

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.39745/2016

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

26/08/2022

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In the matter between:

MOKWELE, NOMSA PATRICIA

PLAINTIFF

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

DEFENDANT

JUDGMENT

MANAMELA AJ

INTRODUCTION

- [1] This is a civil trial for the determination of quantum in respect of personal injuries resulting from a train accident of a commuter, Ms. Nomsa Patricia Mokwele (“the Plaintiff”), against the Passenger Rail of South Africa (“PRASA”). The merits of the case were settled at 100% liability in favour of the Plaintiff.
- [2] The Plaintiff boarded a train at New Canada Station heading to Crown Mines Station, on 22 October 2016 at about 14:30. The Plaintiff alleged that the coach in which she was conveyed was overcrowded, and it stopped for a short time to allow commuters, including the plaintiff, to disembark and others who were at the platform to embark, before the passengers could disembark, the train suddenly jerked and started moving and caused the Plaintiff to lose her balance and fall through the open doors onto the platform.
- [3] As a result, the plaintiff sustaining injuries in the form of a fracture on the right ankle. The plaintiff received medical treatment for the injury at Hellen Joseph Hospital on 22 October 2016 to 25 October 2016.
- [4] At the time of the accident the Plaintiff was employed as a sales consultant at Tevo (Pty) Ltd (“TEVO”). The Plaintiff’s employment status is of critical importance in the determination of the issue in dispute.

ISSUES FOR DETERMINATION

[5] The issues to be decided are the appropriate heads of damages in respect of general, past and future medical expenses, past and future loss of earnings and in particular the basis of calculation of post-morbid loss.

THE PLAINTIFF'S CASE

[6] The Plaintiff testified in her own case, followed by the Occupational Therapist – Ms. M Shakoane, the Industrial Psychologist Ms. Vuyo Nako and for the defense the expert witnesses who testified in court are Ms. L Burns and the Industrial Psychologist Mr. Ben Moodie. The other experts, being the orthopedic surgeons, Professor A Scheepers and Dr R Stein, filed their evidence by way of affidavits, respectively.

[7] In the Plaintiff's Particulars of claim the following damages were pleaded, as the plaintiff's claim –

“17.1 General damages, for pain and suffering, disfigurement and loss of

amenities of life – R800 000.00;

17.2. Estimated past, future loss of income and/or diminution of earning

capacity – R3 000 000.00

17.3. Estimated past, future medical expenses and hospital expenses –

R800 000.00

Total R4 600 000.00”

- [8] The plaintiff testified that at the time of the accident she was working as a sales consultant at TEVO, an in-store supplier to Makro, Game or Massmart stores, dealing with products such as cleaning appliances, vacuum cleaners, beddings and other supplies. Her position was commission based. Her highest qualification is grade 11. She testifies that her job involved a lot of product presentation to customers, and required standing, walking around the store and merchandising, lifting of some of the products, from time to time. During evidence-in-chief she testified that she was employed from August 2016 to August 2017.
- [9] Her mother assisted her with personal care like bathing, and her two minor children were moved to their paternal grandparents, as she could not manage to take care of them. At the time of the accident her children were 10 and 5 years, respectively. In January 2017, the plaintiff testified further that she tried to resume her employment at TEVO, and since she had limited mobility she was redeployed from a bigger store, Makro, to a smaller store, Game, after some 3 days of resuming her duties. At Game she worked until she left her employment around August 2017. In her evidence, the Plaintiff said she resigned because she could not endure the pain, she constantly relied on pain medication and could not stand for long. Her productivity dropped and she lost sales.
- [10] Her reason for leaving employment remain unclear from her testimony, as she testified that she resigned, proof of resignation was filed during trial in the form

of an email dated 25 October 2017, albeit that according to the employer the Plaintiff left employment around April 2017.

- [11] The plaintiff testified that had it not been for the accident she would have progressed to management level at TEVO or other similar position elsewhere. After the accident she managed to secure employment at a call centre agency, where she was assigned to a role of verification agent, she worked at that agency for almost 12 months, until her contract ended.

