

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 3434/2017

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

TSEKANE SHANDRAY SELLO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

RAF CLAIM No: 560/12352463/328/0

RAF LINK No: 3414319

HEARD ON:

26 & 27 JULY 2022

JUDGMENT BY:

DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 21 September 2022.

[1] This is a claim for loss of past and future income resulting from the injuries the plaintiff sustained as a pedestrian on 14 December 2014 after being struck by a motor vehicle driven by Mr. O. van der Walt.

[2] Pursuant to the accident, the plaintiff instituted a claim against the defendant for payment of the amount of R1 597 870.00 under the following heads of damages:

2.1. Future medical expenses	R85 720.00
2.2. General damages	R450 000.00
2.3. Past and future loss of income	R1 062 150.00

[3] On 4 September 2018 the defendant conceded the merits 80% in favour of the plaintiff for proven or agreed damages and subsequently undertook to furnish the plaintiff with the statutory undertaking for future medical expenses in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 ("The Act"). The plaintiff has since abandoned her claim for general damages.

[4] It is common cause that at the time of the accident the plaintiff was 16 (sixteen) years old and had left school before completing grade 6 (six). As a result of the accident, she sustained tibia and fibula fractures of the left lower leg. She was transported from the scene of the accident by an ambulance to Mohau hospital where she was admitted until she was transferred to Bongani hospital on 18 December 2014. At Bongani hospital she underwent surgery to repair the fractures, she was ultimately discharged with crutches on 8 January 2015. The plaintiff regained independent mobility during May 2015, afterwards she did not undergo further medical treatment.

[5] By agreement between the parties, the matter is determined on the basis of the parties' respective heads of argument and the plaintiff's expert reports by the orthopaedic surgeon Dr Oelofse, occupational therapist Ms Alana Stroebel, industrial psychologist Dr Evert Jacobs and actuaries Munro Actuaries. No oral evidence was led by either party.

[6] The plaintiff's claim is premised on the grounds that immediately before the accident she had been employed for a month as a general worker at a butchery and earned R500.00 per week. Her duties involved stuffing sausages, cutting, wrapping and packing meat whilst standing or seated and also walking around. As a result of the accident, she did not return to work and due to the dilapidating effect of the injury she will no longer be able to withstand the physical demands of her work. She has consequently suffered a loss of earnings in the amount of R849 720.00 after having applied 20% apportionment on the amount of R1 062 150.00 as quantified by the Actuary.

[7] The experts state that the injury has left the plaintiff with permanent deficits she must therefore not be allowed to do any physical labour, she must be accommodated in a permanent light duty or sedentary work environment which she can manage until she retires at the age of 60 (sixty) however, due to her low level of education and minimal (1 month's) work experience, it would be difficult for her to find a new job in particular a sedentary position. The plaintiff has become an unequal competitor in the open labour market as compared to her uninjured peers. She will have limitations in meeting the requirements of full range light and medium work.

[8] According to the Actuary, the plaintiff has suffered loss of earnings totalling an amount of R1 062 150.00 made up as follows:

8.1. Past loss of income in the amount of: R219 545.00 (R231 100.00 less 5% contingencies)

8.2. Future loss of income: R842 605.00 (R991 300.00 less 15% contingencies)

[9] The defendant contends that the plaintiff is not entitled to the amount she seeks and aver that the plaintiff's salary before the accident has not been verified. The industrial psychologist did not even attempt to obtain the information in that regard and there is also no explanation provided as to why the information was not obtained.

[10] The defendant submits that due to the lack of corroborating evidence the contingencies to be applied should be higher than those suggested on behalf of the plaintiff. Furthermore, the plaintiff's experts have proffered contradictory evidence with regard to the plaintiff's injured scenario. According to the Actuary the injury has rendered the plaintiff unemployable whilst the Occupational Therapist indicates a residual capacity to work and except to state that the plaintiff can no longer work as a general worker at a butchery, there is no evidence that she cannot work in other employment environments.

[11] It is the defendant's case that the amount that would be just and equitable under these circumstances would be an amount of R325 000.00 (three hundred and twenty-five thousand rand) after having applied 10% and 30% contingency deductions to past and future loss of income pre-morbid and 50% contingency deductions in relation to the post-morbid position.

[12] The onus is on the plaintiff to tender sufficient evidence of her income to enable the court to assess and quantify her loss of past and future earnings.¹

[13] The plaintiff did not testify in support of her allegations that at the time of the accident she was earning an income but due to the injuries she sustained in the accident her earnings have been diminished. Instead, she has relied on expert reports which are not substantiated by any collateral evidence. In fact, the Actuary abnegates the amounts on the basis that '*...the earnings as the date of the accident are unverified. We have not been provided with collateral evidence to verify the earnings information. We have based our calculations on these proposed earnings, but defer to fact.*' The actuarial calculations do not provide any assistance to this court.

[14] In the plaintiff's heads of argument, reference is made to the adverse effect of the injury on the plaintiff's "career" and this is despite the fact that on the established facts the plaintiff has no career, at least not yet, she left school at a tender age of 16 (sixteen) before she even completed grade six and after having failed various grades.

¹ *Mlotshwa v Road Accident Fund* (9269/2014) [2017] ZAGPHC (29 March 2017) paras 14 to 17.

[15] No evidence has been tendered to support the contention that the plaintiff is no longer be able to withstand the physical demands of her work. On the plaintiff's own submission, she did not return to work after accident, it is assumed without factual evidence that her employer would have declined to accommodate her in a sedentary position.

[16] As correctly contended in the defendant's heads of argument, there is no evidence that as a result of the injury the plaintiff cannot work in other employment environments.

[17] The function of damages is to place the plaintiff in the position that she would have been in but for the accident. On the available evidence I'm not persuaded that the injury sustained by the plaintiff had a cognisable effect on her pre and post-accident earnings. The plaintiff's prospects of obtaining employment could be curtailed by her lack of education, and skills including the general economic conditions prevailing in this country, not the deficits resulting from the injury.

[18] I'm not in agreement with the defendant's contention that applying higher contingencies to reduce the quantum would cure the inadequacy of the plaintiff's evidence. The assessment of the amount to be awarded as damages only arises after a plaintiff has proffered sufficient evidence to prove the alleged loss of income.² As pointed out in *Rudman v Road Accident Fund*³, an award for damages cannot be based upon speculation. It must have an evidential foundation.

[19] For the reasons that I have set out above, I'm not persuaded that the plaintiff is entitled to the award she seeks. Accordingly, I make the following order:

1. The plaintiff's claim for past and future loss of income is dismissed with costs.
2. The defendant shall furnish the plaintiff with an undertaking as envisaged in Section 17(4)(a) of the Act for 80% of 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 out of the injuries sustained by her in the motor

² *Road Accident Fund v Kerridge* **2019 (2) SA 233** (SCA) para 25.

³ **2003 (2) SA 234** (SCA) para 11.

vehicle collision which occurred on 14 December 2014 after such costs have been incurred and on proof thereof.

N.S. DANISO, J

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