

SOUTH AFRICA / JUDGMENT

Tshabalala v Road Accident Fund (12133/2018) [2023] ZAGPJHC 257 (23 March 2023) [2023] ZAGPJHC 257

COURT

South Gauteng High Court, Johannesburg

BEFORE

Gilbert AJ

CASE / FILE NUMBER

12133/2018

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
Case No: 12133/2018
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES

In the matter between:

MBALI
TSHABALALA
Plaintiff
and
ROAD
ACCIDENT FUND
Defendant

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The plaintiff instituted action against the Road Accident Fund arising from an incident that the plaintiff pleads occurred on 26 November 2016 at approximately 22h30 along Mooki Street in Orlando West, Soweto when she as a pedestrian was struck by the insured vehicle “outside the road”.
2. The particulars of claim provide for the following heads of damages:
 - 2.1. an estimate for past hospital expenses of R5 000.00;
 - 2.2. an estimate for past medical expenses of R5 000.00;
 - 2.3. the usual undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 1996 in respect of estimated future medical expenses;
 - 2.4. an estimate of R250 000.00 for past loss of earnings;
 - 2.5. an estimate of R2 500 000.00 for estimated future loss of earnings and loss of earning capacity;
 - 2.6. general damages in respect of pain and suffering, loss of amenities of life and disability of R1 500 000.00.
3. When the matter was called before me on 9 March 2023, but before plaintiff’s counsel made an opening address and commenced proving her claim in terms of Uniform Rule 39(1), I enquired of the plaintiff’s counsel whether the matter was ripe for hearing on trial and that it would not become a part-heard trial before me. I was, amongst other things, concerned that there were no affidavits uploaded to the electronic court file in which the plaintiff or any other witness sought to adduce factual evidence, whether related to the merits of the matter (such as how the collision occurred) or to found a factual basis for the expert reports that had been filed and which expert reports the plaintiff intended to introduce into evidence by way of affidavit.
4. Insofar as the merits were concerned, and while the matter was waiting to be allocated for trial on 9 March 2023, the Fund made an offer in relation to the negligence aspect of the merits, which the plaintiff accepted. That settlement of the merits is expressly stated to be limited to the element of negligence (i.e. that the insured driver was solely negligent for the collision) and does not include, for example, the element of causation. Nonetheless, this offer by the Fund demonstrated that the Fund was satisfied that the collision as pleaded by the plaintiff had occurred and was caused entirely by the negligence of the insured driver. This then was sufficient to satisfy me on this aspect of the matter, and that the plaintiff need

not led evidence on that aspect of the merits.

5. As my interaction with the plaintiff's counsel continued before the commencement of his opening address, it transpired that the plaintiff was seeking a reduced amount of R500 000 for general damages but significantly larger amounts in respect of past loss of earning of R290, 818 and future loss of earnings of R9, 941, 286.00. This notwithstanding that the claim in the summons was for significantly less, being only R250,000 and R2 500 000 respectively. There is clearly a very large disconnect (nearly fourfold) between the total claimed by the plaintiff in her summons for past and future loss of earnings and that which she now is claiming, based upon an actuarial report dated 8 March 2023 and which had been uploaded to CaseLines the day before.
6. During the course of this interaction with plaintiff's counsel, he informed me that as far as he was aware there was an amendment to the pleadings to address this disconnect.
7. As this interchange progressed between plaintiff's counsel and the court, the plaintiff's attorneys at 14h26[1] uploaded a document entitled "Notice of Intention to Amend in terms of Rule 28".[2] This document gives notice that the plaintiff intends at the hearing of the trial action on 9 March 2023 to amend her particulars of claim by substituting the amount claimed in respect of past loss of earnings in the particulars of claim of R250 000.00 with an increased figure of R290 818.00 and a similar substitution of the amount claimed in respect of future loss of earnings and loss of earning capacity of R2 500 000.00 with a revised sum of R9 941 286.00. This was to align these claims for loss of earnings with that reflected in the revised actuarial report dated 8 March 2023. This document is dated 8 March 2023 and appears to have been stamped by the Fund acknowledging receipt on 9 March 2023.
8. I raised my concern with plaintiff's counsel with the timing of the uploading of notice of intention to amend. I raised with plaintiff's counsel that if left unexplained by the plaintiff, an inference could be drawn that the notice of intention to amend was only uploaded because of my line of enquiry as to the disconnect between that claimed in the summons and that claimed on the day of trial and that but for my having pursued this line of enquiry, my attention would not have been drawn to this disconnect or even that there was a pending application for leave to amend the particulars of claim. Plaintiff's counsel assured me that this inference was not justified and that it was coincidental that in the cut and thrust of my interactions with

