

*IN THE HIGH COURT OF
GAUTENG DIVISION,*



*SOUTH AFRICA
JOHANNESBURG*

APPEAL CASE NO: A011280-2023

COURT A QUO CASE NO: 34481/2018

1. Reportable: No
2. Of interest to other judges: No
3. Revised

Wright J
23 January 2024

In the matter between:

JUSTINE PHIRI

APPELLANT

And

ROAD ACCIDENT FUND

RESPONDENT

FULL COURT APPEAL - JUDGMENT

WRIGHT J

1. The appellant, Mr Phiri is now 45 years old. He was injured when he was struck by a vehicle when crossing the road on 18 July 2012. He, through his attorneys of record caused an action to be instituted against the present respondent, the Road Accident Fund.
2. In paragraph 1 of the particulars of claim, dated 22 August 2018 Mr Phiri is described as unemployed. It was alleged that Mr Phiri had suffered a fractured right humerus, a head injury and a right knee injury.
3. R20 000 was claimed as “*non-emergency medical treatment*”. This claim was later not proceeded with.
4. An amount of R300 000 was claimed for future medical expenses. Given the provisions of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 this claim is difficult to understand. The section replaces the right claimed in the summons with a right to an undertaking from the Fund covering future medical costs. The merits were agreed by the parties at 80-20 in favour of the plaintiff. The Fund apparently gave Mr Phiri an undertaking when the agreement on merits was reached.
5. The Fund was not represented at the trial. The evidence for Mr Phiri was neither challenged nor contradicted. No evidence was led for the Fund.
6. In paragraph 8.3 of the particulars of claim it is alleged that Mr Phiri, prior to the accident was employed as a labourer, earning R3 000 per month. R200 000 was claimed for past loss of earnings. The particulars of claim do not begin to set out how this claim is made up as is required by Rule 18(10). The purpose of the Rule is to allow the defendant to see how the claim is calculated.

7. The summons alleges that Mr Phiri has not worked since the accident “*to date*”, that is 22 August 2018. R700 000 is claimed for future loss of income. Rule 18(10) is again not complied with.
8. R500 000 is claimed for general damages.
9. The Fund pleaded but the defence was struck out. The matter proceeded to trial on a default judgment basis.
10. At some stage, the claims were amended upwards. The notice of amendment makes no attempt to set out the increased claims in line with Rule 18(10).
11. At the hearing, Mr Phiri’s legal representative moved only for loss of earnings and general damages.
12. Mr Phiri testified as did Dr Tladi, an orthopaedic surgeon, Ms India, an occupational therapist and Ms Magotla, an industrial psychologist. No evidence was led for the Fund.
13. Mr Phiri said that before the accident he hawked goods like car polish, making about R700 per week profit. He said that he worked six days per week before the accident. As a result of the accident he was in hospital for about a week and then he needed physiotherapy. He said that he needed two years to start working again. He said that after the accident, and once he started working again, he made about R250 profit per week, working between three to five days per week.
14. Net, he was essentially claiming loss of profit at R700 per week from the date of the accident for two years and thereafter at R450 per week, that is R700

less R250, giving a loss of R450 per week. There was no evidence as to when he would have retired with and without the accident.

15. Mr Phiri explained the apparent contradiction between the allegation in the particulars of claim that he was, prior to the collision employed as a labourer earning R3 000 per month and his evidence that at the same time he was a hawker. R700 profit per week translates to R2 800 every four weeks. Adding two or three days each month, depending on the number of days in the month and depending on when in the week he took a day off, one can see that the allegation in the particulars that he earned R3 000 per month is close to his evidence that he earned R700 per week.

16. The question is whether or not it is significant that:

16.1 he had admittedly signed an RAF1 form describing himself as unemployed and

16.2 the particulars of claim describe Mr Phiri as a labourer while he in his evidence said that he was a hawker.

