

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

Case No: 17468/2021

Reportable: No
Of interest to other Judges: No
Revised: Yes
Date: 12 April 2024

SIGNATURE

In the matter between:

H BUTHELEZI

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MOOKIJ

1 The plaintiff claims against the Road Accident Fund, following an accident in which the plaintiff was involved. The defendant admitted liability for 100% of such damages as the plaintiff may prove. In relation to the pleadings, this is part of the plaintiff's pleaded claim. She was a passenger in a taxi that overturned when the driver sought to overtake a bus.

2 The plaintiff did not plead any particular injury or injuries that she suffered. She pleaded as follows, in connection with this aspect.

“As a result of the accident, the plaintiff suffered the following injuries; please refer to the hospital records.”

3 The plaintiff claims the total amount of R2.1 million made up of various headings including past loss of income in the amount of R1 million and a future loss of income in the amount of R500 000.00.

4 At the beginning of the trial the plaintiff sought an order in terms of Rule 38(2), that the reports by her expert witnesses be admitted as evidence on affidavit. The Court

granted the order. The plaintiff did not give evidence. She made her case by way of reports prepared on her behalf. I refer to some of those reports.

5 She referenced a report by Dr Chetty, orthopaedic surgeon. Dr Chetty assessed the plaintiff with the assistance of an interpreter. The plaintiff was a passenger in a taxi, she did not wear a seatbelt. The plaintiff had an x-ray done which showed a T12 vertebral fracture. She was given a lumbar brace.

6 She required no surgical procedures and was discharged on the same day. The plaintiff complained about severe back pain, inability to stand for a long time, inability to bend, inability to sleep on the right side and constipation. Dr Chetty conducted radiological examination on the plaintiff and recorded "an old healed compression fracture T12 with sclerosis and callus formation and reduced height degenerative changes in lumbar spine." The plaintiff indicated to Dr Chetty that the plaintiff was self-employed as a dressmaker but was unemployed at the time of the assessment.

7 She was a recipient of a disability grant since 2019. Dr Chetty further records that the plaintiff used crutches. As part of her case, the plaintiff also referred the Court to the report by the occupational therapist, who recorded as

follows. That the plaintiff was assisted by the plaintiff's daughter, during the assessment. The daughter provided collateral information that included affidavits by clients of the plaintiff.

8 The occupational therapist recorded that the plaintiff walked with the aid of a stick, she squinted her eyes owing to visual difficulties as she had not brought her reading glasses. She wore a spine brace and presented with verbal and non-verbal signs of pain to her spinal region. The report continues that the plaintiff was diagnosed with hypertension and arthritis post-accident.

9 The plaintiff is recorded as being physically and psychologically healthy and stable before the accident. She was 64 years old on 15 June 2020, the date of the incident. The occupational therapist recorded the following regarding the plaintiff's pre-injury work history. The plaintiff became self-employed in 2003 as a machinist, sewing uniforms for use in a church.

10 The plaintiff used a hand and foot-controlled sewing machine. The accident, according to the occupational therapist, occurred whilst the plaintiff was self-employed, reporting a profit of R6 000 per month. The plaintiff did not work as a machinist following the accident owing to

injuries she sustained in the accident. She was unable to cope with prolonged sitting, standing or walking.

11 She was no longer able to work and depended on her spouse and a pension of R1 800 per month. The occupational therapist referenced affidavits by clients of the plaintiff. The first affidavit was deposed to on 8 January 2021, recording that the deponent purchased church uniforms from the plaintiff and that the deponent was a client of the plaintiff.

12 The second affidavit was deposed to on 6 January 2021, recording that the deponent purchased church dresses from the plaintiff. The third affidavit was deposed to on 16 January 2021, recording that the deponent was a client of the plaintiff and that the deponent purchased clothes from the plaintiff. The occupational therapist continued that the plaintiff would have continued working with the same or similar capacity, apart from the accident, and that the plaintiff would have worked until retirement age or until she was deemed unfit.

13 The occupational therapist further recorded that the plaintiff was unlikely to cope with physically demanding work of a labour-intensive nature due to the severity of her injuries and secondary issues. She suffered a total loss of income due to a chronic deficit. The Court was also

referred to the evidence by the industrial psychologist who reports, among others, that the plaintiff earned approximately R7 000 per month, depending on the number of orders received.

- 14 The industrial psychologist considered affidavits by clients of the plaintiff who indicated buying clothing from the plaintiff. Those would be affidavits referenced by the Court a short moment ago. The industrial psychologist says, as part of the report and in relation to events after the accident:

“Mrs Buthelezi was unable to return to work following the accident. She reportedly did not receive an income while she was away from work.”

- 15 The plaintiff discontinued operating her business because she experienced difficulties with sitting for prolonged periods.

- 16 The plaintiff is said to have been unemployed and was dependent on her pension grant of R1 860. The industrial psychologist recorded the following regarding the plaintiff's income potential. The plaintiff did not provide proof of income. The plaintiff reported earning R7 000 per month, depending on orders, before the accident. The

industrial psychologist estimated that the plaintiff had an annual income in the amount of R84 000.00.

