

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

Case No: 21945/2018

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

SIGNATURE

In the matter between:

TSHWARELO KHOMOLA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MOOKI J

1 The applicant sustained injuries when she was struck by a car whilst crossing a road on 18 June 2016. She subsequently instituted proceedings against the road accident fund, claiming loss of earnings and general damages. The plaintiff claims against the Road Accident Fund ("RAF") pursuant to the Road Accident Fund Act 56 of 1996. The defence by the RAF was struck for lack of compliance with an order of the court regarding the conduct of the trial. The court heard the matter as an undefended trial.

2 The court considered the evidence by way of documentation, having granted leave in terms of Rule 38 (2).

3 The plaintiff was injured in the following circumstances, as detailed in a statement that she made to the police. She was travelling to a place where her sister sold food. She was carrying a table on her head to get to the other side. She checked both directions of the traffic before concluding that "it was safe for me to jump." She crossed the road and was on the other side when she heard "a big bang sound," at which she realised that she was hit by a car. She fell to the ground. She opened her eyes and saw a white lady looking/staring at her. She was not on the road when the car struck her.

4 James Nyamatutu, a security guard, witnessed the incident. He made a statement to the police that the plaintiff was carrying a table on her head. She was struck by a car as she was about to reach the other side of the road. The plaintiff fell to the side of the road and started crying.

5 Egmont Pooe, a constable in the South African Police Service also made a statement. His statement recorded, amongst others, that the accident occurred at 09:30 in the morning.

6 It was submitted that the RAF be found to be 100% negligent, more so because no evidence was placed before the court on behalf of the RAF. I disagree. The accident occurred in the morning. One of the statements that form part of the police docket records that the road where the accident occurred is a busy road. The plaintiff crossed the road whilst bearing a table on her head. She does not claim to have crossed the road at a pedestrian crossing. She therefore crossed the road at a point that was not designated for pedestrians. In addition, her bearing a table on her head whilst crossing the road must have impeded both her agility and ability to observe the movement of traffic. She would have been impeded from turning her head as she made her way across the road, so as to better assess the traffic on the road. I find that she contributed to the accident. I apportion her liability at 50%.

7 The plaintiff sustained the following injuries: head injury with facial laceration, pelvis fracture involving left pubic ramus fracture and an abrasion on the left arm.

8 Dr N S Ngcoya, an orthopaedic surgeon, assessed the plaintiff on 5 June 2019. He reported that the plaintiff complained of headaches and dizzy spells, that she lost sensations on part of her head, her right pinky finger was painful and became swollen when working with it, her right leg became painful after walking.

9 He remarked that the plaintiff suffered a head injury with facial laceration, pelvis fracture involving left pubic ramus fracture, and a left arm abrasion. Her injuries were managed non surgically and had healed satisfactorily.

10 S F Mphuthi, a clinical psychologist, reported that the plaintiff was self-employed before the accident – she cooked and sold food. She was unemployed (holding piece jobs) at the time of the assessment. The plaintiff was carrying a table across the street to her food stall when she was hit by a passing car. She stayed with her sister in a rented shack before the accident. Both sold food. The plaintiff, following the accident, continued to reside in the same shack, together with her sister, sister-in-law and the plaintiff's child. The sister was the only breadwinner. The plaintiff receives a social grant for her daughter.

11 The plaintiff repeated grade 6. She also repeated grade 10 "five times," before leaving school in 2014. She was employed as a cleaner at a primary school in

2015 and was self-employed since 2016, cooking and selling food. She stopped after the accident. She worked for three months in 2016 as a domestic worker but stopped because of pain. She then worked for three months at Mabotoane Security as a security officer, where she had to stand for a long period. She left because she could not cope because of accident-related injuries.

12 Mphuthi reports that the plaintiff returned invalid responses to all tested domains on the neuropsychological test. She also failed to perform on the CNS Vital Signs test. She experiences anxiety and stress to a very severe degree, and depression to a moderate degree.

