

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-045963

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

DATE: 08 May 2024

WEIDEMAN AJ

SIGNATURE

In the matter between:

NOMVULA HLANJIWE TSHUMA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

WEIDEMAN AJ

- [1] This matter was on the default judgment roll for the 26th March 2024. When the matter was called, there was no appearance for the RAF,

despite due notice of the trial date being given to it. The matter proceeded on a default basis.

- [2] It was first stood down until 11h30 at the request of the plaintiff's representative and thereafter again to 14h00. At 14h00 there was a further request to stand the matter down until 10h00 the next day. On the 27th March 2024, when the matter was called at 10h00 there was a final request for a further stand down until 11h30 when the matter eventually began.
- [3] The plaintiff lodged a claim with the defendant ("the RAF") in terms of the provisions of the Road Accident Fund Act, No. 56 of 1996 ("the Act") claiming damages resulting from the injuries sustained in the collision.
- [4] Counsel for the plaintiff proceeded to present her case in respect of all issues of liability and quantum [excluding the claim for general damages, for reasons set out later].
- [5] After hearing the evidence of the plaintiff and argument by counsel, I reserved judgment.

LIABILITY

- [6] The plaintiff bears the onus to prove that the RAF is liable under the provisions of the Act, to compensate her for damages suffered because of the injuries sustained in the collision. This includes the onus to prove that the driver of the insured vehicle negligently caused the collision.
- [7] Application was made in terms of Rule 38(2) of the Uniform Rules of Court that I hear evidence on affidavit, as it would be expedient to do so. The affidavits deposed to by all the expert witnesses are filed of record.
- [8] *Havenga v Parker 1993 (3) SA 724 (T)*, confirmed by the Supreme Court of Appeal in *Madibeng Local Municipality v Public Investment Corporation 2018 (6) SA 55 (SCA)*, found it is permissible to place expert evidence before the Court by way of affidavits in terms of Rule 38(2). Accordingly, that application was granted.

- [9] The plaintiff substantially complied with the requirements set out in the Practice Directives of this Court and the Uniform Rules of Court, entitling her to proceed on a default basis.
- [10] The accident from which this claim arose occurred on the 26 June 2020. According to the particulars of claim “The plaintiff was a pedestrian walking along Esselen Street, Hillbrow. When the plaintiff was about to cross Kotze Street, a motor vehicle approached at high speed and hit the plaintiff from the back.” [CaseLines 02-4]
- [11] According to the plaintiff’s Section 19(f) affidavit the following occurred: “I was coming from work walking along Esselen Street approaching the Rea Vaya Bus station, when I was about to cross Kotze Street a motor vehicle approached at high speed and hit me from the back”.
- [12] I lost consciousness and I woke up at Hillbrow Community Clinic.” [CaseLines 04-52]
- [13] The next document of relevance is the Accident Report Form [CaseLines 04-60 to 04-63]. From it one deduces that the 26 June 2020 was a Friday. This is only relevant as an indication of what the possible traffic flow could have been at 17h35 on a Friday afternoon in Hillbrow, albeit there is no evidence before court as to what the traffic conditions may have been. It is interesting that the Accident Report Form does not contain any version of how the accident may have occurred. It only add to the available information by confirming that the street in which the accident allegedly occurred is a one-way street.
- [14] According to the hospital records she had a 3cm laceration on the right side of her forehead and a dislocated shoulder. She was treated and discharged the same evening. The treating personnel did not consider it necessary to keep her for observation or to do a CT scan or investigate whether there was a brain injury. [CaseLines 04-48 to 04-51]
- [15] According to the medico-legal report of Ms D Mathebula, occupational therapist, she lost and regained consciousness at the scene of the

accident and was assisted by a bystander to walk to the hospital which was about two hundred meters away. [CaseLines 08-3]

- [16] The same version of how she got to the hospital is also recorded in the report of L Modipa, the clinical psychologist. [CaseLines 08-35]
- [17] In contrast to the above the plaintiff reported to Dr Mazwi, neurosurgeon, that she was transported to hospital in an ambulance. [CaseLines 08-60]
- [18] In debating the mechanism of the accident with counsel it was put to her that it is difficult to understand how the accident occurred. Both in her particulars of claim and in her section 19(f) affidavit the plaintiff clearly states that the offending vehicle was travelling at speed. The plaintiff is equally adamant that the vehicle collided with her from behind. How does she then know that it was travelling at speed?
- [19] Counsel was also asked to assist the court by proffering an explanation of how the mechanism of the accident could have occurred. If the vehicle hit her from behind, at speed, one would expect some injury to her pelvis or back from the primary contact with the vehicle, yet she has no injuries to her back or pelvis.
- [20] Further, how does a vehicle hit her from behind, but her injuries consist of a laceration to the front of her head (forehead) and a dislocated shoulder?
- [21] According to photos that were available in court the Rea Vaya Bus station had been built in the centre of the road with one lane of travel passing on each side of the bus station platform. The lanes are fairly narrow.
- [22] Looking at the scene of the collision the only possible conclusion is that the collision must have occurred somewhere on the road. The difficulty with this scenario is that it would have been impossible for the vehicle to collide with the plaintiff with the front of the vehicle and for it to continue driving without driving over the plaintiff, given the raised platform of the bus station on the one side and the raised sidewalk on the other.

