

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 58501/2021

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

27 November 2023

Date: Signature

In the matter between:

SKHOSANA, THANDEKA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 27 November 2023.

HITCHINGS AJ:

Introduction

1. The plaintiff is Thandeka Skhosana, a major female who was born on 26 January 1997.
2. The plaintiff sought default judgment against the Road Accident Fund for compensation for injuries which she claimed to have sustained in a motor vehicle collision which occurred on 23 September 2018. The matter appeared before me as a default judgment because the defendant had, following service on it of a notice of bar, failed to file a plea and was accordingly barred from filing a plea.
3. The plaintiff was represented by Adv I Nwakodo and the defendant was represented by State Attorney Ms N Moyo.

Application for the Upliftment of Bar

4. At the commencement of the hearing Ms Moyo applied from the bar for the upliftment of the bar because the defendant wished to file a plea. She added that if the bar were to be uplifted, the defendant would apply for the postponement of the application for default judgment.
5. Ms Moyo indicated that if I were to uplift the bar, the defendant would file a plea to the effect that the plaintiff had failed to comply with section section 24(1)(a) and (4) of the Act of the Road Accident Fund Act 56 of 1996 ("the Act"), read with The Management Directive issued on 8 March 2021 and The Supplier Communication issued on 19 May 2021. (Both Directives were subsequently published in the Government Gazette in a Board Notice issued on 4 June 2021). The defendant would therefore plead that plaintiff was accordingly not entitled compensation.
6. I pointed out to Ms Moyo that in the recent full bench matter of *Mautla and Others v Road Accident Fund and Others* ((29459/2021) [2023] ZAGPPHC 1843 (6 November 2023)) Regulation 7 and the said directives had been

reviewed and set aside. Her response was a proverbial shrug of the shoulders accompanied by a statement that despite the judgment, it remained her instructions to argue that regulation 7 and the relevant notices still had to be complied with. She argued that since the plaintiff had not, despite the defendant's written objection, properly complied with these prescripts, the plaintiff had been non-suited.

7. In a short *ex tempore* judgment, I refused the application for the upliftment of the bar. The principal reasons were that no explanation had been proffered by the defendant for its failure to have pleaded within the period contemplated in the notice of bar, no explanation had been tendered as to why the application for the upliftment of the bar had been brought so late, and the fact that the proposed plea would in any event not disclose a defence.

Application for Default judgment

8. At the commencement of his address in the application for default judgment, Mr Nkwakodo informed me that the plaintiff would be pursuing a claim for only future loss of earnings which would be some R1,5 million (even though the particulars of claim reflect an amount of only R1 million).
9. Mr Nkwakodo applied for the matter to be heard on affidavit in terms of Uniform Rule 38 (2). Ms Moyo indicated that the defendant did not oppose the application and I accordingly granted it.
10. All evidence was accordingly adduced by way of affidavit. As I will point out hereunder, this evidence was largely contradictory. It is important to note that the plaintiff deposed to an affidavit confirming the correctness of the facts recorded by the respective experts in so far as such facts referred to her – thereby confirming the contradictory evidence.
11. The orthopaedic surgeon, Dr Kumbirai's affidavit which had ostensibly been filed for the purpose of confirming the contents of his 21 July 2021 report did not state that he had examined the plaintiff, but rather that he had examined himself. Thus Dr Kumbirai's report was not confirmed under oath. I

nevertheless, and in favour of the plaintiff, had regard to Dr Kumbirai's report.

