

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 09439/2010

In the matter between:

FLORENCE TSHEPISO MASHILOANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MEYER, J

[1] The plaintiff, who was born on [..] M[...] 1[...] and presently 18 years of age, claims the payment of compensation for her damages as a result of bodily injuries sustained by her due to an accident that occurred on 7 August 1993, when she was only five months old. The plaintiff sustained compound fractures of the right hand

thumb and index finger. She was left with a shorter deformed thumb and her index finger was amputated. She also sustained a de-gloving injury to her right forearm that left her with a scar.

[2] The issue of liability has already been resolved. The plaintiff will be entitled to 100% of her proven damages. The parties also reached agreement in respect of certain matters relating to the quantum of damages. It was agreed that the defendant is to pay to the plaintiff the sum of R250, 000.00 in respect of her general damages and provide her with an undertaking in terms of s 17 of the Road Accident Fund Act 56 of 1996 in respect of her future medical treatment. The only remaining issue is the plaintiff's claim for loss of earning capacity and future loss of earnings.

[3] The plaintiff testified. Ms C Tsatsawane, an occupational therapist, and Mr H van Blerk, an industrial psychologist, who each prepared a medico-legal report following their assessments of the plaintiff, also testified for the plaintiff. Dr LA Fourie, an industrial psychologist, who also prepared a medico-legal report following his assessment of the plaintiff, testified for the defendant. Joint minutes were prepared by the occupational therapists for both parties, Ms. Tsatsawane for the plaintiff and Ms. C Myburgh, who was not called to testify, for the defendant; the industrial psychologists for both parties, Mr van Blerk for the plaintiff and Dr Fourie for the defendant; and the educational psychologists for both parties, Dr WM Kumalo for the plaintiff and Ms L Swart for the defendant, neither of whom were called as witnesses. The parties admitted the actuarial assumptions made by the defendant's actuary, Dr RJ Koch.

[4] The plaintiff testified that her father's highest educational level is standard 8. He was a police officer and thereafter became a motor mechanic. He now receives a disability pension. Her mother's highest educational level is matric. She was a domestic worker and is not presently employed. The plaintiff's only sibling is her 14 year old sister, who is presently in grade 8. Her father left the common home during 2007, and the plaintiff resides with her mother.

[5] It appears from the report of Ms Tsatsawane, which she confirmed when she gave evidence, that the plaintiff had a normal birth and that her milestones were normal. She sat at 6 months, crawled at 7 months, stood and walked at 10 months, and she was able to speak before 24 months. The plaintiff started grade 1 in primary school in the year 2000 when she was 6 years and 9 months old. The plaintiff has never failed a grade at school. However, she left school during 2010 when she was doing grade 11 due to pregnancy and gave birth to her child on 23 October 2010. She went back to school and was doing grade 11 in 2011. The *communio opinio* is that she will probably complete high school successfully with a grade 12 certificate.

[6] It is common cause that due to the injuries to her forearm and hand, the plaintiff's hand function and co-ordination of her right dominant hand are significantly affected. The plaintiff will have difficulty performing activities requiring manual dexterity with the right hand. The plaintiff confirmed when she testified that she had informed the orthopaedic surgeon, Dr SM Sara, that she has difficulty doing up buttons, but can otherwise perform most manual activities including writing. She also confirmed that she has always coped at school using her right hand and that she writes 2 – 3 hour papers with that hand. The plaintiff testified that she participates in sports irrespective

of her hand disability. She confirmed the following which is stated in the medico-legal report of the educational psychologist, Ms Swart:

'Florence still takes part in Athletics. She does very well and usually ends up amongst the top three positions. She gets home after practise, does her chores and then her homework. Since she had her baby, it is now difficult to juggle her responsibilities, taking care of her chores and her daughter, as well as attending to her schoolwork.'

[7] The plaintiff testified that she experiences difficulties which are caused by the unusual way in which she holds a pen without an index finger. This slows down her writing. Her hand or finger (presumably her shortened thumb) pains when she writes for long and she then needs to take a break from writing. Her hand sometimes swells. The plaintiff testified that she particularly experiences difficulty in completing examination papers. Ms Tsatsawane performed a writing speed test on the plaintiff in which she was required to write or copy 133 words in 7 minutes. She finished this task in 6 minutes and 22 seconds, which, in the opinion of Ms Tsatsawane, is indicative of a good performance. Ms Tsatsawane also commented that the plaintiff was stretching her muscles after the task. It is accepted that the plaintiff's writing speed is compromised. She experiences discomfort and probably requires extra time when writing for longer periods of time. The occupational therapists agree that she would benefit from occupational therapy treatment, including hand therapy. They agree, however, that due to poor hand function the plaintiff would have difficulties doing work that requires fine motor coordination and the poor dexterity would affect her working speed.

[8] It also appears from the evidence of the plaintiff, however, that she has coped thus far by undertaking new dexterities with her left hand. She, for example, does

needle work with her left hand. She testified that she uses her left hand for most things which she cannot do with her right hand. Ms Tsatsawane expressed the opinion that needle work requires fine motor-coordination and that the plaintiff has fine motor-coordination of the left hand. The plaintiff was only five months old when the accident happened and she has adapted fully to her condition and is coping. She has no limitation in respect of her personal care, home chores and management.

