

SOUTH AFRICA / JUDGMENT

## Zangwa v Road Accident Fund (1188/2018) [2019] ZAGPPHC 459 (14 August 2019) [2019] ZAGPPHC 459

COURT

North Gauteng High Court, Pretoria

BEFORE

E Van der Schyff

CASE / FILE NUMBER

1188/2018

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REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH  
AFRICA  
GAUTENG DIVISION, PRETORIA  
CASE NO: 1188/2018  
14/8/2019

In

|                     |                                                                                      |
|---------------------|--------------------------------------------------------------------------------------|
| the matter between: | NOMVUZO<br>THEODORA ZANGWA<br>PLAINTIFF<br>and<br>ROAD<br>ACCIDENT FUND<br>DEFENDANT |
|---------------------|--------------------------------------------------------------------------------------|

### JUDGMENT

VAN DER SCHYFF, AJ

### Introduction

1. The plaintiff was injured, as a passenger, in a motor vehicle accident on 7 February 2016.

2. The defendant conceded its liability but rejected a claim for general damages. The defendant undertook to issue a certificate in terms of section 17(4) of the Road Accident Fund Act, No. 56 of 1996 to cover the plaintiff's future medical expenses. The parties agreed that the plaintiff suffered loss of earnings both past and future, and the court was solely required to determine the contingencies that need to be applied in calculating the past and future loss of earnings respectively.
3. The parties agreed to the base figures representing the plaintiffs pre contingencydeduction amounts for past and future injured and uninjured income respectively.
4. It is important to note that the parties agreed that no witnesses had to be called and that the reports of the expert witnesses, and the subsequent joint minutes, were accepted as evidence. I enquired from plaintiffs counsel whether it would not be necessary for me to hear the plaintiff's viva voce evidence, but he indicated that the content of the expert reports would be sufficient to address any possible queries.
5. I pause to mention that I am of the view that an undesirable trend is developing specifically in relation to the quantification of general damages and claims for loss of past and future earnings in road accident matters. Parties are progressively relying merely on the reports of experts to place evidence before the court not only relating to the consequences and sequelae associated with injuries, but also pertaining to the very personal experience of plaintiffs who suffered injuries. This effectively constitutes hearsay evidence, and although it can be accepted that time and money are conserved where reports of expert witnesses are accepted as evidence as far as the respective experts are in agreement, no expert can testify as to the personal experience of a plaintiff. It is almost unthinkable that the onus relating to the highly personal nature of claims for pain and suffering can be met without a plaintiff's own testimony. In the current matter, general damages are not to be decided but as will become evident, the plaintiffs personal experience after the accident and because of the accident, impacts on the quantification of the

claim for loss of past and future earnings.

6. It is trite that contingencies are "usually the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned", but for the accident.[1] The percentage of the claim allowed for contingencies is dictated by the unique facts of each case and is entirely at the discretion of the court.[2]
7. In determining the appropriate contingencies that need to be applied I read all the expert reports that were filed and the available joint minutes. In determining the contingencies to be applied I take the following into consideration:

7.1. From the information contained in the Industrial Psychologists' reports, it transpires that the plaintiff was employed as a Project Manager by the Department of Public Works. The plaintiff resigned her employment in February 2017 allegedly as a result of the sequelae of the injuries sustained;

7.2. After the accident occurred the plaintiff was transported to hospital and consulted with a medical practitioner. She was diagnosed with a whiplash injury and concussion grade 1, and afforded sick leave from 7/2/2016 to 12/2/2016. I pause to mention that concussion grade 1 is often described as a mild concussion;

7.3. Dr Okoli, a specialist neurosurgeon interviewed the plaintiff on 17 April 2018. He noted that the plaintiff indicated that she started to experience headaches within a month or two after the accident. She also began to experience difficulties with her concentration and short term memory and her performance deteriorated significantly. Dr Okoli indicated that a clinical psychologist should evaluate the neurocognitive disorders described by the plaintiff. Dr Okoli also noted that the plaintiff experienced vertigo but that she had no mood disorder or sleep disturbances and did not suffer from epilepsy. She did not have a history of depression;

