

SOUTH AFRICA / JUDGMENT

Tjiane v Road Accident Fund (52384/2021) [2024] ZAGPPHC 710 (22 July 2024) [2024] ZAGPPHC 710

COURT

North Gauteng High Court, Pretoria

BEFORE

Lubbe

CASE / FILE NUMBER

52384/2021

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
Case Number: 52384/2021

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE: 22/07/2024

SIGNATURE

In the matter between:

GODREY CHRISTIAAN TJIANE
PLAINTIFF
and
ROAD ACCIDENT FUND
DEFENDANT

JUDGMENT

LUBBE: AJ

1. This is an action which served before this court on default judgment basis. The issues of general damages and past medical expenses have been separated from the remainder of the quantum issues in terms of Rule 33(4) and stands to be postponed for later determination.
2. The Plaintiff brought an application that the evidence be accepted by way of affidavit as contemplated by section 34(2) of the Civil Proceedings Act, 25 of 1965 read with Uniform Rule 38(2). This application is granted.
3. The Plaintiff also filed an application in terms of Rule 30 for the setting aside of the notice of intention to defend served on 9 July 2024 at 09h20.
4. When the matter was heard on 10 July 2024, Mr Geach SC appeared on behalf of the Plaintiff and Ms B Rangata on behalf of the State Attorney. The Defendant did not proceed to argue opposition to the Rule 30 application and was amenable that the case proceeds.
5. The parties proceeded to argue on the issue of loss of earnings and after argument, this court reserved judgment in respect of this head of damage.
6. The court was greatly aided by the heads of argument filed by Plaintiff and proceed herein by quoting to a large extent from the document.

THE

FACTS:

7. The Plaintiff was born on 25 December 1978 and was involved in an accident on 7 April 2018.
8. The issue of merits was disposed of on 23 May 2022, when the Honourable Acting Justice Retief ordered the Road Accident Fund to pay 100% of the Plaintiff's proven or agreed damages.

INJURIES:

9. The Plaintiff sustained the following injuries as a result of the accident:
 - 9.1. Soft tissue back injury;
 - 9.2. Soft tissue right knee injury;
 - 9.3. Buttocks injury;
 - 9.4. A psychiatrist (Dr Fine) diagnosed the Plaintiff with symptoms of post traumatic stress disorder due to accident related emotional shock and depression.

10. Reference is made to these injuries inter alia in the RAF1 and the hospital records in CaseLines bundle 18.
11. The Plaintiff was a traditional healer at the time of the accident earning R7 000,00 per month. The Plaintiff holds a Grade 12 certificate as well as a traditional healer certificate. He has been doing the work of a traditional healer since 2003 and his duties are that he collects the herbs from the mountain and bushes and once he is home, he would crush it and package it. He would go to the mountain once a week.
12. An assistant assists him with harvesting the herbs, plants and roots as he is blind. The blindness is not accident related.
13. His income is R7 000,00 after deducting R1 500,00 for Mr Masangu.
14. The evidence is that he returned to his work, but only earns R4 500,00 per month post accident and he has seen lesser patients as he has to take rest breaks. He currently only sees about 1 patient a day. He is struggling with longer sessions and he is no longer able to pay Mr Masangu R1 500,00 per month;
15. Mr Masangu only occasionally assists him at this stage as he also no longer makes as much “muthi” as he did prior to the accident considering that he is seeing fewer clients.
16. An affidavit has been filed by Mr Masangu who confirmed that he was Plaintiff’s helper and that he was paid R1 500,00 per month for assisting the Plaintiff.
17. The facts are also that the Plaintiff can no longer stand for long or walk far as a result of the injuries sustained in the accident.
18. Dr Bogatsu explains the pain and the inability to stand or walk for long, backache, spasms, pins and needles.
19. The Plaintiff suffered shock and pain following the back injury and multiple soft tissue injuries. He continues to suffer from chronic mechanical pains.

DR FINE – PSYCHIATRIST:

20. Apart from the physical complaints, Dr Fine refers to the emotional problems, namely anxiety and depression and states that Plaintiff presents with symptoms of PTSD and accident related depression.
21. The psychiatric effects, in conjunction with the physical effects has since become established in chronic form due to the very lengthy period of time elapsed since the accident, impacting on his ability to perform and enjoy his normal activities of daily living and life amenities.
22. He qualifies for general damages owing to his severe long term mental and severe long term behavioural disturbance or disorder. He has a WPI of 10%.

OCCUPATIONAL THERAPIST:

23. 13 The complaints are discussed insofar as physical problems are concerned and is set out as pain in his thighs, hips, knees and lower back which is exacerbated by:

23.1. sitting for prolonged periods;

23.2. standing or walking for prolonged periods of time;

23.3. lifting heavy objects;

23.4. cold inclement weather;

23.5. stooping for too long;

23.6. disturbed sleeping patterns due to pain.

