court for determination was quantum for general damages and past and future loss of income. The evidence was limited to the contingencies and the application thereof. They also confirmed two scenarios provided by the actuaries regarding the contingencies. However, they did not agree on any of the scenarios.
4. The court granted the application, which was by consent between the parties, for the evidence to be adduced by way of affidavits in terms of rule 38 of the Uniform Rules of Court[1].

Rule 38(2) provides: “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.”

5. The oral evidence of the plaintiff, orthopaedic surgeon, occupational therapist, Clinical psychologist, industrial psychologist, and actuary was dispensed with. The parties further confirmed that none of the expert reports were in dispute.

Plaintiff's case

6. The plaintiff, through her counsel, Ms Mboweni, adduced evidence by referring to the expert reports, which were served on the defendant and filed in respect of injuries sustained, diagnosis, received and anticipated treatment, past and current complaints, medical prognosis, employment history and associated earnings, past, current and future employment disabilities, career postulations for the calculation of the plaintiff's past and future loss of earnings as well as actuarial calculations of the Actuaries.

Dr GK Tsolo (Dr T)

7. Dr T is a medical doctor who has specialised in orthopaedic surgery. He stated that he examined her spine and left foot. He found that the plaintiff had a lumbar spine fracture, as the injury occurred in the junctional area between the stiff thoracic spine and the mobile lumbar spine. His opinion is that the plaintiff is at risk of developing adjacent-level spondylosis and will most likely have chronic back pain. She continues to suffer from pain in the spine, which affects her engagement in activities of daily living and leisure tasks.
8. Regarding the left leg, he concluded that the plaintiff had left leg monoparesis. The back pain radiated down her left leg, and she had to use crutches. She will likely have difficulties engaging normally in activities requiring extensive mobility demands and heavy load handling. While

her symptoms may be managed and addressed with conservative and surgical methods, a full recovery is not expected. Her whole-person impairment was calculated at 24%.

P Manana (Manana)

9. Manana is an occupational therapist holding a bachelor's degree in occupational therapy. In their report, they stated that the plaintiff could meet sedentary to higher ranges of light occupations following the accident due to lower back pain and left lower limb pain. She did not meet the demands of her job following the accident, rendering her a vulnerable employee. According to the plaintiff, she struggled to function optimally in the department because she experienced difficulties with the fast-paced structure. The workload involves her lifting boxes of files and filing and sorting necessary documentation, which is

physically strenuous.

10. The plaintiff had existing predisposing factors. The accident most likely exacerbated any pre-existing psychological difficulties. Her physical injuries make it difficult for her to fully exert herself in the work environment, affecting her physical, occupational and psychological functioning.

Ms P Mokwala

11. Ms Mokwala holds a degree in clinical psychology. She noted that the plaintiff indicated elevated levels of subjective experiences of anxiety and depression, as she was tearful, increasingly irritable, and socially withdrawn with intrusive thoughts about the accident, which she said could be attributed to her mood swings. She has been left physically compromised post-accident, as she would always have to compete with better, able-bodied, pain-free individuals in the workplace. Her current neurocognitive profile is most likely representative of her pre-morbid functioning. However, it should be noted that her psychological functioning has been further compromised by the accident.

C. Badalani (Badalani)

12. Badalani is an industrial psychologist who holds a degree in Industrial Psychology. She stated that the plaintiff was employed as a General Administrator when the accident occurred. Following the accident, she returned to work after approximately two months, for which she was not remunerated (unpaid leave). She opined that she was mainly employable in the unskilled to semi-skilled types of employment.
13. At the time of the accident, she was earning R6 825.00 (Basic Pay) per month (i.e., R6 825.00 per month x 12 months = R81 900.00 per annum). With her educational background, work experience, and skills repertoire, the plaintiff would have continued working in similar employment categories until retirement age. She could have benefited from further on-the-job training and development. Furthermore, she would probably develop 18 skills that would have allowed her to progress within the company or at another employer. She was likely to advance to the Median of the B1 semi-skilled (Basic Salary) within the Corporate Sector (R. Koch, 2023) by the age of 50 years old.
14. The plaintiff informed the industrial psychologist that she lost her job due to the limitations she experienced at work. Her work capacity had been reduced. The collateral information obtained from her manager indicated that the accident injuries limited her in performing her work duties.