The Collision

12. In her affidavit in terms of section 19(f)(i) of the Act deposed to on 30 March 2021, the plaintiff stated that the vehicle in which she had been travelling had collided with a vehicle approaching from the front in its wrong lane. Her description was that the other vehicle "...was driving on (sic) the oncoming traffic lane". This accords with the version pleaded in the particulars of claim.
13. The plaintiff's version of the collision as recorded in her section 19 (f) (i) affidavit and in her particulars of claim differs irreconcilably from the version which she gave to the experts who examined her.
14. According to the report of the orthopaedic surgeon, Dr Kumbirai, dated 21 July 2021, the plaintiff had described the collision as having been caused when the vehicle in which she had been a passenger "was T-boned by another car at a robot". This is also the version recorded by Dr Kumbirai in the RAF 4 serious injury assessment report.
15. According to Mr Modipa, the clinical psychologist who examined the plaintiff on 20 July 2021, the plaintiff
"... recalled their vehicle was hit on the left side by another vehicle that failed to stop at the traffic intersection. She sustained injuries to the right arm."
16. The report of an industrial psychologist, Mr Kalanko, reflects that:
"The claimant was reportedly a passenger when the accident occurred. She noted that the car she was in collided with another car at an intersection."

The injuries

17. The plaintiff testified in her section 19 (f) (i) affidavit, that she had suffered a "broken hand". No mention was made of any back or elbow injuries.

18. As reported by Dr Kumbirai in his report, after the collision the plaintiff had been transported to Zola Clinic. On examination, it appeared that she had suffered a soft tissue injury to her right elbow. The x-ray examinations showed that she had not suffered any fractures. There was no mention of a “broken hand”. There was also no mention of any back injuries. A backslab was applied to her right elbow and she was discharged on the same day. The backslab was removed after 3 weeks. The plaintiff received pain management.
19. The report of an industrial psychologist, Mr Kalanko, reflects that according to the plaintiff, she had sustained the following injuries during the collision:
 - 19.1. *Right hand injury*
 - 19.2. *Right arm injury*

The plaintiff's employment

20. According to the particulars of claim, the plaintiff had, on the date of the collision, been employed as a “cook and/or chef”.
21. Dr Kumbirai reported that the plaintiff had been unemployed at the date of the accident.
22. Mr Kalanko, the industrial psychologist, reported that at the time of the collision, the plaintiff had been employed as a “domestic worker” and “cook/cleaner”.
23. Mr Modipa, the clinical psychologist, reported that at the time of the collision, the plaintiff had been employed as “a cook”.

The Sequelae of the Injuries

24. As far as the sequelae of the plaintiff's injuries were concerned, Dr Kumbirai reported that the plaintiff had sustained a soft tissue damage to her right elbow. He observed:
 - 24.1. *“No deformity noted”;*

- 24.2. *“Full range of motion - no pain”;*
 - 24.3. *“Neurovascularly intact”;*
 - 24.4. *“X-rays of the right elbow done by Drs Mkhabele and Indunah Diagnostic Radiologists on 19 July 2021 were normal”;* and
 - 24.5. *“the injuries have resulted in Non-serious long-term impairment/loss of body function.”*
25. Mr Kalanko, the industrial psychologist, reported the following:
- 25.1. *She suffers from back pains;*
 - 25.2. *She has recurring headaches;*
 - 25.3. *She has concentration difficulties;*
 - 25.4. *She cannot lift heavy objects with her right arm;*
 - 25.5. *She suffers from pains on her right arm especially during cold weather; and*
 - 25.6. *The complaints noted by the claimant may have a negative effect on her ability to work in the open labour market.*
26. The *sequelae* referred to by the industrial psychologist, Mr Kalanko, and particularly the back pains, headaches and difficulties in concentrating, do not appear to be logically connected to the soft tissue injury to the plaintiff's elbow. This much was candidly conceded by Mr Nwakodo.
27. Ms Mathebula, an occupational therapist who examined the plaintiff on 20 July 2021 gave the following summary:
- Summary of physical residual problems***
- She presented with physical residual limitations attributed to the injury sustained as a result of the accident in discussion that includes pain reported on the lower back with thoraco-lumbar spine movements, pain reported with right shoulder and elbow movements, reduced sitting, standing and walking endurance with reports of painful lower back, grade 4 muscle strength of the right shoulder and elbow with reports of pain, reduced right dominant hand grip strength, reduced right upper*

limb endurance, reduced dynamic balance due to painful lower back and she experiences occasional headaches, painful lower back and right elbow.

