

SOUTH AFRICA / JUDGMENT

Xaba v Road Accident Fund (2241/2024)
[2024] ZAMPMHC 59 (8 November 2024)
[2024] ZAMPMHC 59

COURT

Middelburg High Court, Mpumalanga

BEFORE

N G M Mazibuko

CASE / FILE NUMBER

2241/2024

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG

CASE NO: 2241/2024

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES / NO
- (3) REVISED: YES / NO

Date 8 November 2024

Signature

In the matter between:

SANDILE BANELE XABA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

REASONS

Mazibuko AJ

Introduction

- [1] This is an action for damages arising from a motor vehicle collision on 2 April 2023, where the plaintiff was a pedestrian. As a result, he suffered personal injuries and claims damages in the amount of R2 475 575.

Background facts

- [2] At the commencement of the proceedings, the parties informed the court through their respective counsel that the merits and future medical expenses had been settled at 80/20, which is 80% in favour of the plaintiff.
- [3] The matter was before the court for determination of loss of income and general damages.
- [4] The court granted an application for the evidence to be adduced by way of affidavits in terms of rule 38(2) of the Uniform Rules of Court.[1]
- [5] The oral evidence of the plaintiff, Dr SK Mafeelane, the orthopaedic surgeon; Prof S Mutambirwa, the urologist; S Marule, the occupational therapist; B Oosthuizen, the industrial psychologist and C du Plessis, the actuary, was dispensed with.
- [6] After the admission into evidence of the plaintiff's affidavit, the plaintiff's experts' affidavits, and the plaintiff's expert reports. On behalf of the plaintiff, Mr Moifo made submissions on the loss of earnings, general damages and the costs.
- [7] In defending, the defendant, through its counsel, Ms Nefolovhodwe, argued that the plaintiff's claim be dismissed as the plaintiff's hospital records (the records) were not before the court. The ones the plaintiff relied on were for a certain Sandile Ndzimande and /or Sandile Nkosi. The plaintiff's affidavit was not sufficient to explain the discrepancies.
- [8] The court sought clarity concerning the defendant's concession of merits and offer on future medical expenses. She responded that though the parties had already settled on these heads of damages, the plaintiff still had to discharge the onus to prove his claim by presenting credible evidence.
- [9] Mr Moifo replied and referred the court to the trial bundle, wherein the plaintiff's affidavit dated 8 May 2023 explained that at the hospital, they referred to him as Sandile Ndzimande and /or Sandile Nkosi. He submitted that it was the hospital's fault, not the plaintiff's, that the records were in other persons' names.
- [10] The plaintiff believed his affidavit sufficiently explained the discrepancies in the hospital records. Mr Moifo indicated he could call the plaintiff to explain the hospital records. He was reminded that the plaintiff's case was closed. He argued it was not.

- [11] The defendant confirmed the parties' cases were closed. The court inquired whether the plaintiff was applying to re-open its case. The plaintiff insisted he could still call witnesses as he had not closed his case. The matter stood down for parties to make submissions on the issue of whether or not the parties' cases had been closed. If yes, would the plaintiff explore the options available to him to achieve his desire to lead further evidence?
- [12] On resumption, the parties respectively made submissions on whether they had closed their respective cases. I found that the parties had closed their cases.
- [13] An application to re-open the plaintiff's case to lead evidence regarding the discrepancies in the hospital records was brought and opposed. The application was refused. The plaintiff's claim for loss of income and general damages was dismissed. Now, he has requested written reasons for the court's order.

Plaintiff's case

Hospital records

- [14] In order to prove his claim for loss of income and general damages, the plaintiff relied on his affidavits and the experts' reports. According to the entries made in the Ermelo hospital records relied on by the plaintiff, on 2 April 2023, the patient by the name of Sandile Nkosi was together with relatives brought by paramedics with reference number ER23/6112 at the Ermelo hospital heavily intoxicated. He was admitted with an open book pelvis fracture with scrotal injury and a left distal femur fracture with peroneal nerve palsy. He was treated and admitted until 4 May 2023 with follow-up treatment.
- [15] The hospital records presented by the plaintiff reflected Sandile Ndzimande as the patient treated on 6 April
2023. However, Sandile Nkosi is reflected as the patient in the same records on the same day. On 3 May 2023, an entry was made in the hospital records where Sandile Nkosi verbally consented to a specific medical procedure. The records reflected entries by different hospital and medical staff from 2 April to 4 May 2023. However, some entries indicate a date of arrival as 24 April 2023. In some reports, including reports where blood was drawn, the patient's date of birth is not stated.
- [16] A document resembling a cover page from Ermelo Hospital, which looks like it originally read Sandile Nkosi, with 'Nkosi' being scratched out. Next to the scratched 'Nkosi', the surname 'Xaba' appeared.