him that the document was uploaded. Other than recording a sense of unease, I take this issue no further.

9. But what remains to be considered is the lateness of this intended amendment and whether the matter could be said to be ready for trial in light of such a substantial amendment that had not yet been effected and of which the Fund had only been informed the day before. Plaintiff's counsel's submission was that the plaintiff could not be faulted for the lateness of the amendment as the revised actuarial report was only provided by the actuarial expert the day before, on 8 March 2023, as appears from the date of that document, and that report in

turn was based upon a revised expert report of the industrial psychologist, which itself had only become available on 7 March 2023, as appears from the date of the report.[3]

10. I raised with plaintiff's counsel why the revised industrial psychology report only materialised on 7 March 2023. The submission was that the experts in Road Accident Fund's matters were not readily available and that a consultation needed to be arranged in advance with an expert to enable them to do interviews and follow-up interviews, and render the appropriate expert reports. This naturally led to my further enquiry, which was when were interviews with the experts, particularly the industrial psychologist, requested. The experts could hardly be faulted for delivering expert reports late if they were not approached timeously.
11. I specifically stood down the matter for plaintiff's counsel to take instructions on this aspect. Having taken instructions, plaintiff's counsel informed me that the interviews had been arranged by telephone and there was no readily available record as to when these were arranged. I have some difficulty in appreciating this explanation as typically an attorney would make file notes, even if in manuscript, as to when telephone calls were made and that it was therefore concerning that this evidence was not readily available. This was especially so as plaintiff's counsel was video-linking from his instructing attorney's office.
12. The submission continued that it was not at all unusual for updated expert reports to be produced and which then necessitated amendments to the pleadings in that reports became stale as the trial dates were awaited. Although I accept that it may become necessary to furnish updated reports or addenda to reports as the matter progresses, this does not adequately explain in my view why in this particular instance updated reports only materialised in the week before trial, at least in relation to the industrial psychologist..
13. The trial date in this matter had already been allocated on 8 July 2022.[4] This is after the court on 11 May 2022 struck out the Fund's defence and directed that the plaintiff may approach the Registrar

for an allocation for a default judgment trial date. Revised Directive 1 of 2021, as it then was as at May 2022, provides in paragraph 23 that a plaintiff may only seek of the trial interlocutory court a referral to the Registrar to obtain judgment by default in the default judgment trial court "when all necessary preparation to present the relevant evidence is accomplished". The plaintiff's expert evidence should have been ready, and any amendments effected to her pleadings, before the plaintiff even approached the trial interlocutory court in May 2022 for a referral to this default judgment trial court.

14. The plaintiff still did not address the deficiency before applying for a trial date, and persisted with that deficiency, once the trial date was allocated, until the day of the trial before me.
15. What further detracts from the plaintiff's explanation is that an actuarial report had already been obtained on 25 November 2021,[5] which showed then already the amounts for loss of earnings had increased to R6 585 652 and R7 532 190, depending

on which scenario was adopted. It was clear then already, in November 2021 that there was a significant disconnect between

what had been claimed in the particulars of claim and the actuarial report. But no amendment to the pleadings was done and the plaintiff went ahead and sought a trial date on the basis the matter was trial ready.