Namir Waisberg Actuaries (The actuaries)

15. The actuaries compiled a report indicating that at the time of the accident, Ms Shongwe was earning approximately R83 571 per annum (based on her year-to-date basic pay, unpaid time, company contributions and UIF as per the payslip dated 23 August 2019). She would have received uniform increases until reaching a level of R185 000 per annum (Median of Paterson Level B1 Basic Package as per Robert Koch 2023) by age 50. Further, she would have then received salary inflationary increases until retirement.
16. In March 2023, she was dismissed and has remained unemployed. The actuaries assumed the same post-morbid earnings as in the pre-morbid scenario; however, they illustrated a higher future post-morbid contingency deduction to allow for increased employment vulnerability, labour incapacity, uncertainty, possible long periods of unemployment and early retirement. They concluded that a 10% spread for past loss of income would be appropriate. For future losses, they provided two scenarios for what they termed sympathetic employment and unemployment, with a 10% and 15% spread, respectively.

Defendant's case

17. Through its counsel, Ms Malope confirmed the merits were conceded. She indicated that the defendant expected the plaintiff to give oral evidence. She revealed they were not calling witnesses and had procured no expert witnesses. The defendant addressed the court at the closing of its case and did not submit any written submissions.

Discussion

18. It is trite that when the court considers an appropriate quantum, it would be guided by previous comparable cases. In respect of the general damages, the court was referred to the cases, namely, *Ndaba v RAF*[2], *Wiese v Road Accident Fund*[3] and *Lawson V Road Accident Fund*[4]. *Moalahi v Road Accident Fund*[5], the plaintiff was involved in a motor vehicle accident and sustained multiple injuries, including a left knee injury. The court awarded the plaintiff an amount of R810 000.00 in respect of general damages. The plaintiff further argued that from the mentioned cases, each injury was separately awarded.
19. Considering that the plaintiff suffered a whole-person impairment of 24%, [MN1] as noted by the Orthopaedic surgeon, Dr T. Dr T pointed out that the plaintiff has a painful lower back and left leg, which worsens with the inclement weather and is forced to walk in crutches. Post-accident, she has difficulty with mobility as she struggles to walk for long periods. She has difficulties with house chores as she cannot lift heavy things as she would pre-accident. She also struggles to sleep at night as she experiences pain during the night. She has a paraspinal surgical scar in the thoracolumbar region. Considering Dr T's report and the impact of the injuries on the plaintiff, in my view, she has proven her damages, and it is justified that she be compensated and awarded R1 300 000 as a fair and reasonable amount for general damages.
20. In relation to future loss of earnings, Robert Koch, on page 100 of *The Quantum Yearbook*, states that a sliding scale used is 0.5% per year of employment to retirement, that is 25% for a child, 20% for youth and 10% for middle age. The plaintiff was 41 years old at the time of calculation and, therefore, falls within the 10% sliding scale based on the Robert Koch *Quantum yearbook*.
21. The determination of the general contingency deduction to be made falls squarely within the discretion of the court, which must decide what is fair and reasonable[6] When the court makes an order for future loss of earnings, it is expected to use contingency deductions to provide for any future circumstances that may occur but cannot be predicted with precision. It is accepted that the extent of the period over which a plaintiff's income has to be established directly influences the extent to which contingencies must be accounted for. With the unforeseen contingencies, the longer the period can influence the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies must be applied. The actuarial calculations are helpful, though not binding to the court, as the court has broad discretion to award what it considers fair and reasonable compensation.
22. A contingency deduction is made so that any possible and relevant future event which might otherwise have caused or influenced the extent of the damages sustained by the plaintiff is considered.[7] Contingencies have been described as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement, and other unforeseen factors.[8] The courts have recognised, however, that the fortunes of life are not always adverse; they may be favourable.[9]