Experts' evidence

Orthopaedic surgeon

- [17] According to the Orthopaedic surgeon's report. They considered the hospital records and interviewed the plaintiff. The report stated that the plaintiff complained of waist pain, left knee pain and left drop foot. He is only suitable for sedentary work.

[18] The sequelae of the injuries are:

- a) left drop foot gait-peroneal nerve palsy.
- b) left knee flexion is only up to 90 degrees (normal is 130 degrees)
- c) 18 cm scar on the left mid-thigh lateral aspect extending distally to the knee.
- d) Knee stiffness.
- e) Pubic symphysis diastasis.
- f) He has great difficulty standing and walking for a long time.
- g) He has great difficulty climbing stairs and walking uphill.
- h) He has great difficulty doing jobs requiring physical exertion and household chores, and he cannot run.

Urologist

[19] The urologist found that the patient had erectile dysfunction, and there might be issues with fertility due to the injuries sustained.

Occupational therapist

- [20] The Occupational therapist opined that the plaintiff will struggle to engage in vigorous tasks that require intense physical force due to the pain and weakness in the left leg. He will have difficulty standing and walking for more than 15 to 20 minutes. He is not fit to lift and carry objects heavier than 7kg, especially continuously, due to pain. He is unable to recover fully to his pre-accident status.
- [21] In her opinion, the plaintiff will benefit from occupational therapy and assistive devices, such as a shopping bag on wheels, washing machine, heat pack for pain, bucket on wheels, 3 days a week of domestic assistance and R5 000, 00 per annum for heavy gardening maintenance.
- [22] Further, it would be difficult to attain and maintain suitable employment in the open labour market. He should be considered vulnerable and will be reliant on a sympathetic employer to accommodate his physical and cognitive needs. He will likely require reasonable accommodation for the rest of his working years.

Industrial psychologist

[23] The Industrial Psychologist interviewed the plaintiff. According to the report, they were informed by the plaintiff that he left schooling in 2020, and his highest level of education was Grade 7. He entered the labour market as a Forest Worker in 2020 after a period of unemployment. His duties were cutting down trees using a chainsaw. He was self-employed from February to March 2023, collecting cans, aluminium and scrap metal. He was unemployed at the time of the accident. He provided no proof of his schooling, earnings, or

collateral information.

- [24] They considered the plaintiff's current complaints, as stated by other experts, including the orthopaedic surgeon and occupational therapist. It was noted that the complaints would most likely affect his productivity and effectiveness in the workplace should he attain employment. The experience of pain might necessitate early retirement.
- [25] The plaintiff had not entered any form of employment since the accident. He is unfit to perform jobs in the open labour market or in a self-employed capacity like he did prior to the accident due to the injuries sustained and the sequelae thereof. His occupational choices have thus been limited. It is assumed that had the plaintiff secured employment in the open labour market; he would have been able to perform jobs until the normal retirement age of 65 or for as long as his health permitted. As a result, his future employability and earning potential have been negatively affected, and he has been rendered unemployable in all labour markets.
- [26] The industrial psychologist assumed that he may have re-entered into employment in the open labour market by January 2024 between the lower (R27 600, 00) and median (R49 800, 00) brackets for unskilled workers employed in the noncorporate sector and that his earnings may have progressed to the upper bracket (R110 000, 00) for unskilled workers employed in the noncorporate sector by the age of 45 and that thereafter he will receive annual inflationary increases until retirement.
- [27] He will continue to suffer a loss of earnings, as he has been rendered unemployable in all labour markets owing to the injuries sustained in the accident and the sequelae thereof. His loss of earnings equates to the difference between the aforementioned pre- and post-accident scenarios. It is recommended that an appropriate pre-accident contingency deduction be applied.