17. Mr Phiri has a Grade 11 education but not a matric.

18. Regarding his having signed the RAF1 form, he said in evidence that "*They did that because they wanted me to give a letter or a sick note which I can take to the hospital and I could not do that because I was not employed.*" Mr Phiri is Setswana speaking and testified through an interpreter.

19. Regarding the description in the particulars of claim describing Mr Phiri as unemployed, Mr Phiri testified that *“maybe that other person did not understand me clearly.”*
20. These two answers were given in response to questions by the presiding acting judge.
21. Mr Phiri testified that by unemployed he meant self employed as a hawker.
22. I would not draw any an inference against Mr Phiri. One can readily see how he might run together the concepts of unemployment and self -employment, leaving aside any possible difficulties in translation, even assuming that the form was accurately filled in and the summons accurately drafted. A hawker who simply buys a few goods for cash and then sells them for cash is employed in a loose sense of the word but does not necessarily work for another person. On Mr Phiri’s evidence, he does not work for another person.
23. Mr Phiri produced no documentation to back up his claim but in my view, this cannot be held against him as one would not expect a hawker to have such documentation.
24. Dr Tladi testified. He confirmed a broken humerus which had not been properly operated on and he confirmed reduced strength in the shoulder with reduced mobility and that Phiri will always have pain.
25. Ms India testified, saying that Mr Phiri could lift a weight of 3 kgs to waist level and with pain.

26. Ms Magotla testified, saying in effect that Mr Phiri's ability to earn after the accident is less than it was before the accident. Ms Magotla conceded that her only source of information was Mr Phiri himself.
27. Mr Phiri testified that about 18 months after the accident he applied to a mine for a job as a machine operator but he did not get the job as he did not have the strength. Thereafter, he applied for a job elsewhere, which job would have entailed carrying cement and bricks. He could not take the job as, once again he did not have the strength. The question arises, if Mr Phiri did not have the strength why did he apply for the jobs? In my view, he may well have been desperate for an income of any kind. His testimony was not challenged or contradicted.
28. There is an actuary's report in the court file but the actuary was not called to testify and neither is there an affidavit by the actuary confirming his report. There is therefore no actuarial evidence before the court.
29. In my view, Mr Phiri, on the evidence, suffered a loss of earning capacity and a concomitant loss of earnings. It would be unwise of me to attempt to quantify the loss as this should be done by an actuary according to the terms of the order below.
30. Regarding general damages, an RAF4 form was submitted to the Fund on behalf of Mr Phiri as is required to advance a claim for general damages. The Fund never responded. In these circumstances the court has no jurisdiction to deal with the question of general damages. See *Mphala v Road Accident Fund (698/16) [2017] ZASCA 76 (1 June 2017)* at paragraph 12.

31. The learned trial judge correctly declined to hear the question of general damages and postponed it. The question of general damages may not be decided by this court now for two reasons, namely lack of jurisdiction and a postponement of a claim is in any event not appealable.
32. It may well turn out that the entire claim, including that for general damages, if applicable, falls within the jurisdiction of the Magistrates' Court. It may, at the end of the day be appropriate that costs in the matter as a whole be awarded on a scale in that Court. Costs in this appeal should thus be reserved.
33. This being a minority judgment, I would have proposed the following order:
 - 33.1 The appeal is upheld in relation only to the question of loss of earnings.
 - 33.2 The appeal relating to the question of general damages is removed from the roll.
 - 33.3 The appellant is entitled to 80% of loss of earnings calculated at R700 per week before the application of tax, if any and if applicable, for two years from 19 July 2012 until 18 July 2014 and at the rate of R450 per week, before the application of tax, if any and if applicable, from 18 July 2014. The period for which this claim will run is left open and is to be calculated by the actuary of the appellant.
 - 33.4 The actuary's fresh report is to be sent to the RAF for its consideration.
 - 33.5 Costs reserved.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : **11 October 2023**

DELIVERED : **23 January 2024**

APPEARANCES :

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RESPONDENT **No appearance**

Instructed by **Road Accident Fund**

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