Cognitive and mood problems:

24. Short temperedness and irritability as well as travel related anxiety.

25. The Plaintiff can no longer go out to the field or up the hills to dig out the roots and herbs due to the pain in his lower back and legs.

26. He reported the following during the occupational therapy assessment, pain in his legs extending from his thighs to his calves and in his lower back with all associated movements.

27. When considering his functional residual capacity, it equates to dynamic strength and postural tolerance for light work.

28. The capacity to tolerate stooping as well as kneeling on an occasional basis are only applicable for no more than a third of his working day. His ability to engage in sitting, standing, stair climbing, walking in repetitive trunk rotation was limited to frequently, thus not more than two thirds of his working day.

29. He is thus restricted to sedentary and light work within the above set out parameters.

30. His pre-accident and current work as a traditional healer is classified as light work. It remains evident that retains the physical capacity to engage in the work demands of his work as a traditional healer. He has been able to continue with the work demands for approximately 5 years since the accident.

31. He depends more on his assistant as walking up hills and mountains and the fields and digging up roots and plants while in the kneeling and stooping posture will exacerbate the pain he experiences in his legs and his lower back. It is therefore justifiable that he no longer engages in these activities.

Dr Leon Fine's psychiatric medico lego report. See CaseLines: 08 – 109.

32. Current emotional state:

32.1. The Plaintiff suffers from anxiety and fear whenever he is walking along the road or crossing and hears a car next to him.

32.2. When he is afraid, he breathes much faster.

32.3. He gets bad dreams of accidents and he experiences nightmares of being again in an accident.

32.4. He gets times of depression and is more short tempered or easily angered.

32.5. He presents with symptoms of post traumatic stress disorder due to accident related emotional shock and of accident related depression. (See: CaseLines: 08 - 112).

32.6. He requires psychiatric treatment and psychiatric medication as well as psychotherapy. A good prognosis is given on such optimal treatment.

DR PRETORIUS – INDUSTRIAL PSYCHOLOGIST:

33. In an addendum psycho legal evaluation report dated 1 July 2024, Dr Pretorius deals with the facts as well as the medico legal report of Dr Fine dated 30 May 2024.

34. In the initial report of Dr Pretorius, dated 7 December 2023, he deals in detail with the reports of the other experts and insofar as the income is concerned, pre-accident. It is opined that the amount of R84 000,00 per annum is considered reasonable when considering market research which was conducted.

35. Inflationary related earnings growth until the age of 65 is suggested. During the period of recuperation namely 7 April 2018 to 6 July 2018, he did not ear any income. (see: CaseLines: 08 – 65).

36. After returning to his capacity as traditional healer post accident, his income reduced to R54 000,00 per year. In the post-accident scenario and inflationary related earnings growth will be applicable to age of 65. Retirement for both pre and post-scenarios are 70 and it is recommended that an appropriate higher post-accident contingency be applied for increased risk of further loss of earnings. (see: CaseLines: 08- 65).

Work history:

37. The Plaintiff has been involved in his sell employment as traditional healer from 2003 up to the current date.

38. In his affidavit, he confirms that he earned R7 000,00 per month in 2018 terms, before the accident and after the accident R4 500,00.

Collateral information:

39. It is set out in an affidavit from the Plaintiff dated 20 May 2023, that he is unable to work as he did before the accident, hence the reduced income of R4 500 per month post morbid. Reference is also made to the affidavit of Mr Masangu confirming that the Plaintiff is no longer able to pay him his salary as he struggles to continue with his work as a traditional healer.
40. Market research is then referred to insofar as traditional healers are concerned and the physical requirements is that of having to be physically strong and in good healthy condition as they must perform physical duties like digging, etc.
41. In extreme cases they need to perform extensive traditional/ritual dances. A Sangoma who cannot perform these duties, will have to pay a helper not less than R500,00 per week.

Psychological/cognitive requirements:

42. A Sangoma must at all times be attentive and concentrate on what the ancestors and bones are telling him or her before healing of the clients. They should be able to remember and concentrate on mixing herbs for the right disease and also correct measurements of muthis. (see:CaseLines: 08
- 72)

Financial aspects:

43. A Sangoma can on average earn plus minus R1 500 per week for consultation only, plus additional treatments of R4 000 plus training, if such Sangoma has students of his own.
44. According to collateral information an entry level Sangoma earns R9 000,00 per month. This information was confirmed by Mr Sello Khubela.

Pre-accident employability and career growth:

45. Taking into consideration that he has been a traditional healer for about 16 years prior to the accident, it is reasonable to assume that he can be viewed as a more senior traditional healer and that he had a stable and established business with regular patients.
46. He would have continued working as a traditional healer until age 70, considering collateral information.
47. The pre-accident earnings are then set out and it is opined that the amount of R7 000,00 seems reasonable and acceptable.
48. Post-accident earnings: - he only sees about 1 client per day and his post-accident earnings are around R4 500,00 per month (2023 terms).

Contingencies:

49. An appropriate pre-accident contingency is referred to due to fluctuations in terms of his earnings as a traditional healer. (see: CaseLines 08 – 76).