17 The industrial psychologist indicated that the plaintiff, but for the accident, would have continued the work of an unskilled nature for the rest of her working life. The plaintiff was 64 years at the time of the accident. The industrial psychologist indicated that the plaintiff was likely to increase her earnings until the age of 70 because she was self-employed. The plaintiff, according to the industrial psychologist, had no handicaps before the accident.

18 A plaintiff is to prove his case by presenting evidence to the Court. Before damages payable to an injured person can be assessed, it is necessary that the Court should determine factually what injuries were suffered by a plaintiff because of a defendant's wrongful act.

19 The defendant did not admit that the plaintiff suffered a loss on account of the accident. The plaintiff is required to prove not only that she suffered a loss, but she is also required to prove the extent of that loss.

20 The plaintiff did not give evidence as already indicated. She did not confirm the factual averments about her as recorded in the reports by her experts.

21 In so far as experts express an opinion on an issue, the facts upon which such an opinion is based must have been established, otherwise the opinion has no value for the Court. This general principle was reiterated in the matter of HAL obo MML v MEC For Health, Free State.¹

22 Regarding the loss of income, the plaintiff must adduce evidence of her income to enable a court to assess her loss of earnings. In addition, the plaintiff must prove the amount of income that a plaintiff will reasonably lose in future because of the injury.

23 As regards the future loss of income, a Court must compare what a plaintiff would have earned if it were not for the accident, with what she would likely have earned after the accident.

24 I revert to reports relied on by the plaintiff. The reports are based on hearsay, including in several crucial respects. The plaintiff, in her pleaded case, did not plead any sequelae arising from what injury she may have suffered. The plaintiff did not confirm the factual averments made about her in the reports by her experts.

25 I comment as follows on some of the reports. The occupational therapist does not mention that the plaintiff

¹ (Case no 1021/2019) [2021] ZASCA 194 (22 October 2021)

had a pre-existing compression fracture T12 with sclerosis and callus formation. The occupational therapist commented that Dr Chetty's observed that the plaintiff "has pre-existing medical conditions such as arthritis and hypertension."

26 Other reports, on the other hand, say the arthritis and hypertension arose following the accident. I also draw attention to the fact that the occupational therapist did not mention that the plaintiff was a recipient of a disability grant. Dr Chetty, on the other hand, pointed out the issue.

27 The nature of the plaintiff's disability was not mentioned. It was also not mentioned when the disability arose. This notwithstanding, the occupational therapist says in her report that the plaintiff was physically and psychologically healthy and stable before the accident. This cannot be correct with reference to Dr Chetty's observations and remarks.

28 The occupational therapist referenced affidavits by clients of the plaintiff. And there was no comment as to, for example, the deponents to those affidavits saying they were "clients" of the plaintiff. I emphasise reference to the deponents being "clients" of the plaintiff because of contentions by several experts that the plaintiff became

completely unable to work as a seamstress following the event.

29 The industrial psychologist recorded as follows as part of her report:

“Mrs Buthelezi was unable to return to work following the accident. She reportedly did not receive an income while she was away from work.”

30 The Court does not find this statement helpful. I shall revert why the Court holds this view. Before doing that, the Court draws attention to a further remark by the industrial psychologist on events following the accident. This is what the industrial psychologist wrote:

“Ms Mgidi’s vocational diagnosis is poor in terms of physically based work competency.”

31 The industrial psychologist referenced a Ms Mgidi. This remark, together with the remark that the plaintiff was unable to return to work, shows that the report by the industrial psychologist did not record proper factual issues regarding the plaintiff. The report is a cut and paste of what the industrial psychologist said in the past about some other person.

32 It is nonsensical for the industrial psychologist to say that the plaintiff was unable to return to work and that the plaintiff reportedly did not receive an income while she was away from work. That is because the industrial psychologist said elsewhere in her report that the plaintiff was a self-employed seamstress since 2003. What The remarks by industrial psychologist had nothing to do with the plaintiff. They make sense only in the context of a cut and paste from a report dealing with a different person.

33 A plaintiff is required to plead a particular injury that he suffered. It was not competent for the plaintiff in this matter to merely refer to hospital records as constituting the basis for an injury or injuries that she contends for.

34 I also find that the plaintiff failed to establish that she suffered a loss. The reports by experts are based on hearsay. Some of the reports are a clear cut and paste of information pertaining to persons other than the plaintiff. The collateral information that the experts sought to rely on does not support the claim, for example that the plaintiff suffered a loss of earning capacity.

35 The affidavits relied upon by the experts are of persons who describe themselves as clients of the plaintiff. The affidavits are deposed to after the date of the incident.

Those affidavits are inconsistent with the plaintiff being unable to work as a seamstress following the incident.

36 I make the following order:

The plaintiff's claim is dismissed.

Omphemetse Mooki

Judge of the High Court

Heard: 21 January 2024

Revised: 12 April 2024

For the plaintiff:

Instructed by:

For the defendant: no appearance