[23] Counsel conceded that the plaintiff lied, under oath, that she was unconscious after the accident and only woke up at Hillbrow Hospital. She walked to the clinic herself.

[24] Similarly, it is the opinion of this court that she was not truthful when she claimed that the vehicle was travelling at speed. Speed and her injuries are contra indicated.

[25] Does that imply that no collision occurred? No, it must be accepted that a collision did occur but how the collision occurred is not known. Given the scene of the accident it is also not possible for the collision to have occurred anywhere else but on the road surface. If this is accepted, then it must also be accepted that there is some negligence on the part of the driver of the unknown vehicle.

[26] At the same time, the plaintiff must have been on the road surface. According to the Accident Report Form it was a one-way street and she therefore only had to keep traffic from one direction in mind yet, for reasons not known to the court, she simply never saw the vehicle.

[27] Given the dearth of facts and not wanting to non-suit the plaintiff I find that both parties must accept equal responsibility for the collision and the plaintiff will therefore be entitled to 50% of such damages as she might be able to substantiate.

QUANTUM

[28] The plaintiff is claiming general damages and filed the required RAF4 forms in support thereof. However, there is no indication that the RAF formed a view on the seriousness of the injuries sustained by the plaintiff.

[29] Counsel for the plaintiff conceded that the decision whether the injuries of the plaintiff are serious enough to meet the threshold requirement for an award of general damages, was conferred on the RAF and not on the Court. The assessment of damages as "serious" is determined administratively in terms of the manner prescribed by the RAF

Regulations, 2008, and not by the Courts. Accordingly, the plaintiff's claim for general damages will be separated from the other heads of damages and postponed.

[30] Meyer AJ (as he then was) held in *Mathebula v RAF (05967/05) [2006] ZAGPHC 261 (8 November 2006) at para [13]*:

"An expert is not entitled, any 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. (See: *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH, 1976 (3) SA 352 (A)* at p 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A)* at p 315E; *Lornadawn Investments (Pty) Ltd v Minister van Landbou 1977 (3) SA 618 (T)* at p 623; and *Holtzhauzen v Roodt 1997 (4) SA 766 (W)* at 772I)."

[31] In *Michael and Another v Linksfield Park Clinic (Pty)Ltd and Another (2002) 1 All SA 384 (A)*, the Supreme Court of Appeal had the following to say regarding the approach to be adopted in dealing with the expert evidence:

"[34] As a rule, that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court's reaching its conclusion on the issues raised."

[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. . . ."

[32] In *Twine and Another v Naidoo and Another (38940/14) [2017] ZAGPJHC 288; [2018] 1All SA 297 (GJ)*, the court had the following as a guide in approaching the expert evidence:

"Para 18: a. The admission of expert evidence should be guarded as it is open to abuse, c. The expert testimony should only be introduced if it is relevant and reliable. Otherwise, it is inadmissible. ." r. A court is not bound by, nor obliged to accept, the evidence of an expert witness: "It is for (the presiding officer) to base his findings upon opinions properly brought forward and based upon foundations which justified the formation of the opinion." s. The court should actively evaluate the evidence. The cogency of the evidence should be weighed "in the contextual matrix of the case with which (the Court) is seized. If there are competing experts, it can reject the evidence of both experts and should do so where appropriate. The principle applies even where the court is presented with the evidence of only one expert witness on a disputed fact. There is no need for the court to be presented with the competing opinions of more than one expert witness in order to reject the evidence of that witness. 2023 JDR 1213 p11 t."

- [33] It is trite that the plaintiff bears the onus to prove how the injuries have affected her in respect of her earning capacity.
- [34] There is a difference between the question whether the plaintiff has suffered an impairment of earning capacity, and the question whether the plaintiff will in fact suffer a loss of income in the future.
- [35] The latter question is one of assessment in respect of which there is no onus in the traditional sense. It involves the exercise of quantifying as best one can, the chance of the loss occurring.
- [36] It is now trite that any enquiry into damages for loss of earning capacity is by nature speculative. All the court can do is estimate the present value of the loss whilst it is helpful to take note of the actuarial calculations, a court still has the discretion to award what it considers right.