Actuarial calculations

[28] The filed actuarial calculations dated 01 August 2024 were as follows:

Pre-morbid: Past Loss : R22 575, 00

Less 5% Contingency: R1 129, 00

Subtotal: R21 446, 00

Pre-morbid: Future Loss: R2 078 939, 00

Less 15% Contingency: R311 841, 00

Subtotal: R1 767 098, 00

Post-Morbid: Past/Future Loss: R0, 00

Subtotal : R0, 00

Total Loss of Earnings: R1 788 544, 00

Defendant's case

[29] The defendant closed its case without calling any witnesses. The defendant's counsel, Ms Nefolovhodwe, contended the plaintiff's injuries. It was argued that the plaintiff had not made out a case for loss of earnings and general damages as he did not provide relevant hospital records. All his expert reports were based on what the plaintiff informed the experts and on the information from the hospital reports that did not belong to him.

Issues

[30] The issue before the court is whether the plaintiff has proven its case on the balance of probabilities concerning the claim of loss of income and general damages.

Legal framework

[31] 'Rule 39(13) ... the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case.

The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.

(14) ... Provided that if the plaintiff shall have called evidence on any such issues before closing his case he shall not have the right to call any further evidence thereon.

(15) Nothing in subrules (13) and (14) contained shall prevent the defendant from cross-examining any witness called at any stage by the plaintiff on any issue in dispute, and the plaintiff shall be entitled to re-examine such witness ...

[32] Section 24(2) (a) of the Road Accident Fund Act[2] (The Act) reads: 'The medical report shall be completed on the prescribed form by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained in the accident from which the claim arises, or by the superintendent (or his or her representative) of the hospital where the deceased or injured person was treated for such bodily injuries: Provided that, if the medical practitioner or superintendent (or his or her representative) concerned fails to complete the medical report on request... within a reasonable time and it appears that as a result of the passage of time the claim concerned may- become prescribed, the medical report may be completed by another medical practitioner who has fully satisfied himself or herself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.'

[33] In Schwikkard PJ (et al.), Principles of Evidence[3], a basic principle that applies in civil matters is discussed, which is: 'In civil cases, the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities" but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the

probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.'

- [34] "At the close of the case, when both parties have had the opportunity to present whatever evidence they consider to be relevant, the defendant will be 'absolved from the instance' if, upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. It means that the plaintiff has not proved her claim against the defendant. It is not a bar to the plaintiff reinstituting the action (provided the claim has not by then prescribed), and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution from the instance is the proper order when, after all the evidence led, the plaintiff has failed to discharge the normal burden of proof." See Principles of Evidence.[4]

Discussion

- [35] After admitting the reports into evidence, the plaintiff submitted his closing arguments. He raised an issue that his case was not closed, though he was already addressing the court in reply to the defendant's closing submissions. This judgment will briefly deal with this aspect.

Parties' cases

- [36] In terms of rule 39(13), the plaintiff shall first call his evidence on any issues in which the onus is upon him and may then close his case. In casu, the plaintiff's affidavit, experts' affidavits, and experts' reports were admitted as evidence. The plaintiff led no other evidence. Mr Moifo made closing arguments. The defendant then closed its case and presented its closing arguments.

The plaintiff then replied. At this point, the court sought clarity from Mr Moifo regarding the hospital records, as raised by Ms Nefolovhodwe during her address.

- [37] Mr Moifo informed the court he would call the plaintiff to testify and give an explanation concerning the hospital records. When he was reminded, the plaintiff's case was closed. He insisted it was not.
- [38] Even when seeking an explanation, it was unclear why the plaintiff considered its case still open after both parties had made closing submissions. In my view, the parties' cases were closed at this stage, hence the closing arguments. I found it was no more open to the plaintiff to tender evidence. What was available to him, though, was to seek leave to re-open its case.