16. The prejudice to the Fund arising from this belatedly intended amendment is self-evident. The plaintiff's intended claim for loss of earnings increased fourfold from R2.75 million to over R10.2 million, on the eve of the trial with less than one day's notice. Plaintiff's counsel, to his credit, readily acknowledged this prejudice. This prejudice exists even if the Fund's defence was struck out because the Fund was at the very least entitled to adequate notice that there would be such a large increase in the claim.
17. The matter stood down before me overnight from 9 March to 10 March 2023.
18. Upon the resumption of the trial on 10 March 2023, plaintiff's counsel, having taken instructions overnight, accepted that the trial could not proceed, at least in relation to the issue of loss of earnings and earning capacity.
19. Further, overnight, interactions had taken place between the plaintiff's legal representatives and the State Attorney on behalf of the Fund and who had reached agreement on certain issues.
20. Accordingly, a revised draft order was uploaded to the electronic court file on 10 March 2023 in which the plaintiff sought amended relief, and which required the issue of loss of earnings and earning capacity to be postponed sine die.
21. What had been achieved overnight was that the Fund now acknowledged its liability 100% in favour of the plaintiff on the merits and that the Fund was agreeable to general damages of R500, 000 in favour of the plaintiff.
22. This does not address the matter not being trial ready when it was called before me, and that a trial date should not have been sought where the plaintiff's expert evidence was outdated and the pleadings would have to be amended. Plaintiff's counsel sought to persuade me again on 10 March 2023 that the matter was trial ready, but in light of what is the common cause prejudicial amendment sought to be made by the plaintiff increasing her claim fourfold in respect of loss of earnings and earning capacity, I cannot find that this matter was ready for trial.
23. Ordinarily then the matter should have been struck from the roll. But plaintiff's counsel prevailed upon me to at least grant the relief in the draft order that that had uploaded.
24. I have closely reflected upon whether I should accede to the request, and to this end reserved judgment on 10 March 2023, particularly as I did not find the submissions persuasive in explaining the belated expert evidence and intended amendment.

25. Nonetheless, plaintiff's counsel did submit that in the interests of justice, the plaintiff should be entitled to at least some relief at this stage given her ongoing pain and suffering.
26. Although the manner in which the plaintiff's attorneys have gone about preparing for this trial and more particularly in ensuring the matter is trial ready is seriously remiss, I am persuaded that the plaintiff, who instituted her action five years ago in March 2018, should have some relief.
27. I turn to the draft order that has been placed before the court by the plaintiff's counsel that the plaintiff seeks be made an order of court.
28. In paragraph 1 of the draft order, pursuant to the agreement reached between the plaintiff and the defendant, an order is sought that the defendant concedes liability 100% in favour of the plaintiff. I am not inclined to include this as part of the order. The court has not interrogated this concession by the Fund and there is no factual evidence, at least not yet, to support the concession, such as whether causation should be conceded in relation to loss of earnings.
29. In paragraph 2 of the draft order, the plaintiff seeks judgment against the defendant for R500 000 in respect of general damages payable within 180 days from the date of the order. Plaintiff's counsel informed me, and this was confirmed by the State Attorney on behalf of the Fund who was granted limited audience to address me given that the Fund's defence had been struck out,[6] that this had been agreed with the Fund. I however am not prepared to accede to granting this relief at this stage. As will appear below, the matter is in any event to return to the trial court and that court, having heard such evidence as may be led, will be better placed to decide whether general damages should be granted and in what amount.
30. The recent reminder by the Deputy Judge President of this division in a notice published on 19 January 2023 is apposite:

"It is appropriate to remind practitioners of the rationale for these procedures. In all the cases public money is being spent. It is incumbent on the courts not to be a rubberstamp either settlements or default judgments which are not rationally premised. Regrettably, experience has shown that there are frequent settlements reached which are irrational. Similarly, when an organ of state is remiss in engaging with the plaintiff and a default judgment per se is justified, it remains appropriate that a court making an order of court by default does not inadvertently endorse opportunistic overreaching at the public expense".
31. I do not suggest that the claim for general damages constitutes an opportunistic overreaching at the public's expense but rather that this issue should be ventilated at the trial in due course rather than this court rubberstamp the settlement that has been reached between the parties in relation to that head of damages.