[37] With the above as background I now turn to the medico-legal reports filed of record. The first of these that must be considered is that of the neurosurgeon, Dr Mazwi [CaseLines 08-58 to 08-74]

[38] According to his report he had only the RAF 1 claim form and the Hillbrow hospital records available to him. In examining the plaintiff he found:

- No abnormality in respect of the cranial nerves.
- No ophthalmic abnormality.
- No trigeminal abnormalities.
- No facial abnormalities.
- No vestibulocochlear deviations.
- Oculomotor, Adducens, Trochlear – all normal
- Glossopharyngeal, Vagus – all normal
- Hypoglossal – all normal
- Motor examination: normal muscle bulk and normal power in all groups with normal balance and gait posture.
- Sensory examination: all sensory modalities and dermatomes intact.
- Spine: normal curvature of the spine, non-tender.
- Chest: all normal
- Cardiovascular: all normal
- Abdomen: all normal

[39] Factually, based on his examination, he found nothing wrong with the plaintiff. Based on the hospital records and the fact that the plaintiff's GCS was 15/15 he finds there was a mild head injury. This does not equate to a brain injury.

[40] No CT or MRI scan was performed, not during the original treatment, not at any stage thereafter and not as part of his evaluation. The only “evidence” available to Dr Mazwi was the verbal reporting of the plaintiff.

[41] The following comment in the case of *AM and another v MEC Health, Western Cape (1258/2018) [2020] ZASCA 89 (31 July 2020)* is equally applicable *in casu*:

“[21] The opinions of expert witnesses involve the drawing of inferences from facts. If they are tenuous, or far-fetched, they cannot form the foundation of the court to make findings of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation.”

[42] To the extent that all the conclusions of Dr Mazwi is based only on the reporting of the plaintiff and that his own assessment found nothing wrong there were simply no facts available on which Dr Mazwi could conclude that the plaintiff sustained anything other than a mild concussion, at best.

[43] Dr Mazwi’s medico-legal report is of no assistance to the court and his conclusions, as far as it suggests a brain injury, is not accepted.

[44] The occupational therapist Ms. D Mathebula concluded that the plaintiff retains the competency for light to low medium duties with reasonable accommodation. The physical demands of her pre- and post-accident occupation as a domestic worker and child minder falls within light to medium duties.

[45] The industrial psychologist recorded the history as provided by the plaintiff and quoted extensively from the other medico-legal reports. What is however glaring in its absence is any source documentation in respect of employment. There is no contract of employment, there are no payslips, there are no bank statements, there is no indication that any attempt has been made to interview the employer to confirm the plaintiff’s employment and to enquire from the employer as to the reason why the plaintiff is only working 3 days a week at the stage that she saw the plaintiff.

[46] According to the industrial psychologist's report the plaintiff left Capello's restaurant, first in Sandton City and thereafter in Melville for better prospects. At the time she left she was earning R5000 to R6 000 per month, yet she accepted employment with a Mr Govender at R4 200 per month. This is never questioned or interrogated by the industrial psychologist.

[47] At the time of her assessment in June 2022 the plaintiff was working for the same employer as she worked for pre-accident but only three days per week at an income of R4 500, more than she earned pre-accident.

[48] The only confirmed injuries the plaintiff sustained were an injury to the right shoulder and an injury to the forehead. Most of her residual complains relate to her eyes (which Dr Mazwi found normal), her back and her knee, neither of which were injured in the accident. [CaseLines 08-89]

[49] There are no facts contained in the report of the industrial psychologist that could serve as a foundation on which to find a claim for loss of income. The alleged, unproven, reasons why she cannot work a full week does not appear to be accident related.

[50] The report of the industrial psychologist is of no assistance to the court.

[51] The report of the actuary is of assistance only to the extent that it assist in quantifying the possible claim for past loss of income. In this regard the amount as per the actuarial report is allowed, less 50%, i.e. R33 956.50.

[52] It is the opinion of this court that there is no substantiated claim for future loss of income or loss of earning capacity.

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

53.1 The defendant is liable for 50% of such damages as the plaintiff may be able to prove.

53.2 The Defendant shall pay to the plaintiff the amount of R33 956.50 in respect of the claim for past loss of earnings.

53.3 The plaintiff's claim for future loss of income is dismissed.

53.3 The amount of R33 956.50 shall be paid to the plaintiff within 180 (ONE HUNDRED AND EIGHTY) Court days of the date of this Court Order.

53.4 In the event of the aforesaid amount not being paid timeously, the defendant shall be liable for interest on the amount *a tempore morae*, calculated 14 (FOURTEEN) days after the date of this Order to date of payment, as set out in Section 17(3)(a) of the Road Accident Fund Act 56 of 1996.

53.5 The claim for general damages is separated from all other issues of quantum, and is postponed *sine die*.

53.6 The Defendant shall issue an undertaking in terms of Section 17 (4) (a) of the Road Accident Fund Act as amended, limited to 50%.

53.7 The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale.

WEIDEMAN AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines*. The date and time for hand-down is deemed to be 08 May 2024.

Heard on: 26 & 27 March 2024

Delivered on: 08 May 2024

Appearances:

On behalf of the Plaintiff: Ms A N Nyathi

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On behalf of the Defendant: No appearance