Application to re-open

- [39] The plaintiff subsequently brought an application to re-open his case to tender evidence regarding the names appearing on the hospital records, whose names differed from his. It was opposed and argued that the issue of the different names reflected on the hospital records was not new to the plaintiff, as he had elected to file an affidavit in dealing with it. Further, oral evidence would not differ from what was already in the affidavit.
- [40] The plaintiff argued that the defendant had not raised an issue regarding the hospital records. He believed the affidavit was sufficient until the defendant's sudden change during its closing arguments. Besides, the defendant had already accepted his claim when it conceded to 80% liability in his favour and settled in relation to future medical expenses.
- [41] It is trite that once a party has closed its case, it will not generally be allowed to lead further evidence save in rebuttal. However, the court has discretion to be exercised judicially to allow a party to re-open its case and to lead such further evidence. It might be helpful to mention that the trial bundle reflects no record of case management of the matter as per the Division's practice directives. Notwithstanding the plaintiff's correspondence with the defendant, no pre-trial conference was held, and no statement of issue was filed. Nevertheless, the plaintiff proceeded to request the matter to be certified trial-ready. He was allocated the hearing date.
- [42] It was common cause the defendant's counsel only learnt about the matter the previous week during its trial-ready certification and hearing date allocation, to the extent that she was not available to proceed on the first day of the roll call. It was evident the defendant participated in the proceedings at a later stage. Regardless, the parties settled the merits and future medical expenses and proceeded to trial.
- [43] The parties are adversaries. It is left to each of them to formulate their case in their own way, subject to the basic rules of pleadings. Each party knows the case they have to meet and cannot be taken by surprise at the trial. The parties' pleadings bind to them as they bind to the court. The court's function is to adjudicate the specific matters in dispute that the parties have raised by their pleadings. See *Vermeulen and Others v Minister van Veiligheid en Sekuriteit en Andere* (1377/2008) [2011] ZANWHC 85 (10 March 2011) at para 1.
- [44] It was common cause that the issue of the incorrect names had been known to the plaintiff at least since 13 May 2023, when he deposed to an affidavit to that effect. Ermelo Hospital was the hospital he was admitted to after the accident, the plaintiff alleged. Though, his testimony could shed light on how he was admitted to a Hospital for over a month without bringing to the hospital and medical staff's attention that he was not Sandile Nkosi and or Sandile Ndzimande but Sandile Banele Xaba. Without pre-judging the plaintiff's testimony, I did not see how this testimony would take his case any further. At best, in my respectful view, he would confirm what was already in his affidavit, that they referred to him by these two names.

- [45] The core issue was that he was not one of the hospital or medical staff who respectively made entries cumulatively compiled into hospital records. Only what purportedly resembled the outside cover of the hospital records contained the name Sandile Xaba. 'In this regard, Xaba' was added to the cover after 'Nkosi' was scratched out. No expert in writing was needed to note that the 'Xaba' seemed to have been added by different handwriting, and the pen font did not look similar. However, the content of the records remained referring to that of Nkosi and/or Ndzimande.
- [46] The plaintiff might not be totally faulted for viewing the concession and the settlement regarding the merits and future medical expenses as acceptance of his claim, which is why he did not find it essential to testify. However, he still retains the onus to prove his claim. It is unclear on what basis the defendant conceded and made an offer without realising that the basic lodgment documentation was not in order concerning the hospital records.
- [47] I could not find that the defendant would suffer prejudice should I grant leave to re-open the plaintiff's case. However, on the part of the plaintiff, I found that the oral evidence would not take his case any further. The hospital records are essential and material evidence; his experts relied on them to compile their reports. He did not make the entries in the records. Due to their entries, the whole different hospital and medical staff are the only ones who can explain why they referred to him as they did.
- [48] The hospital records are far from being a source of any clarity. Only the staff could explain why the hospital records have the records of two persons: Sandile Nkosi and Sandile Ndzimande. He was not the relevant person to comment on the entries or any recordings in the hospital records, including their cover. Further, the plaintiff wanted to explain the material discrepancies, which he did not have to do as he had already done his limited part in his affidavit. Consequently, I found that the plaintiff had not made out a case for re-opening his case. The application for re-opening of the plaintiff's case stands to be dismissed.

Loss of income and general damages

- [49] The plaintiff must prove his claim of loss of income and general damages on a balance of probabilities. The hospital records did not reflect the name of the plaintiff as a patient or a person who was treated for personal injuries from a motor vehicle accident. Prima facie, the records are not of the plaintiff. They are for Sandile Nkosi and or Sandile Ndzimande. Undoubtedly, they are integral to the plaintiff's experts' reports. All his experts, except the actuary, considered same when they did the assessment, formulated their opinions and compiled the reports. Notably, no experts raised any issue regarding the fact that the names in the hospital records differed from the person they alleged to have interviewed, except the Industrial psychologist.
- [50] The hospital records cannot be said to be credible evidence, even if they were to be said they were that of the plaintiff. They refer to two persons, Nkosi and Ndzimande. Only the custodian of the hospital records, the hospital Superintendent, can testify about their

upkeep and filing. The further difficulty facing the plaintiff was that only the different hospital and medical staff who made different entries on different days for the period of his admission and that of his visits as an out-patient could explain whose diagnosis, treatment, procedures, findings and other medical attention received according to the hospital records.