50. The whole person impairment insofar as the orthopaedic surgeon is concerned, is 3%. However, the drop in his traditional healing practice is understandable when consideration is given to the impact that pain is having on his functioning during consultation with the Plaintiff as well as when having to source his muthi's.
51. The occupational therapist states that his pain may improve after intervention. It is therefore probable that he will continue with his current self-employed capacity as traditional healer. However, he will probably remain vulnerable and limited for as long as his symptomatology persists, and he will not be able to reach his pre-accident uninjured earnings.
52. Reference is again made to the opinion of the occupational therapist Ms Steyn where she states that for as long as symptomatology persists, he will not be able to regain his pre-accident residual functional capacity and he will remain more dependent on his assistant as he would have in his uninjured state.
53. Within this specific context it is expected that pain will disrupt his ability to maintain longer sessions with clients and it limits his capacity to seek muthi at places higher in the mountains which in turn makes the need for assistance more likely with associated higher costs. These factors both compound together to force him into seeing fewer clients, which again feeds back into reduced performance of his business.
54. He has therefore suffered a negative impact on his career and earnings as a direct result of the accident and he will not be able to reach his pre-accident earnings level. The dropping of productivity in his traditional healing practice is understandable when consideration is given to the impact that pain is having on his functioning during consultation.
55. It is noted that pain has a negative impact on an individual's motivation and drive to continue working.
56. It is therefore probable that he will remain vulnerable and limited for as long as his symptomatology persists and not able to reach his pre-accident uninjured earnings.
57. He has always relied on his physical abilities to generate an income. In alternative work capacities he will be reliant on his physical abilities. Due to his vision impairment, it is unlikely that he will seek other employment. It is also important to note that traditional healers generally view their role as a calling and to deviate from this can be considered to be almost unthinkable.
58. He is at risk of getting a bad reputation due to physical limitations as he struggles to sit on the ground for the entire consultation as well as his limitations with regard to sourcing material. He risks experiencing progressive reduction of his business and associated income, which will impact negatively on his earnings growth.
59. His loss and motivation and mechanical pain experience creates the risk of him abandoning his business completely before retirement age.

60. He is at risk of experiencing progressive reduction of his business and associated income due to the expected disinterest in tasks, lack of engagement and loss of motivation (see: CaseLines: 08 – 79).
61. He is therefore a vulnerable competitor in the open labour market, and it is not longer expected from him to reach the career and earnings potential as expected in the uninjured state. He is at risk of a further negative insult to his career and earnings as a result of vulnerable functioning in his post-accident state.
62. He is at risk from an occupational capacity perspective to earn less than postulated or stop working completely.
63. The risks set out previously should be considered for an appropriate post accident contingency application.
64. Future loss of earnings must also be considered against the background of having to undergo treatment and his recuperation period. The industrial psychologist indicates a higher post- accident contingency deduction.

THE ARGUMENTS:

65. Ms Rangata appeared on behalf of the Defendant and suggested as the court understood it that higher contingency deductions are indicated. This is to cater, inter alia, for the fact that the plaintiff is blind and resultant uncertainties about his income and productivity in the pre- morbid scenario. She proposed 25%. After having applied her contingency deductions she proposed an amount of R 750 000.00 as reasonable compensation.
66. Mr Geach SC who appeared on behalf of the Plaintiff, referred inter alia, to the report of Dr Fine and the incapacity which has been brought about by that. The combination between the psychiatric sequelae and physical problems should be considered.
67. According to Mr Geach SC the approach as in the calculation as contained in the heads of argument at CaseLines A27, applying a 5% in respect of past and a 10% and 30% in respect of future, culminates in a fairly calculated loss of R1 219 721.00.
68. The argument is further that the industrial psychologist has postulated an extremely conservative scenario pre-accident. There is no material career progression despite the young age of the Plaintiff and there is ample space for career progress.
69. The court is however satisfied that under the current factual circumstances, inflationary increases are sufficient.
70. The court is of the view that the facts point thereto that the plaintiff's conditions are to a substantial degree "treatable" and the plaintiff has always been reliant on assistance for physical tasks.

71. The calculation of loss is done up to the age of 70 years so the court is inclined to apply a higher pre- morbid future income deduction of 15% to also make provision for uncertainties relating to his income. The proposed 25% by defendant is in the court's view, too high. The court is inclined to increase the pre- morbid past income contingency deduction to 10% as well.
72. The differential should be 10% to make provision for the fact that treatment is anticipated to have a positive outcome and Dr Fine ascribes a 10% WPI from his perspective. The 3% orthopaedic impairment rating is taken into account but the 13% is reduced to 10% following the positive prognosis for the results of treatment.
73. The end result is that the past loss is R 263 693.00, the future loss is R 799 194.00 with a combined total loss of R 1 062 887.00.
74. The court accordingly grants an order as per Annexure "X" annexed hereto.

G LUBBE

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

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Prepared on 10 October 2026 · Esheria