13 Mphuthi concluded as follows regarding vocational consequences: the plaintiff was a security officer before the accident. She failed, post-accident, to cope with the demands of her role as a security officer. Her performance on cognitive testing and her clinical psychological profile indicated that, among other things, the plaintiff will tend to perform tasks at a slower pace, forget important details, and would have difficulty managing her levels of frustration in the workplace.

14 Dr S S Selahle, a plastic and reconstructive surgeon, assessed the plaintiff on 31 July 2023. The plaintiff was unemployed at the time of the assessment.

15 He remarked on scars sustained because of the injury. The plaintiff complained of scarring, recurrent headaches, and painful lower limbs. Dr. Selahle opines that the scars were unsightly, and that the plaintiff suffered emotional pain due to the disfiguring scars.

16 Dr JA Smuts, a neurologist, assessed the plaintiff on 31 July 2023. His brief included a statement by the plaintiff, which recorded that the plaintiff was a pedestrian on her way to where her sister sold food. She was carrying a table on her head and was struck by a car. The plaintiff woke up at the hospital.

17 Part of the plaintiff's current complaints included that the plaintiff could not see at a distance and that her left eye was sometimes painful. She also complained of scarring, headaches, pain in the neck and lower backpain. Her arm was weak, her left hip was painful if she walked long distances or stood for a long time. She was also forgetful and short-tempered.

18 Dr Smuts did not have reports of the CT brain and C-spine mentioned in documents submitted to him. He expressed the opinion that the plaintiff sustained a significant head injury and was left with mild to moderate brain injury.

19 Ms. S D Mogola, an occupational therapist, assessed the plaintiff on 6 June 2019. She prepared her report on 25 January 2024. The plaintiff was unemployed at the time of evaluation.

20 Ms Mogola reported that the plaintiff did not use any medication at the time of the assessment. She had occasional headaches. The plaintiff resided in her parents' house with four brothers and a sister, in a two-bedroom house in a rural area.

21 Ms Mogola related the following as the plaintiff's work history: Selinah employed the plaintiff as a cooker in 2016 before the accident. The plaintiff left because of the accident. She was then employed by Ms. Amukelani in 2017 as a domestic worker and resigned. She was then employed by Mabatoane in 2017 as a security officer. She also resigned from this job.

22 The occupational therapist reported that the plaintiff did not experience any visual problems. The plaintiff presented with normal physical endurance in the testing for sitting and standing endurance.

23 Vuyani Muleya, the industrial psychologist, prepared a report that is dated 1 February 2024. There is no mention of when the assessment was made. The industrial psychologist reported as detailed below.

24 The plaintiff had a grade 9 as her highest qualification. None of her siblings were employed. She was employed as a "packer." Her employment history was detailed as follows: she was employed as a cook at Lonia's Takeaways at the time of the accident, earning some R2000 per month. She recuperated for two months, during which she was not paid. She was replaced at work and remained unemployed until April 2017 when she was employed as a domestic, working part time. She earned about R1700 per month. She struggled and resigned in July 2017, whereafter

a company called Mabotwana employed her as a guard, earning some R4 300 per month. She was so employed from August 2017 until November 2019, when her contract expired. She was then employed by SUZ as a packer at SUZ in December 2019, at R4 766.84 per month as confirmed in a salary advise dated 26 January 2024.

25 Her pre-accident working potential was described as follows. She was employed as a cook, earning about R2000 per month, which is equivalent to an unskilled labourer in the open market. There was no proof of earnings. The plaintiff would have reached her career ceiling at age 45, earning at the upper quartile of unskilled labourer's scale; to be followed by inflation-related salary increases to age 65.

26 Her post-accident details were as follows. She was employed as a guard from August 2017 until November 2019 "when her contract expired." She secured employment in December 2019 as a packer and remains employed as a packer.

27 The industrial psychologist expressed the view that the plaintiff "did not retain the capacity to meet the physical demands of her pre and post-accident job and all the future jobs that are physically demanding." She concluded that the plaintiff was no longer an equal participant in the open labour market due to her limitations, that the plaintiff's current employer was sympathetic in excusing the plaintiff from carrying heavy objects and allowing the plaintiff to alternate between standing, walking and seated positions. The plaintiff was also "pardoned from doing cognitively challenging tasks."