THE DEFENDANT'S CASE

- [12] Under cross-examination, the defense counsel placed on record that according to the information provided by the employer, the plaintiff absconded from TEVO, on her own accord. Some of the extracts from the Plaintiff's curriculum vitae shows that worked for a family member's tombstone company, Thokwa Trading (Pty) Ltd, whilst working at TEVO, where she apparently assisted with administrative work during her off days earning between R600-R800 per month, without providing much information on the exact dates and proof of remuneration.

- [13] The occupational therapist opined that the Plaintiff is not suited to her pre-morbid occupation. The orthopedic surgeons illustrate some loss but differ in so as the extent for the loss suffered.

- [14]

[15] During cross-examination, counsel for defendant put the proposition to Plaintiff that she would be able to cope with previous position at TEVO. Plaintiff repeated she can't cope, unless she is rather placed in the office. She confirmed that she still has the plate and the screws and does not know when she is going to remove the plate and screws. She testified that she stopped attending to hospital.

[16] The counsel for defendant further put it to Plaintiff that she would be able to return to work after treatment and after the screws and the plate are removed, the Plaintiff testified that maybe after the removal of the screws and plate she would suffer no pain but added she was not sure of the outcome.

[17] Counsel for Defendant further cross examined Plaintiff that once Plaintiff goes for removal of the screws and plate and after treatment she would suffer no pain to which Plaintiff responded that doctors said after operation she would not have pains but she still suffers pain. The proposition was put to her that she would be able after the plate and screws are removed because the doctors say the prognosis is good.

VALUATION OF EVIDENCE

[18] The evaluation of the evidence for quantum entails an inquiry as to the capacity to be employed, this is based on extent to which the injuries sustained by the plaintiff has affected her employability, lifestyle and general well-being, and the extent to which the plaintiff should be compensated.

[19] The evaluation of the amount to be awarded for the loss does not involve proof on a balance of probabilities (**M S v Road Accident Fund (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019)**). In M S case the court held that the evaluation of loss is a matter of estimation. Where a court is dealing with damages which are dependent upon uncertain future events - which is generally the case in claims for loss of earning capacity - the plaintiff does not have to provide proof on a balance of probabilities (by contrast with questions of causation) and is entitled to rely on the court's assessment of how he should be compensated for his loss. The parties routinely seek to assist the court in this assessment of the amount payable by resort to the expertise of an actuary. This is not an obligatory approach to the

quantification of damages and a court should be careful not to treat these reports as if they are scientific data and the approach directive.

- [20] The plaintiff is still searching for employment. It is likely that she would get a position where she would be able to earn at least in line with her earnings at the time of the accident, I do not see why she would have not qualified for another basic-skill where she would have earned the national minimum wage which has just been increased from around R21,69 to R23.19 per hour for the year 2022 with effect from 01 March 2022, which is R4,174.20 per month and R50,094.20 per annum.

General damages

- [21] In the matter of ***Mahlangu v Road Accident Fund (2013/46374) [2015] ZAGPJHC 342***, the plaintiff had sustained the following injuries: left ankle fracture which constituted fractured ankle bones, torn ligament, and soft tissue. The court awarded the plaintiff R 300 000.00 in respect of general damages in 2015 monetary terms.
- [22] In ***Alla v Road Accident Fund 2013 (6EB) QOD 1 (ECP)*** a 41-year-old correctional officer sustained fracture of the ankle resulting in displacement of the distal tibio-fibula joint and soft

tissue injury. Surgery was in the form of an open reduction and internal fixation of the fracture. She was immobilized in a cast for six weeks and thereafter in an air cast brace. Pain was still being experienced in the ankle resulting in the difficulty in walking long distances. Claimant was awarded general damages in the sum of R301 000.00 in 2020 monetary terms.

- [23] **Coetzee v Union and National Insurance Company Limited (1969)2(QOD) 55 (AD)** plaintiff sustained an ankle plus shoulder with reconstruction operation on lateral ligament of ankle with arthrodesis only partially successful – osteoarthritis in joints of the ankle and foot. Recommendation for future operations necessary to stiffen ankle and thereafter the foot-while physiotherapy and dislocated shoulder joint with complication still minor pain and discomfort (which an award of R501,000.00 (in 2020 monetary terms) was made in 1969)).
- [24] In the matter of **Nyawose v Road Accident Fund (14546/2018) [2021] ZAGPPHC 506 (10 August 2021)**, the Plaintiff was a 20-year-old male, who sustained a right ankle – distal tibia and fibula fractures, the outcome diagnosis of the orthopedic surgeon note that he had healed previous right ankle distal and fibula fractures, post fracture chronic mechanical pain right lower leg and ankle.