7.4. Dr Mureriva, a clinical psychologist, opined that although the impact of the plaintiff's injuries on her overall disability is mild, her cognition is moderately affected. In his report he stated that the postconcussion symptoms experienced by the plaintiff were consistent with, but not exclusive to postconcussion syndrome. He reported that the plaintiff's activities of daily living were mildly impaired by the accident;

7.5. Dr Mureriva administered the computerized CNS Vital Signs Neurocognitive battery. This battery evaluates, amongst others, memory, processing speed, reasoning and cognitive flexibility. The plaintiff's overall performance on the neuropsychological tests was below average. He opined that the below average overall performance is a significant drop from the average to above average pre accident capacity suggested by the plaintiff's academic and occupational history. Also of importance is that Dr Mureriva opined that it is likely that the plaintiff's below average performance is partly attributable to the concussion sustained, and the disruptive impact of accident-related pain, discomfort and emotional distress. It is important to note, however, that as for the validity indicator, Dr Mureriva makes the following remark: "For several of the subtests, the validity indicator shows that Ms Zangwa had invalid responses. Invalid responses arise when the client misunderstands the instructions or does not put in her best effort. They could also arise from any other disruptive factor, such as tiredness, poor sleep the night before, pain, or injury that impairs movement."

7.6. Dr Mureriwa conducted an EEG. He reported that the plaintiff's " EEG absolute scores are within normal limits". This finding is consistent with the average to above average preaccident neurocognitive capacity suggested by her academic and occupational history. However, he also noted that the " EEG peak frequency, however, is around 7Hz." This is much lower than the norm and indicates a slower than normal speed of processing information. Such slowness is consistent with traumatic brain injury and probably partially contributed to the below average performance on the neuropsychological tests. He additionally found that the plaintiff suffers from moderate to severe hypocoherence which indicates that there is decreased sharing of information between brain areas which reduces brain efficiency and leads to cognitive, emotional and behavioural deficits. The tests revealed that the plaintiff's complaints about poor concentration, anxiety and forgetfulness correlates significantly with EEG dysregulation in the brain networks associated

with those symptoms.

7.7. The plaintiff attended a psychoeducational evaluation on 10 October

2018. Ms Nethavhani reported that the plaintiff's overall cognitive

performance was within the low average range. Her memory scores was within the below average range which indicates problems with

immediate memory and inability to recall learned information which is crucial to the learning environment.

7.8. Dr Oelofse, an orthopaedic surgeon, noted that the plaintiff continued to suffer from pain in her head and neck which eventually subsided with treatment but progressively increased as she became more active. He opined that her productivity would increase with treatment.

7.9. Dr Omojovo, an orthopaedic surgeon, assessed the plaintiff on 26 May 2019. He noted that the plaintiff exhibited signs of posttraumatic stress disorder. He noted that she is not disabled and has no impairment of function. He stated that her orthopaedic injury should not impact on her ability to compete in the open market labour market.

7.10. Dr Mudau, a neurosurgeon, examined the plaintiff on 25 June 2019 subsequent to her being evaluated by Dr Omojovo who proposed that she be evaluated by a neurosurgeon. Dr Mudau concluded that the claimant sustained "a mild concussive head injury. The injury has resulted in posttraumatic headaches without any other neurocognitive sequelae."

7.11. In their joint report Dr Okoli and Dr Mudau agreed that the plaintiff has suffered a "mild diffuse traumatic brain injury", and that the plaintiff has no neuropsychological disorder. The two practitioner's differ as to whether the plaintiff qualifies for general damages.

7.12. T Mahlokweng, an occupational therapist, evaluated the plaintiff on 26 or 28 June 2018 (the date is not clear from the report). This report differs significantly from all the other expert reports and contrary to the orthopaedic surgeons' reports states that the plaintiff's physical obstacles will hinder employment in the open labour market. I do not find this report to be an objective wellbalanced report. In an addendum report the occupational therapist indicated that the plaintiff suffered from psychological problems which may have a negative impact on her occupational performance if left untreated. Reference is made to the benefits that might accompany appropriate future treatment.