28 The plaintiff told Ms Muleya that the plaintiff was struggling at work due to her limitations, but was carrying on because of tough economic times. Ms. Muleya opined that the plaintiff was at risk of experiencing prolonged periods of unemployment. She further opined that the plaintiff had suffered both past and future loss of income.

29 Mr D T Mureriwa of One Pangeae Expertise & Solutions, a firm of actuaries, prepared a report on the plaintiff's loss of earnings. The report is informed by the opinion of the industrial psychologist, including that the plaintiff's pre-accident income was based on the plaintiff being employed as a cook, earning R500 per week.

30 The actuary, having applied contingencies, calculated that the plaintiff has a resultant loss of R1, 002, 041. The plaintiff claims this amount as her loss of earnings.

31 The plaintiff's evidence is inconsistent. A number of findings by several of her experts have no foundation.

32 The plaintiff told the neurologist that she woke up at the hospital following the accident. She however, in her statement to the police, which statement was made closer to the events, recorded that she fell after being struck and that she then opened her eyes and saw a white lady looking/staring at her. A witness made a statement that the plaintiff cried after being knocked to the ground. She therefore did not lose consciousness. She certainly did not wake up at the hospital following the accident. This would have a bearing on whether she suffered a brain injury.

33 The plaintiff was inconsistent regarding whether she was self-employed, was an employee, or that she was unemployed. She told the occupational therapist on 6 June 2019 that she was unemployed; that she worked at Mabotwane as a guard but resigned after three months "due to pains." This differed from what she told the industrial psychologist, namely that she was employed at Mabotwane from August 2017 until November 2019, when her contract came to an end.

34 The plaintiff told the neurologist that the plaintiff woke up at the hospital following the accident. This was untrue. The neurologist concluded that the plaintiff sustained a significant head injury and was left with mild to moderate brain injury. The neurologist came to this conclusion without evidence of a CT brain scan or any other imaging done on the plaintiff.

35 The industrial psychologist relied on the plaintiff having been employed by SUZ as a packer from December 2019. She was still employed when the industrial psychologist assessed her. The report by the industrial psychologist is dated 1

February 2024. It follows that the plaintiff was still employed by SUZ as at 1 February 2024. The industrial psychologist relied on salary advices said to be from SUZ in her assessment of the plaintiff. The advices raise questions. The plaintiff told the industrial psychologist that the plaintiff was paid weekly. This is not reflected in the payslips referenced by the industrial psychologist.

36 The information about the payslips does not make sense. The plaintiff said she was paid weekly. There are no sequential payslips, despite it being said that the plaintiff had been employed by the same company as a packer from December 2019. The following illustrates questions about the integrity of the payslips. The industrial psychologist referenced:

36.1 two payslips for the year 2020, dated 10 January and 17 January.

36.2 two payslips for the year 2021, dated 8 January and 15 January.

36.3 two payslips for the year 2022, dated 14 January and 21 January.

36.4 two payslips for the year 2023, dated 21 January and 2 June.

36.5 One payslip for the year 2024, dated 26 January.

37 The industrial psychologist did not enquire why the plaintiff did not deliver more than two payslips in any one year. There is no explanation why the plaintiff gave these payslips. The payslips are not annexed to the report of the industrial psychologist. There was also no collateral in relation to the plaintiff saying that she earned R500,00 per week, selling food.

38 The information that the industrial psychologist relied upon for the plaintiff's stated loss of earnings is wholly inadequate. It follows that the actuarial calculations are, in turn, unsound. The plaintiff is required to prove the loss that she suffered. There is insufficient evidence to substantiate the loss claimed by the plaintiff.

39 I make the following order:

39.1 The defendant is liable for 50% of such loss as agreed or as proven by the plaintiff.

39.2 The issue of general damages is postponed indefinitely.

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

39.4 The defendant is ordered to furnish the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

39.5 The defendant is ordered to pay costs.

Omphemetse Mooki

Judge of the High Court

Heard: 20 February 2024

Decided: 12 April 2024

For the plaintiff: A Seshoka

Instructed by: Molefe Machaka Attorneys Inc.

For the defendant: no appearance