

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/54925

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

..... 08/03/2024
SIGNATURE **DATE**

In the matter between:

NONTOBEKO QWABE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

WEIDEMAN AJ:

INTRODUCTION

- [1] This matter was before Court on the 16th February 2024 in one of the dedicated Default Judgment Courts created in the South Gauteng Division of the High Court to deal with claims against the Road Accident Fund where, for whatever reason, the Road Accident Fund had failed to file an appearance to defend, failed to file a Plea, or had its defence struck out through failure to adhere to the Rules of Court or the Court's Directives.
- [2] The plaintiff is an adult female born on the 16th of October 1992 who instituted action for damages as a result of injuries she sustained due to a motor vehicle accident which occurred on the 1st February 2020 along Jules and Betty Streets, Jeppestown, Johannesburg.

IN DISPUTE:

- [3] All issues, i.e. liability and as well as quantum remained in dispute on the papers. At the hearing of the matter, it transpired that the court will only be required to address two issues, negligence and loss of income.

NEGLIGENCE:

- [4] The plaintiff elected to lead evidence by making use of affidavits as envisioned in rule 38(2) of the Uniform Rules of Court, read with the Practice Directives in this Division. The application was moved and granted.
- [5] The plaintiff's "Merits Bundle" appears on CaseLines at pages 0006-26 to 0006-35 and consists of two documents, the Officers Accident Report (OAR) and the plaintiff's section 19(f) affidavit.

- [6] The plaintiff's section 19(f) affidavit appears on CaseLines at 0006-34. Paragraph 3 thereof contains the following cryptic description of the events:

"On the 1st February 2020 and at approximately 17h55 and at or near Jules Street and Betty Street, Jeppestown, Johannesburg, Gauteng Province, I was standing on the pavement when a motor vehicle with registration letters and numbers SYH 421 GP driven by unknown driver drove off the road and knocked me down. The said motor vehicle did not stop after the collision."

- [7] Not included in the "Merits Bundle" are the hospital records and in which the following is recorded in manuscript at CaseLines page 0006-69:

"Attempted kidnapping of patient's sister. When she went to run after them, she got knocked down and drove over her right leg."

- [8] A further relevant note made in manuscript in the hospital records, but in a different handwriting and on a different day, can be found on CaseLines at page 0006-70 and reads as follows:

"PVA – Reports that the car rolled over her right leg in an attempted kidnap."

- [9] When the discrepancies between the version recorded in the hospital records and the Section 19(f) affidavit were raised with plaintiff's counsel, he indicated that the plaintiff is available and that he wishes to call her to testify, which the plaintiff did, on the following day, 17 February 2024.

- [10] During her oral testimony, the plaintiff was at pains to assure the court that the accident did not happen at the intersection of Jules and Betty streets but in

Jules St and that Betty Street was mentioned only to give an indication of where in Jules Street the incident occurred. This was in response to a question which was posed to plaintiff's counsel the previous day, enquiring whether he performed an *inspection in loco* at the intersection of Betty and Jules Streets. It was put to counsel that it would be physically impossible for a vehicle to mound the pavement at that intersection, collide with a pedestrian and still retain the ability to drive off.

[11] It should be kept in mind that the Plaintiff, at the time of the accident, resided in Jules Street and would have been familiar with the surroundings.

[12] The Plaintiff's viva voce evidence was that she was standing on the pavement with her cousin taking photos when a motor vehicle came from behind and hit her causing her to fall to the ground. The occupants of the vehicle, a blue "taxi combi" approached her and took her cellular phone.

[13] The Plaintiff testified that Nosipho (assumed to be her cousin) accompanied her in the ambulance.

[14] The Plaintiff denied having ever given the versions recorded in the hospital records as referred to above and that she had no knowledge as to how it happened to be incorporated in the hospital records.

[15] The second document making up the Plaintiff's "Merits Bundle" and which was the subject of the Rule 38(2) application, is the Accident Report Form (OAR) and which can be found on CaseLines from 0006-29 to 0006-32.