23. As they stand, the actuarial calculations are based on two scenarios in which the plaintiff will be employable and earn the income she would have earned pre-morbid and where she will be unemployed. There is unchallenged evidence that she is compromised by the injuries sustained. However, she would not manage to do the same amount of work like lifting and carrying heavy boxes, sitting, and walking for more extended periods, as she used to do pre-accident. Therefore, her performance is impacted and compromised. She is currently unemployed.
24. Having considered the plaintiff's circumstances, which must influence the assessment of the general contingencies to be applied and the content of the expert reports, as agreed by the parties. The court accepts the actuarial calculations of a 10% spread (5% / 5%) for the past loss of earnings[MN2] . The plaintiff reported that she was dismissed[MN3] from work, and her employer confirmed that the injuries are limiting her to perform her job. There was no further collateral information

regarding her dismissal from employment, except the stated limitation, which is already a common cause between the parties when

regard is had to the experts' reports. No evidence was provided by the plaintiff that her dismissal was causally linked to the motor vehicle accident or attributed to the injuries sustained in the accident. There is, therefore, no persuasive ground for this court to follow the scenario that the plaintiff would be unemployable in the future. The court has, therefore, considered the sympathetic employment scenario of a 10% spread, as indicated by the actuaries, as fair and reasonable. The court is of the view that an appropriate award for the plaintiff's total loss of earnings must be in the amount of R1 784 194.

25. Concerning costs, the plaintiff has been successful, and there is no reason why she should not be entitled thereto.
26. Consequently, the following order is granted.

Order:

1. By agreement between the parties: The defendant is liable to compensate the plaintiff for 100% of the proven delictual damages suffered due to the motor vehicle collision on 24 August 2019.
2. The defendant shall pay the capital amount of R 3 084 194 (Three million eighty-four thousand one hundred and ninety-four rand) in full and final payment of the plaintiff's claim for General Damages and past and future loss of earnings, which is calculated as follows: R1 300 000.00 for General Damages and R1 784 194 for past and future loss of earnings.

4. By agreement between the parties: The defendant shall furnish the plaintiff with an unlimited Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital and nursing home and treatment of and rendering of a service to the plaintiff and the supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the motor vehicle collision of 24 August 2019 after such costs have been incurred and upon proof thereof.
5. The parties confirmed that there is a valid contingency fee agreement.
6. The defendant shall pay the plaintiff's taxed or agreed party and party costs up to date on the High Court scale, including the reasonable costs for preparing the actuarial calculations, medico-legal and addendum reports of the experts.

N. Mazibuko

Acting Judge of the Mpumalanga Division, Mbombela

This judgment was handed down electronically by circulation to the parties' representatives by email.

Representation:

Counsel for the Plaintiff: Ms V Mboweni Attorneys for the Plaintiff: Mboweni Attorneys Counsel
for the Defendant: Ms TB Malope Attorneys for the Defendant: Office of the State Attorney
(Mbombela) Heard: 18 October 2023 Date of

Judgment:

17 November 2023

[1] Act 59 of 1959

[2] 2011 (6E3) QOD 14 (ECB)

[3] (9263/2019)

[2022] ZAWCHC 171 (30 November 2022),

[4] 2010 (6C4) QOD 1 ECP

[5] (938/20147)

[2021] ZANCHC 32

[6] *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), at paragraphs

[95] to [96]; and *Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd* [2016] 4 All SA 153 (GJ), at paragraph [147].

[6] *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), at paragraphs

[95] to [96]; and Nationwide

Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd [2016] 4 All SA 153 (GJ), at paragraph [147].

[7] Erdmann v Santam Insurance Co Ltd [1985] 4 All SA 120 (C); Ncubu v National Employers General Insurance Co Ltd [1988] 1 All SA 415 (N); and Burns v National Employers General Insurance Co Ltd [1988] 3 All SA 476 (C).

[7] Erdmann v Santam Insurance Co Ltd [1985] 4 All SA 120 (C); Ncubu v National Employers General

Insurance Co Ltd [1988] 1 All SA 415 (N); and Burns v National Employers General Insurance Co Ltd [1988] 3 All SA 476 (C).

[8] Road Accident Fund v Guedes 2006 (5) SA 583 (SCA), at paragraph [3].

[9] Southern Insurance Association v Bailey NO, n 1, supra, at 117B.

[MN1]In paragraph 8 supra, the evidence by Dr T was that the whole person impairment was 15%

[MN2]Past and future loss of earnings

[MN3]Could the dismissal be attributed to the injuries sustained in the accident or was there another reason for the dismissal. Did the Plaintiff provide evidence that her dismissal was causally linked.

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