- [51] Upon evaluating the evidence presented before me, I found that the plaintiff's burden of proof has not been discharged. The hospital records relied on, as considered by the plaintiff's experts, were not that of the plaintiff. The issue of different names in the records is a material discrepancy on an important document, which confirms whether the plaintiff was the same person who was involved in a motor vehicle accident, sustained injuries and whose relatives and the ambulance brought him to receive medical treatment at Ermelo Hospital.
- [52] The hospital records are essential to, among others, guide the different experts on what injuries were suffered and sequelae, as well as the treatment received on admission and in the future. For a claim for loss of income and general damages, it is crucial to know how and where the plaintiff got injured and its effects, which is considered together with the plaintiff's type of employment or labour.
- [53] The records also guide the hospital and medical staff on the plaintiff's revisit as an out-patient and on re-admission, if any, as to what further medical attention is needed. It is unclear how the plaintiff presented himself on return as an out-patient so that the hospital and medical staff could draw his file for further treatment. The plaintiff does not keep his hospital records. They are kept in the hospital.
- [54] The court must consider the whole body of evidence and make a determination. What I find probable and consistent with proven facts is that the plaintiff was not the person who was treated at Ermelo Hospital on 2 April 2023 and discharged in May 2023, but the person or persons mentioned in the hospital records. On 3 May 2023, an entry was made in the records that a certain Sandile Ndzimande gave verbal consent. Had it been the plaintiff who gave verbal consent, he would have informed the staff at the hospital that he was Xaba, not Ndzimande and or Nkosi. Again, only the medical personnel who made the entry concerning the verbal consent can explain, not the plaintiff. I, therefore, reject the plaintiff's experts' reports as they were based on their interview with the plaintiff and the hospital records. The plaintiff cannot rely on the hospital records that are not his or do not reflect him as the patient who was admitted and treated in that hospital.
- [55] The question the court entertained was whether, under the circumstances and considering the whole body of evidence, it was competent to absolve the defendant or dismiss the claim. I believe even if the plaintiff intends to reinstate the claim later, without prejudging, the evidence presented before me is unlikely to change. He might not be met with prescription since the accident only occurred in 2023. However, if the evidence remains the same, there are no prospects of success.

- [56] Even when I consider the absolution in the interest of justice, by considering prospects of success in the future. Given the evidence and the particularity in the hospital records and the two persons, Nkosi and Ndzimande, in one set of hospital records, there appear to be no prospects of success. Therefore, his claim stands to be dismissed as he had not made out a case for loss of earnings and general damages.
- [57] Even if I may be wrong in dismissing the claim instead of absolving the defendant. The matter deserves to be finalised. The effect of absolution from the instance and dismissal of the claim may appear similar and sound equivalent. However, dismissal brings about finality with an unpretentious effect compared to absolution, whose outcome is operable. The plaintiff's claim for loss of income and general damages stands to be dismissed.
- [58] As a result, the following order is granted;

Order:

1. By agreement between the parties, the defendant is liable to compensate the plaintiff for 80% of the proven delictual damages suffered in the motor vehicle collision that occurred on 8 April 2023.
2. By agreement between the parties, the defendant is liable for 80% of the plaintiff's future medical expenses.
3. The plaintiff's claim for loss of earnings and general damages is dismissed.
4. No order as to costs.

N G M Mazibuko

Acting Judge of the Mpumalanga Division, Middelburg

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

Representation:

Counsel for the Plaintiff: Mr M B Moifo Attorneys for the Plaintiff: Mathikithela Attorneys

Counsel for the Defendant: Ms A Nefolovhodwe Attorneys for the Defendant: State Attorney

Heard: 17 and 18 September 2024 Date of Judgment and Order: 18 September 2024 Written

reasons:

08 November 2024

- [1] Uniform Rules of Court, Act 59 of 1959.
- [2] Act 56 of 1996.
- [3] (4 edn, JUTA 2016).

[4] Section I Proof Without Evidence, Chapter 32, The Standard and Burden of Proof and Evidentiary Duties in Civil Trials, paragraph 32.

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