7.13. M Magoele, an occupational therapist noted that the plaintiff did not display any notable physical residual problems and that she physically retained the strength to cope with the inherent job requirements of her previous or similar occupations. It was also noted that the plaintiff's cognitive functioning is normal. Ms Magoele did note however that the plaintiff suffered from depression and recommended psychological intervention.

7.14. It is common cause that the plaintiff resigned about a year after the accident. According to the experts she ascribed the reason for the retirement to the fact that she was not able to function optimally due to memory and concentration loss, and the fact that she tired easily. Both Industrial Psychologists contacted her pre accident supervisor. Mr Tsiu and Mr Moodie reported that they were informed by the supervisor that the plaintiff's work performance has declined after the accident. Where she was a model employee before the accident, she became slow to complete tasks and submit reports. However, before the supervisor could start a full assessment on the reason why the plaintiff's work performance declined to see if they could come up with solutions to the difficulties, she resigned.

7.15. It is relevant for the court that the supervisor did not automatically assume that the accident was the (sole) reason for the plaintiff's deteriorated performance. Mr Moodie reported that the supervisor explained that a performance management process in itself is a very long project as " they need to identify what is causing the poor performance, for example is it a training problem, is it the volume of work, or a personal problem."

8. I noted that the plaintiff but did not attend to any recommended treatment:

8.1. Dr Okoli stated in his report that according to the plaintiff she was referred to a physiotherapist after the accident but she did not attend;

8.2. Dr Oelofse proposed that the plaintiff should visit "The Headache Clinic" but there is no indication that she had done so to date.

9. In several of the reports the plaintiff is referred to supportive treatment from which she may benefit, e.g. Dr Mureriva recommended

that the plaintiff should attend at least 30 sessions of psychotherapy to address the accident related pain, discomfort and emotional distress. The recommended psychotherapy is expected to modestly improve the plaintiffs quality of life but it is accepted that she will remain with residual problems because of the severity of her cognitive problems, persistent pain and discomfort and other

forms of continuing accident related stress. Ms Magoele stated that psychological intervention will play a role in the plaintiff's future ability to compete in the open labour market.

10. After considering the information the following scenario emerged: After being injured in a motor vehicle accident the plaintiff who was initially diagnosed with whiplash and a concussion, grade 1, started to experience headaches, anxiety, memory loss and concentration problems to the extent that at the very least the experts indicate that the plaintiff shows symptoms of posttraumatic stress syndrome. The question that the court has to answer is to what extent these symptoms affected her employability.

11. I need to point out that there is no evidence before the court of any medical examinations and medical treatment the plaintiff underwent prior to resigning from her employment to address the symptoms that led to her resignation. The contrary is true, the plaintiff was advised to consult a physiotherapist by the first medical doctor who treated her but she failed to do so.
12. Where a person resigns from her highly paid employment because of anxiety and chronic headaches, one would expect evidence that she was under medical supervision and subjected to medical treatment and that this treatment did not yield fruit. Here, however, the experts indicated that the plaintiff is using over the counter medication like Grandpa to address the headaches. In addition, there is no evidence before the court as to any anti depressants that she may be taking in order to address the depression or that the depression is solely attributable to the accident. The wellknown principle that a plaintiff must mitigate the damages suffered by it involuntarily comes to mind. It was argued on behalf of the plaintiff that she cannot be prejudiced for not receiving any treatment to date because the section 17(4) undertaking was not yet issued. However, the plaintiff received medical aid as part of her remuneration package and no evidence was tendered to indicate that she was not in a position to obtain the necessary medical assistance.
13. The clinical psychologist indicated that the accident probably partially contributed to the below average performance on the neuropsychological tests, but no evidence was led as to: (i) the portion to which the accident contributed to this situation or (ii) other factors that also contributed to the plaintiff's performance. I am of the view that in circumstances where the existing evidence reflects that a plaintiff sustained an injury by bumping her head against the body of the car, being unconscious for a very short period whilst still in the vehicle, thereafter being taken to hospital and discharged on the same day after being diagnosed with whiplash and concussion 1, a plaintiff must provide the court with sufficient evidence to come to the conclusion that the plaintiff's earning capacity was severely impacted by the accident.
14. In the current case the neurosurgeons differ substantially as to the impact that the accident had on the plaintiff's cognitive faculties. The clinical psychologist is not able to find conclusively that the accident was the sole contributor to the plaintiff's current cognitive functioning, but states that her below average performance is partly attributable to the concussion sustained.
15. I also take into consideration that although the experts agreed that the plaintiff attained Maximum Medical Improvement, the neurosurgeons classified the plaintiff's injury as a "mild diffuse traumatic brain injury" and indicated that she will benefit from treatment.
16. The parties agreed to the following precontingency base amounts as the capital value of loss of earnings, excluding the Road Accident Fund Cap:

16.1. R1 834 200 for past loss of earnings suffered as a result of the plaintiff resigning from her employment;

16.2. R14 615 100 as the future income that the plaintiff would have earned if not for the accident;

16.3. R8 063 600 as the future income that the plaintiff will probably be able to earn after the accident.

17. Since the parties agreed that these amounts should be used as the base amounts to which contingencies must be applied I will not dwell on the manner in which the amounts were calculated.

Re: Past loss of income

18. In a claim for loss of past earnings it is necessary for the plaintiff to establish on the evidence that the injuries sustained prevented the earning of a living in the normal way and what the earnings would have been but for the injury.[3]

19. The plaintiff suggested that a 5% contingency deduction would be appropriate.

20. It is trite that a plaintiff's injuries may sometimes lead to the plaintiff resigning her work. JV v Road Accident Fund[4] is such a case. It is important to note, however, that Moeng AJ found that the expert witnesses agreed in their joint minute that " the residual capacity of the plaintiff does not fully meet the physical demands of her preaccident occupation" and this justified her decision to resign.

21. The evidence indicate what the plaintiff would have earned but for the injury. The question that I am grappling with, however, is whether a plaintiff who resigns due to the sequelae of the injuries suffered by her, is summarily entitled to the amount she would have earned if she did not resign. I am of the view that the answer is to be found in the assertion made by Moeng AJ, supra, namely that when the evidence clearly indicates that the plaintiff's residual capacity does not meet the demands of her preaccident occupation, the plaintiff will be entitled to the pre accident salary as compensation. The evidence indicates that the plaintiff's cognitive capacity was partially affected by the accident. Unfortunately the evidence does not indicate the extent to which the plaintiff's cognitive capacity was affected. In addition, it is trite that the state is usually a very sympathetic employer who endeavours to accommodate employees affected by accidents. The evidence is that the plaintiff resigned because she did not want to be subjected to performance management.

22. It has been held in a number of precedents,[5] that a party who has suffered damage has a legal duty to take all reasonable steps to mitigate his or her damages. If the evidence

before this court indicated that the plaintiff underwent the performance management, was offered employment at a lower paygrade

and was even thereafter not able to meet the standards of the employee, I would not have hesitated to apply 'normal' contingencies.

However, there is no evidence before this court that the plaintiff took the reasonable steps that could be expected in these circumstances, to mitigate her loss.

23. In the circumstances I am of the view that a contingency deduction of 50% is appropriate.

Re: Future income but for the accident

24. The plaintiff avers that a contingency deduction between 10% and 15% is appropriate. I pause to note that in answer to a question by the court, it was stated from the bar that the plaintiff was not permanently employed but a contract worker. The defendant argues that the court must provide for a higher contingency deduction because (i) the plaintiff was not permanently employed but on a contract basis; (ii) there is no certainty that the plaintiff, even though she was a dedicated and exceptional employee would have been promoted because posts are advertised in state departments and people compete for the available positions; (iii) the evidence of the defendant's expert witnesses indicate that the plaintiff suffered a mild injury with no serious neurocognitive sequelae; (iv) the experts indicate that the plaintiff will benefit from treatment and her position could improve.