32. The plaintiff in paragraph 3 of the draft order, for the reasons set out above, seeks that the issue of loss of earnings and earning capacity be postponed sine die. As this means that this trial would have to commence in relation to that head of damages in any event, the plaintiff's claim for general damages can also be determined at that stage.
33. In paragraph 4 of the draft order, the plaintiff seeks the usual undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. This is where I am persuaded that the plaintiff, in the interests of justice, should be granted some relief, in the form of the undertaking to address the plaintiff's needs for future medical treatment.
34. In paragraph 5 of the draft order, the plaintiff seeks agreed or taxed costs, including the costs of all expert reports, preparation fees and reservation fees, if any, and the costs of counsel.
35. Having heard the submissions on behalf of the plaintiff and notwithstanding that the Fund is agreeable to paying these costs, I find in my discretion that it would not be appropriate or just to order that payment be made by the Fund of these costs, at least not at this stage. As I have reasoned above, this matter was not trial ready and ordinarily would have been removed from the roll, with no order as to costs or possibly a costs order that deprived the plaintiff's legal representatives of a recovery of any wasted costs from their client, the plaintiff.[7]
36. Although I have been persuaded that some relief is to be granted to the plaintiff in the interests of the plaintiff, this limited success in my view does not justify the plaintiff being entitled to costs at this stage. Whether the plaintiff should be entitled to costs can be determined by the trial court in due course.
37. No expert evidence was adduced before me, as the trial did not commence proper, and as the matter was not trial ready, the Fund can be expected to pay for the costs of the experts, and the like.
38. In the circumstances, I intend reserving the issue of costs, other than for what is stated immediately below, for determination by the next court. That court would be better placed having heard the relevant evidence and dependent upon what evidence is led to decide whether, and to what extent, costs should be awarded in favour of the plaintiff. It is at that stage that the usefulness of the expert testimony will materialise and so that court can decide upon the incidence of costs in respect of the experts.
39. I am not denying that the plaintiff, including her experts and counsel, are entitled to costs but rather that those costs are best assessed by the subsequent court. That those costs cannot be recovered from the Fund at this stage is a sufficient salve for this matter not being trial ready.
40. What I do find in relation to costs at this stage is that to the extent the court does in due course find that the plaintiff is entitled to costs, those costs, insofar as relate to the hearing before me on 9 and 10 March 2023, should not include any costs of experts relating to those days (as no expert evidence was adduced before me), and, insofar as fees are calculated on a

daily basis, should not exceed one day. Although it would transpire that the matter unfolded before me over the course of two days, being 9 and 10 March 2023, this matter was not trial ready and should not have proceeded at all. That the plaintiff may become entitled to any costs for the hearing before me, in due course, is as a result of the limited success that was achieved before me primarily through the plaintiff's engagement with the Fund, and not as a result of the plaintiff having the matter trial ready. The Fund, and the public purse, should therefore not be prejudiced by the matter not being trial ready.

41. The plaintiff has also sought in paragraph 7 of the draft order that I order that "there is no contingency fee agreement in this matter". I expressed concerns as to whether it is appropriate for me to make this order. It is not an order but rather a recordal that the plaintiff is seeking that the court make. In any event, I expressed concern whether I could make such a recordal without being satisfied that it is factually correct, and relevant and necessary. To this end, I afforded the plaintiff's attorneys an opportunity over a week to file an affidavit addressing these concerns.
42. The plaintiff's attorneys did file an affidavit, in which they state under oath that there is no contingency fee agreement and attach the fee agreement that is in place. That fee agreement does appear not to be a contingency fee agreement as it records, particularly in clause 3.3, that the plaintiff will pay her attorneys' attorney and own client costs regardless of whether she is successful or not.
43. But the plaintiff's attorneys in paragraph 2.14 of their affidavit state that their fees will be deducted from the monies received from the Fund, which presupposes the plaintiff's success. This is consistent with a contingency fee arrangement rather than a fee arrangement that the plaintiff will pay the attorney and own client fees regardless of success.
44. As the plaintiff and her attorneys have not had an opportunity to fully consider and make submissions on this issue, I do not intend making any finding in this regard and will leave it to the plaintiff and her attorneys to comply with such practice directives as may be applicable in due course with the trial court.
45. I do record though that it is concerning that the plaintiff's attorneys did not comply with the practice directive to which they directed me in their affidavit, being that contained in paragraph 63.1 of the judgment of *Mofokeng v Road Accident Fund 2012 JDR 1450 (GSJ)*, before seeking that I make the draft order an order of court. That directive, in part, reads:

