

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

Case No: 19284/2017

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

SIGNATURE

In the matter between:

ROFHIWA KHWEKHWE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MOOKI J

1 The plaintiff was injured following a collision between a car driven by the plaintiff and a car driven by an unknown person. The accident occurred on 23 August 2014. The parties settled all heads but the one on loss of earnings. The defendant's defence was struck and the matter came before court on an undefended basis.

2 The plaintiff was granted leave to lead evidence in terms of Rule 38(2). The plaintiff also gave evidence in person. He made his case as detailed below.

3 The plaintiff was the sole member of Rofhtech Engineering Services CC ("Rofhtech Engineering") at the time of the accident. He drew a salary of R30,000.00 as a sales representative. He was unable to continue his work as a sales representative at Rofhtech Engineering following the accident. He then established Rofhtech Supplies (Pty) Ltd ("Rofhtech Supplies") in 2014, a company that is involved in supplies.

4 Rofhtech Supplies, unlike Rofhtech Engineering, required less of his physical presence. He works with a driver and an administrator in Rofhtech Supplies, each of whom is paid R5000,00 per month.

5 The following experts gave evidence as part of the plaintiff's case.

6 Dr M M Maku, an orthopaedic surgeon, assessed the plaintiff on 31 July 2019. He reported that the plaintiff suffered a bi-malleolar fracture in the left ankle. The plaintiff complained of pain in the left ankle on exertion and that the pain got worse in cold weather. He was forced to take medication. The x-ray of the left ankle revealed that the fracture had healed.

7 The plaintiff was found, among others, to present with clinical signs of ankle stiffness. Dr Maku suggested that the plaintiff would benefit from removal of the ankle hardware and that provision be made for ankle rehabilitation by a physiotherapist.

8 Dr Maku found the plaintiff to present with chronic pain on the left ankle. It was difficult for the plaintiff to execute his duties as a projects manager, which required him to be physical and on his feet. He classified the plaintiff's prognosis as "fair."

9 Manoko Mogoroga, a clinical psychologist, assessed the plaintiff on 3 December 2021. The clinical psychologist had regard to the plaintiff's occupational history, including that the Covid-19 pandemic affected the business of Rofhtech Supplies drastically.

10 The plaintiff reported pain on his left foot ankle when seated for long periods, being every 45 to 60 minutes. The clinical psychologist remarked that the plaintiff self-reported that the plaintiff was a "very optimistic man and functioned well" before the accident. The plaintiff was now always worried and feeling depressed when thinking about the accident and the future of his business. He was easily startled when driving on the road, especially when another car was parallel to his car. The plaintiff struggled to sleep at night and had to constantly change his sleeping position to avoid putting strain on the left foot ankle.

11 The clinical psychologist opined that the plaintiff's "...ability to receive information, understand it, make decisions and carryout (sic) instructions may be affected" and concluded that "...there have been significant changes in emotional, physical, behavioural, and social functioning since the accident."

12 Sarah Marule, an occupational therapist, assessed the plaintiff on 23 November 2021. She reports that the plaintiff displayed maximum effort with physical assessments. She commented on the plaintiff's work history; including that the plaintiff was a sales representative for Rofhtech Supplies and that the plaintiff reported several work-related problems in his job as a sales representative. The problems included that the plaintiff struggled to stand and walk for prolonged periods, struggled to lift and carry heavy objects, and struggled to drive long distances.

13 The occupational therapist concluded that the plaintiff, following the accident, has residual physical ability of an occupation within the category of light duty work

and that the plaintiff should be able to continue working with reasonable accommodations. His occupational prospects were negatively affected by the nature of his injuries.

14 Thomas Tsikai, an industrial psychologist, assessed the plaintiff on 23 November 2021. He prepared an addendum report dated 28 January 2023. The addendum detailed the plaintiff's employment background, including that the plaintiff earned R30 000.00 per month at Rofhtech Engineering as a projects engineer. The plaintiff left Rofhtech Engineering on 23 August 2014, after being with the company from March 2014. The plaintiff left because "He was unable to resume his business operations following his involvement in the said accident."

15 The plaintiff received no income between the accident and May 2015. He started supplying electrical equipment in May 2015, earning approximately R20 000.00 per month.

16 The industrial psychologist dealt with the plaintiff's pre-morbid employment prospects. The plaintiff was self-employed as a "process engineer" with a diploma level of education. His business venture was generating a monthly profit of R30 000.00 per month. The plaintiff would have continued as a process engineer, working beyond age 65 until age 70 because he was self-employed. The industrial psychologists remarked that this scenario depended on various unpredictable factors, such as general health and demand for the plaintiff's services.

17 The plaintiff is said to have had prospects of a successful career given his age at the time of the accident, namely 27 years. He is said to have progressed at age 40 to earn an annual income of R504 287.00 on the upper quartile of architects, engineers and related professionals, which would be his career and earnings ceiling. The plaintiff would thereafter receive annual inflationary increases until retirement at age 70.