25. I am of the view that higher than normal contingencies need to be applied in these circumstances. The fact that the plaintiff failed to attend to the proposed interventive treatment seen in conjunction with the respective expert witnesses' opinion that the plaintiff would benefit from such and improve her position, contributes to my view. In addition I agree with the defendant's counsel's argument that it is not a given that the plaintiff would have been promoted to a higher position and that external factors such as other equally and maybe even better qualified candidates who might have applied for available posts create a contingency that the court must take into consideration. A very important factor is the fact that the plaintiff's own clinical psychologist states that the plaintiff's cognitive capacity was only partially affected by the accident. In light of the above, I am of the view that a contingency deduction of 40% would be fair and reasonable towards both parties in the circumstances.

Re: Future income in light of the accident

26. I accept that the plaintiff's ability to function optimally has been affected by the accident. The parties has already discounted the effect that the accident had on the plaintiffs earning capacity by agreeing that it is fair and reasonable to accept that the capital value of what she would have earned if the accident did not occur as R14 615 100,00 and the amount representing what she

will be able to earn as a result of the accident as R8 063 600,00. The plaintiff instructed its actuary to do calculations on a 50% and 55% contingency deduction on the latter amount respectively being allowed, but argued in court that a 30% contingency deduction would be appropriate. The defendant conceded that 30% might be an appropriate contingency deduction.

27. I do not share their view. I am of the view that the impact of the accident is already discounted for to a great extent in accepting that the plaintiff will earn a significantly lower income. I see no reason to deviate substantially from the formula proposed by Dr Robert Koch for determining the "normal contingency deduction". This formula allows for half a percentage per annum for the remainder of the plaintiffs working life, and takes account of the normal life hazards of a claimant. I do take cognisance of the fact that the plaintiff's post traumatic stress disorder might affect her ability to continue working until the normal retirement age, but the majority of the expert witnesses indicated that the plaintiff would benefit from psychotherapy. I am accordingly of the view that a 15% contingency deduction would be fair and reasonable in the circumstances.

#### ORDER

In light of the above, the following order is made:

- [1] A contingency deduction of 50% must be applied when determining the plaintiffs past loss of income;
- [2] A contingency deduction of 40% must be applied when determining the plaintiff's pre morbid future income (income if the accident did not happen);
- [3] A contingency deduction of 15% must be applied when determining the plaintiff's post morbid future income (income as a result of the accident);
- [4] The defendant must provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996 within 10 days of this order;
- [5] The amount calculated in terms of [1], [2], and [3] above must be paid over to the plaintiff by paying the amount into the plaintiff's attorney of record's trust account within 20 days of the order;
- [6] Interest will be levied at the prescribed rate of 10.25% on any amount not paid in accordance with
- [5] above;
- [7] The defendant is to pay the plaintiff's costs on a party and party scale.

E VAN DER SCHYFF

Acting Judge of the Gauteng Division, Pretoria

Heard on:

30 July 2019

For the Plaintiff:

Instructed by:

Lekhu Pilson Attorneys

For the Defendant:

Instructed by:

Godi Attorneys

Date of Judgment:

14 August 2019

- [1] AA Mutual Insurance v Van Jaarsveld 1974 (4) SA 729 (A); HB Klepper The Law of ThirdParty Compensation 2012, LexisNexis 183
- [2] Shield Insurance v Booysen 1979 (3) SA 953 (A) 965G.
- [3] Prince v Road Accident Fund (CA143/2017) [2018] ZAECGHC 20 (20 March 2018) par 16
- [4] (2135/2017) [2019] ZAFSCH 111 (28 June 2019).
- [5] See e.g. De Pinto v Rensea Investments (Pty) Ltd 1977 (4) SA 529 (A), and Versveld v SA Citrus Farms 1930 AD 452.

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