"Whenever a court is required to make a settlement agreement or a draft order an order of court, before the court makes such an order:
 1. the affidavits referred to in section 4 of the Contingency Fees Act, 1997 must be filed, if a contingency fees agreement as defined in the Act, was entered into;

2. if no such contingency fees agreement was entered into, the attorney and his or her client must file affidavits confirming that fact...”

(my emphasis).

46. It was only when in response to my concerns whether I could make the recordal in the order that there was no contingency agreement in place, and I afforded the plaintiff's attorneys an opportunity to file an affidavit, that the plaintiff's attorneys sought to comply with the directive and to file affidavits by the attorney, and the plaintiff, confirming that there was no contingency agreement in place. But for my having raised my concerns, this practice directive would not have been complied with. This is reminiscent of the uploading of the notice of intention to amend only after I raised concerns as to the disconnect between the plaintiff's pleaded case and her intended expert evidence.
47. I reiterate that this matter could not have been, and was not, trial ready given the substantial amendment that is outstanding. The order that I intend granting is to a considerable extent indulgent towards the plaintiff and her attorneys as otherwise the matter should have been removed or struck from the trial roll, potentially with an appropriate costs order adverse to the plaintiff and/or her attorneys.
48. I conclude by stating that the trial did not proceed before me by way of the plaintiff making opening submissions and by the leading of any evidence as envisaged in Uniform Rule 39(1) and (5). In the circumstances, this matter is not a part-heard matter and so the relief that is to be postponed sine die can and should be dealt with in the ordinary course by obtaining the appropriate trial date from the Registrar once the prevailing practice directives have been satisfied and the matter is trial ready.
49. The following order is made:
 - 49.1. the defendant is to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund, 56 of 1996 for 100% of the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment, or the costs of rendering of a service or the supplying of goods to the plaintiff, arising out of the injuries sustained by the plaintiff in the collision which occurred on 26 November 2016, after such costs have been incurred and upon proof thereof;
 - 49.2. the balance of the relief sought by the plaintiff is postponed sine die, including the plaintiff's claim for general damages and for loss of earnings and earning capacity;
 - 49.3. the costs incurred for the hearing on 9 and 10 March 2023 are reserved save that if such costs are ordered in favour of the plaintiff in due course:

those costs are not to include any fees or costs relating to experts, including for expert reports, preparation fees and reservation fees, relating to the hearings on 9 and 10 March 2023;

the plaintiff is not be entitled to legal fees, including for counsel fees, where calculated on a daily basis, for more than one day in relation to the hearing on 9 and 10 March 2023.

Gilbert AJ

Dates of hearing: 9 and 10 March 2023 Date of judgment: 23 March 2023 Counsel for the Applicant: L Luvuno Instructed by: S.S. Ntshangase Attorneys Counsel for the defendant: No appearance, the Fund being in default other than a limited appearance by Adv E Ndlovu of the State Attorney for purposes of confirming that settlement had been reached on certain issues Instructed by: State Attorney

- [1] This appears from a record of document activity under the audit function on the CaseLines file.
- [2] At CaseLines 28.1 to 28.3.
- [3] The report is at CaseLines 018-230.
- [4] This appears from a widely shared note by the Registrar in the Caselines file.
- [5] At CaseLines 018-124 to 018-128.
- [6] Uniform Rule 39(2) provides that when a defendant has by his default been barred from pleading, and the case has been set down for hearing, and the default duly proved, the defendant shall not, save where the court in the interests of justice may otherwise order, be permitted, either personally or by an advocate, to appear at the hearing.
- [7] The Revised Directive 1 of 2021 expressly provides for a party's legal practitioners being disallowed from charging any fees and disbursements to their client.

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