[16] The description given in the OAR of the accident found on CaseLines at 0006-30 reads as follows: "*the victim was lying on the side of the road at corner of Betty Street and Jules Street.*"

- [17] Considering the remainder of the OAR, the OAR is marked “correct road lane,” “travelling straight” and “crossroads.” The manner in which the blocks on the OAR is marked does not assist in giving an indication of the origin of the information, however, as it forms part of the evidence submitted in terms of Rule 38(2) the court must accept that it was the plaintiff’s intention that this information be considered in conjunction with the Section 19(f)(i) affidavit.
- [18] The question that must be asked is if the various records of the accident are *ad idem* or are there significant deviations between the different documents, if considered in conjunction with the plaintiff’s oral evidence?
- [19] There are clearly differences between the various sources of information and I am convinced that the plaintiff did not take the defendant, or the court, fully into her confidence as to the exact circumstances surrounding the accident.
- [20] However, what is certain is that she was in an accident, that the accident did occur at the date and time as alleged and that there is no evidence before court to suggest that there was any contributory negligence by the plaintiff in the accident.
- [21] The only possible conclusion, on the evidence available to the court, is that the unknown driver was the cause of the accident and that he was the sole cause of the accident. The plaintiff accordingly succeeds with her claim on the aspect of negligence and the defendant is liable for 100% of such quantum as the plaintiff can substantiate.

QUANTUM

[22] As a result of the motor vehicle accident the plaintiff sustained the following injuries:

22.1 A degloving injury from the left thigh down to the knee.

22.2 A degloving injury to the right thigh.

[23] The plaintiff's injuries were sutured, graft surgery was done, and debridement of both legs also took place.

[24] The occupational therapist confirmed that the plaintiff is a candidate for performing sedentary to light work and which would be in accordance with her pre accident occupation as a security guard, working in a camera control room. However, she is less competitive in the open labour market.

[25] The clinical psychologist recorded that the plaintiff has an extensive area of scarring involving her thigh region on the right-hand side as well as her left forearm and left knee. These injuries have affected her self-confidence. Due to her neurocognitive, emotional and physical difficulties she anticipated that the plaintiff will be disadvantaged in the future in terms of employment opportunities. The plaintiff continues to be psychologically vulnerable and has elements of anxiety.

[26] The industrial psychologist was of the opinion that the plaintiff presents with residual impairments which would impact on her future earning potential and employability. The plaintiff is less competitive in term of job seeking opportunities compared to her counterparts. The plaintiff's employment as a security guard would be limited to CCTV, or similar roles and which was in line with what the plaintiff did before the accident. Due to the accident the plaintiff has suffered a loss of earning capacity.

- [27] The actuarial report contains the only calculations available to the court and it is in accordance with what the plaintiff earned, both before and after the accident.
- [28] The court is guided by the table in the actuarial report that is contained on CaseLines at page 0006-263.
- [29] The plaintiff's accrued, pre contingency, loss is calculated in the sum of R234 146.00. Given that the plaintiff during this period was also pregnant with twins, I am not convinced that all the time that the plaintiff was not active in the labour market could be directly attributed to the accident. As such the proposed contingency deduction of 2% is too low and the more standard deduction of 5% should apply. From this amount should be deducted the known post-accident accrued income of R109 169.00. The net effect is an amount of R113 269.70 and which constitutes the plaintiff's accrued loss of income.
- [30] As far as future loss of income and impairment of earning capacity is concerned the point of departure would be the pre- and post-accident figures of R1 659 817 and R1 547 692, respectively. The difference between these figures represents the plaintiff's anticipated diminished future earnings. There is no evidence before this court that would substantiate a different contingency deduction from these figures as the difference already makes provision for what is alluded to by the experts in their reports. It is this court's opinion that the same contingency deduction of 20% should apply to both figures.

[31] The result is to reduce the respective figures to R1 327 853 and R1 238 154 and the difference between these figures of R89 699.00 constitutes the plaintiff's future loss of income/earning capacity.

[32] Once the past and future losses of R113 269.70 and R89 699.00 are added together the total loss in respect of both accrued and prospective loss of income will be R202 968.70.

[33] **In the circumstances I make the following order:**

1. The defendant is to pay the plaintiff the sum of R202 968.70 in respect of her loss of earning capacity.
 2. The defendant must provide the plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act to address all future hospital, medical or ancillary expenses that the plaintiff may have because of the injuries sustained in this accident.
 3. The defendant is to pay the plaintiff interest on the said sum of R202 968.70 at the rate of 11.25% per annum from 14 days from date of judgment to date of payment.
 4. The plaintiff's claim for non-pecuniary damages is postponed *sine die*.
 5. The defendant is to pay the plaintiff's party and party costs, as taxed or agreed, on the High Court scale.
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D. WEIDEMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was prepared by Acting Judge Weideman. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 08 March 2024.

Date of hearing: 16 February 2024

Date of Judgment: 08 March 2024

Appearances:

Counsel for the Plaintiff: Adv. JMV Malema

Instructed by. MB Mabunda Inc

Counsel for Defendant: Not represented

Instructed by: Office of the State Attorney