28. As is the case with the report of the industrial psychologist, Mr Kalanko, it will be readily observed that the “*physical residual problems*” reported by Ms Mathebula include issues which, on the face of it, common sense would dictate are not ordinarily associated with a soft tissue injury of an elbow.
29. The orthopaedic surgeon did not refer to any further injuries which could have been caused by the soft tissue elbow injury. And, particularly, he did not refer to any of the back-associated limitations referred to by Ms Mathebula.
30. Mr Nwakodo, correctly in my view, conceded that no link between the elbow injury and the back-associated limitations in particular had been demonstrated.

Inability to Work

31. Ms Mathebula, the occupational therapist, opined that the plaintiff’s occupation as a cook (if one accepts that she had been employed at the time of the collision) fell into the range of light to low medium physically demanding duties. She found, on testing, that the plaintiff had

“...completed the task [which was light to low medium physically demanding] at 91% which is above the minimal requirements of 87.5% in the light physically demanding duties in open labour market.”
32. The plaintiff was accordingly physically able to continue her employment as a cook.
33. Ms Mathebula’s subsequent suggestion that the plaintiff would only be employable with “reasonable accommodation” is based on what she termed the “*physical residual problems*”. As already pointed out above, these limitations were not demonstrated to have been causally connected to the soft tissue elbow injury reported by Dr Kumbirai.

Quantum: Actuarial Report

34. The actuary, Mr Oketch, furnished his report on the basis that the plaintiff had been employed as a domestic worker as reported by the industrial psychologist. The plaintiff's case as pleaded was that she had been employed as a "cook and/or chef". Her section 19 (f) (i) affidavit is silent on the issue of her employment.
35. The actuarial report was also based on the information provided by the industrial psychologist whose opinion relied upon frailties which were not proven to have been causally related to the plaintiff's injury sustained in the collision.
36. I am mindful of the fact that a court is not bound to apply actuarial calculations in determining an appropriate award for loss of earning capacity, but may instead make a globular award which it deems fair and reasonable (*Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) 113 F to114E*).

Conclusions

37. The Supreme Court of Appeal in *Road Accident Fund v Busuku* (2023 (4) SA 507 (SCA) at para [6]) recently restated the principle that
- “. . .it must be recognised that the Act constitutes social legislation and its primary concern is to give the greatest possible protection to persons who have suffered loss through negligence or through unlawful acts on the part of the driver or owner of a motor vehicle.”*
- and
- “. . . the provisions of the Act must be interpreted as extensively as possible in favour of third parties in order to afford them the widest possible protection.”*
38. This principle does not however mean that that a court must disregard the applicable legal rules relating to the proof of liability and the quantum of damages.

39. I was not furnished with any evidence to explain the conflicting versions as reflected, on the one hand, in the particulars of claim and the plaintiff's section 19 (f) (i) affidavit, and on the other hand, the version which the plaintiff gave to the orthopaedic surgeon and the occupational therapist. Thus, I am of the view that, given the unexplained conflicting versions of how the collision occurred, the plaintiff has failed to discharge the onus of proving that the defendant is liable for any proven damages.
40. Even if the plaintiff had proven that the defendant was liable for her proven damages, no evidence was led to demonstrate a causal connection between the soft tissue injury to the plaintiff's right elbow and the plaintiff's back pain, headaches and depression. Quite simply, the plaintiff failed to prove that the soft tissue elbow injury resulted in her being permanently unemployable in the open labour market. So too, no evidence was led to persuade me that the elbow injury resulted in the plaintiff suffering a future loss of earning capacity.
41. In the circumstances, the plaintiff's application for default judgment should be dismissed.
42. I can see no reason why the usual rule relating to costs should not apply.
43. I accordingly make the following order:
The applicant's application for default judgment is dismissed with costs.

HITCHINGS AJ
Acting Judge of the High Court of South Africa
Gauteng local division, Johannesburg

Date of Judgment: 27 November 2023
Plaintiff's Legal Practitioner: Adv I Nwakodo
Instructed by: Anyiam Attorneys Inc

Defendant's Legal Practitioner: Attorney Ms N Moyo
Instructed by: State Attorney