[9] It is also common cause that the plaintiff experiences emotional problems as a result of her disfiguring scarring and lack of an index finger. The plaintiff has not accepted her condition and feels ‘... embarrassed about it.’ She testified that she feels uncomfortable and prefers to stay at home. The plaintiff, however, has friends and she participates in social and sporting activities. She testified that she wears long sleeved tops to conceal the scarring and she conceals her hand by keeping it in a pocket. The occupational therapists agree that the plaintiff needs psychotherapy to deal with the *sequelae* of her accident and that she would benefit from therapy with a clinical psychologist to address her emotional problems. It should also be noted that the plaintiff testified that the separation of her parents and the non-involvement of the father of her child caused her a lot of emotional distress.

[10] Ms Tsatsawane conducted certain tests as part of her assessment of the plaintiff. Presently relevant are the perception test and the visual memory, visual closure and visual figure ground subtests. Ms Tsatsawane defined visual memory as ‘the ability to recall information seen or learned earlier’, visual closure as ‘the ability to identify a whole figure when only fragments are presented, and visual figure ground as ‘the ability to focus attention on specific details from among the many in view at a given moment’.

Ms Tsatsawane reported that the plaintiff's performance was normal in the perception test, borderline in the visual memory subtest, and low-average in the visual closure and visual figure ground subtests. These, according to Ms Tsatsawane play a key role in learning and it is necessary that they be addressed as soon as possible. Ms Tsatsawane expressed the opinion that the 'most likely' cause of the plaintiff's perception difficulties is the absence of her index finger and deformed thumb. Such, in the opinion of Ms Tsatsawane, caused her brain not to develop as fast as other children who could explore with all their fingers and is likely to have impacted on the plaintiff's schooling. Ms Tsatsawane, however, conceded that the plaintiff has all her other fingers to explore, although an index finger plays an important role, and that touch is only one of the five senses, the other being sight, hearing, smell and taste. Any impact which the rate of the plaintiff's brain development may have on her scholastic performance is, however, a matter of mere speculation on the evidence presented.

[11] The industrial psychologists agreed that as a result of the accident the plaintiff's employment opportunities have been curtailed and that she may be disadvantaged in terms of efficiency, effectiveness and productivity compared to healthy individuals of the same age with similar types of jobs. It does, however, not necessarily follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity. The following passage in *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA), at p 241H – 242B, equally applies to the fact of this case:

'The fallacy in Mr Eksteen's criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it

does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.'

Also see: *Roe v Road Accident Fund*, para 11 ((unreported) case no 16157/2009 delivered on 1 April 2010 by Van Oosten, J in the South Gauteng High Court) and *Prinsloo v Road Accident Fund*, paras [7] – [8], ((unreported) case no 139/2009 delivered on 25 February 2010 by the Full Court of the Eastern Cape High Court (Jones J with Pillay J and Makaula AJ concurring)).

[12] The plaintiff testified that her aspiration since her third grade at school had always been to become a police woman. Her intention is to join the SAPS once she obtains her grade 12 at school. Her 'plan B' or second 'option' is to study law if she is rejected by the SAPS. Given that the plaintiff's intellectual capacity seems to be in the slightly below average range a career in law, pre- or post-morbidly, seems improbable. Regrettably, the industrial psychologists ignored the plaintiff's preferred career path, which pre-morbidly would probably also have been to join the police force. The plaintiff's prospects of employment and of promotion within the SAPS have not been addressed. Instead, postulations and assumptions were made that essentially do not assist. The plaintiff testified that she researched the requirements for joining the SAPS, and they are a matriculation certificate, an age requirement, and good health. It is not suggested that the plaintiff is not of good health. She is an athlete and she will probably obtain her matriculation certificate without failing any year at school. The plaintiff is also a person within the category of persons previously unfairly discriminated against *inter alia* on the basis of race and gender and post accident also being a disabled

person will probably benefit by just employment policies to redress and repair past discriminatory practices.

[13] Although the plaintiff has proved that she had suffered injuries which physically impaired her ability to perform certain kinds of work, she has not proved that she has therefore suffered loss.

[14] Finally, the matter of costs. I agree with the defendant's counsel that it was not necessary for the plaintiff to engage the services of two counsel, and that only the costs of the first day of the trial should be allowed if the plaintiff is unsuccessful in her claim for loss of earning capacity and future loss of earnings since the issues of general damages and the plaintiff's future medical expenses were only settled shortly before the commencement of the trial.

[15] In the result I grant judgment in favour of the plaintiff as follows:

1. Payment of the sum of R250, 000.00 in respect of general damages.
2. Interest on the amount in paragraph 1 above at the applicable *mora* rate of interest, presently 15.5% *per annum*, calculated from fourteen days of the date of this judgment until date of payment.
3. The defendant is ordered to furnish to the plaintiff an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her, arising of the injuries

sustained by her in a motor vehicle accident which occurred on 7 August 1993, after such costs have been incurred and upon proper proof thereof.

4. Costs of suit up to and including the first day of trial, and such costs to include the qualifying expenses of Dr Sara, Ms Tatsawane, Prof Chait, Ms Peta, Dr Kumalo, Mr van Blerk, and Dr Koch.

P.A. MEYER
JUDGE OF THE HIGH COURT

27 February 2012