Plaintiff was treated with a below knee back slab, POP was applied on the left lower leg for 5 days and subsequently an open reduction and internal fixation (ORIF) and a circular below knee POP for 6 weeks. The Plaintiff was awarded general damages in the amount R500 000.00 in August 2021.

[25] In the *De Jongh v Du Pisanie* NO [2004] 2 All SA 565 (SCA) where court reiterated on the authority that the modern tendency is to award higher amounts than in the past for general damages a careful reading of the case however, indicate that, although there appeared at the time of the judgment an upward tendency of such awards, the moving away from an over conservative approach which is over emphasized in the matter of *RAF v Marunga* 2003 (5) SA 164 (SCA).

[26] Ultimately, I am convinced that there seems to be a concession around the claim for general damages. An amount of R300 000.00 is therefore found to be reasonable in respect of the injuries suffered by the Plaintiff and the sequelae thereof.

Past medical expenses

[27] The Plaintiff was treated at a public hospital. There are no proven past medical expenses for the plaintiff and therefore no award is made in this regard.

Estimated past, future loss of income and/or diminution of earning capacity

Future medical expenses

[28] The Actuarial Calculation total (009-5) in paragraph 5.1 in respect of future medical expenses is the amount of R486,534.07 based on the findings of Plaintiff's expert Orthopedic Surgeon.

[29] The total cost for Occupational Therapist treatment and medical devices (009-5) is the amount of R59, 753.22.

[30] The total medical costs are accordingly R546,287.29. As discussed above, the contingency factors may be applied if the court deems appropriate. There is no reason to deprive the Plaintiff of her damages only to wait for the expiry of the 3-5 years argued by Defendant.

[31] Actuaries rely on look-up tables which are produced with reference to statistics. Such statistics are derived, *inter alia*, from surveys and

studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff's position using various assumptions and scenarios which should properly be gleaned from proven facts.

- [32] An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.
- [33] An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
- [34] Nicholson v Road Accident Fund (11453/2007) 2012 SGHC (unreported). In addressing the role of expert evidence, Judge Wepener stated as a preliminary note that "a number of expert witnesses called on behalf of the plaintiff overstepped the mark by attempting to usurp the function of the court and to express opinions based on certain facts as to the future employability of the plaintiff and to express views on probabilities. It is the function of the court to base its inferences and

conclusions on all the facts placed before it". In support of his assertion, Judge Wepener cited *National Justice Compania v Prudential* as basis of his argument and *Mathebula v RAF (05967/05) [2006] ZAGPHC* as point of reference.

[35] In *Mathebula v RAF* it was stated that "an expert is not entitled, anymore more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence".

[36] In his cementing his point, Judge Wepener in *Nicholson* case quoted a passage in *S v Gouws 1967 (4) SA 527 528D*, which stated that "the prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialized field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried".

[37] In *Schneider NO & Others v AA & Another 2010 (5) 203 WCC*, which was quoted in the *Nicholson* judgment, Judge Davis stated that at paragraph 211J-212B, "in short, an expert comes to court to give the

court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusions of the expert, using his or her expertise, are in favor of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as far as possible. An expert should not be a hired gun who dispenses his or her expertise for the purpose of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.”

[38] There is agreement that the Plaintiff will have to undergo surgery in the future.

CONCLUSION

[39] In my view the plaintiff has successfully proved that the defendant is liable.

The following order is made:

The Defendant is ordered to make payment to the Plaintiff an amount of

1. *General damages, for pain and suffering, disfigurement and loss of amenities of amenities of life – R300 000.00;*

2. *Estimated future loss of income and/or diminution of earning capacity – R400 000.00*
3. *Estimated past, future medical expenses and hospital expenses – R437, 029.80*
4. *Costs*

P. MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 August 2022

APPEARANCES:

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