18 The industrial psychologist dealt with the plaintiff's post-morbid employment prospects as follows. The plaintiff was 35 years old at the time of his assessment. He could not resume his business operations after the accident. He started supplying electrical equipment in May 2015, earning approximately R20 000.00 per month.

19 The accident made the plaintiff an unattractive and unfair competitor. The injuries drastically affected his physical ability. His specific qualifications in engineering would not allow him to work in any other capacity. The industrial psychologist opined that it was difficult to predict the exact financial impact of risks on the plaintiff. This could be addressed by means of a higher than normal post-accident contingency. With normal contingencies applied to his pre-morbid condition.

20 Munro Forensic Actuaries prepared a report, calculating the loss suffered by the plaintiff. They relied on the report by the industrial psychologist, together with an "employment letter" dated 11 January 2022, for their computations.

21 The actuary took an apportionment of 80% into account in their calculations. The uninjured earnings were premised on the plaintiff earning R30 000.00 per month. They then allowed for inflationary changes, up to retirement at age 70. The injured earnings were premised on no earnings from the date of the accident to May 2015, and then an amount of R20 000 per month from May 2015, allowing earnings inflation to retirement at age 65. The actuary did not apply contingencies. The actuary calculated the loss of earnings after apportionment as R5 476 880.00.

22 The suggested loss of earnings is not informed by proper evidence.

23 The occupational therapist had no collateral information for the conclusions reached in their report. The same applies to the industrial psychologist, who essentially relied on self-reporting by the plaintiff.

24 The plaintiff says he was "self-employed" with Rofhtech Engineering between March 2014 and 23 August 2014, earning a salary of R30,000.00 per month. There is no support that the plaintiff earned a salary of R30,000.00 per month at the time of the accident. The bank statement referred to in the evidence does not support the contention.

25 The following entries in the bank statement relied upon by the plaintiff do not support his claim. The accident occurred on 23 August 2014. The bank statement

depicts entries for the period 6 June 2014 to 21 October 2014. There are only three references to amount of R30,000.00, with an annotation indicative of a “salary.” Those references are for 26 June, 29 August, and 1 October.

26 The references are, in any event, not stipulated as a salary to the plaintiff. For example, the annotation for 26 June reads as follows: “... TRANSFER TO ROFHTECH Salar 07H48.” This was a transfer “to” the company; not a transfer to the plaintiff. There was no evidence who made the transfer.

27 There was no explanation why the plaintiff presented a truncated bank statement for the year 2014. The plaintiff was expected, if his intention was to substantiate his claim that he earned R30,000.00 per month, to present a bank statement for the whole period during which he made the earnings.

28 The bank statement does not support the view that the plaintiff earned R30,000.00 per month. The statement, in any event, shows that the plaintiff received money after the accident, contrary to his evidence. It is untrue that he received no money between August 2014 and May 2015. The statement references an amount of R30,000.00, on the plaintiff’s case, as a salary paid to him on 1 October 2014. It may well be that there were other payments in the months after October 2014. A complete bank statement would have cleared this up.

29 There is also no support that the plaintiff earned R20,000.00 per month after May 2015. The plaintiff is the sole director of Rofhtech Supplies (Pty) Ltd. He has access to bank statements of this company. Those statements would demonstrate payments made to the plaintiff.

30 The view of the industrial psychologist regarding earnings projections in relation to the plaintiff was not informed by persuasive evidence. The actuarial calculations, in turn, are equally based on unsubstantiated assertions. The plaintiff was able to present the best evidence to support his claim. He failed to do so. He did not substantiate his stated loss of earnings.

31 The court in *Hersman v Shapiro and Co*¹ remarked as follows: Monetary damages having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damages have been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.

32 The plaintiff, as indicated earlier, did not make evidence available when such evidence should have been to hand.

33 There were multiple sources available to the plaintiff to produce support for his claim; the bank statements of Rofhtech Supplies (Pty) Ltd, the tax returns of Rofhtech Supplies (Pty) Ltd (which should reflect payments made to the plaintiff), the plaintiff’s own personal tax returns, and accounting records of Rofhtech Supplies (Pty) Ltd.

34 The letter of confirmation of income from Mukwevho Management Consultants, as referenced by the industrial psychologist and the actuary, was not produced as part of the record. There was no evidence as to what informed the content of that letter.

35 I make the following order:

35.1 Absolution from the instance is granted in respect of the plaintiff’s claim for loss of earnings.

35.2 There is no order as to costs.

¹ 1926 TPD 367 at 379

Omphemetse Mooki

Judge of the High Court

Heard: 22 February 2024

Decided: 12 April 2024

For the plaintiff: P Tshavhungwe

Instructed by: Motsepe Attorneys

For the defendant: No appearance