

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 093528/2023

DATE: 18-10-2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 18/10/2024

SIGNATURE [REDACTED]

10 In the matter between

NONDUMISO PRETTY ZUNGU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

WEIDEMAN, AJ: In this matter case number 093528/2023 the matter of Zungu and the Road Accident Fund. This
20 matter was number 37 on my roll this week and after counsel presented the plaintiff's case I indicated that I want to reserve judgment and that I will hand down my ruling this morning.

The accident from which this claim arose occurred on 14 March 2022 and the plaintiff was born on 7 July 1993.

The aspect of liability had previously been resolved on the basis that the defendant accepts 100 percent liability for such damages as the plaintiff may be able to substantiate.

In the interim the plaintiff's claim for general damages had also been resolved and the defendant tendered a standard undertaking in terms of Section 17 (4) (a) of the Road Accident Fund Act in respect of such future hospital, medical, and or ancillary expenses as the plaintiff may require.

10 At the time of the accident the plaintiff was a merchandiser and she earned approximately R2 800-00 per month. If one looks at the various medical legal reports that had been prepared and submitted on behalf of the plaintiff then the first report of relevance is that of the orthopaedic surgeon Dr Kumbirai case lines 01-60.

Dr Kumbirai confirmed a fractured mandible, a head injury, Glasgow Coma Scale 14/15 and a fracture of the left clavicle. He confirmed pain and discomfort in the left shoulder and which is exacerbated by the lifting of heavy
20 weights and cold weather. He indicated in his report that she was compromised in her choice of occupation and would be an unfair competitor in the open labour market.

The second report of relevance is that of the maxillofacial surgeon Dr Vafaei and that report is on case lines at 01-102. Dr Vafaei indicated that with treatment the

plaintiff will return to adequate function and that the injuries which falls within his area of expertise will have no impact on her employment.

The next report of relevance is that of the neurosurgeon Dr Seroto and that report is on case lines at 01-79. Dr Seroto confirmed a head injury, a fracture of the left clavicle, and the fracture of the mandible. In his report, his evaluation indicated that the plaintiff's higher functions were satisfactory.

10 Examination of the cranial nerves indicated that all were normal. Examination of her motor functions indicate all normal. Examination of her cerebellum functions indicated no abnormalities detected. In other words, his evaluation found normality in every one of these areas of examination.

 However, despite that, on case lines 01-90 he found a reduced life expectancy of three to five years. The final report that I wish to refer to in this context is that of Oscar Modipa, on case lines 07-77 and on 07-93 appears
20 the following:

"Her emotional difficulties are evaluated to be amenable to psycho therapeutic intervention and with a fair prognosis."

 However, he still found her to be a vulnerable competitor in the open labour market. The report of the

industrial psychologist is disappointing to say the least as it does not assist the court in ascertaining what a probable future for this plaintiff would be.

We know, as I indicated earlier, that at the time of the accident she was a merchandiser and that she earned R2 800-00 per month. However, the accident having occurred in March 2022, at least in October 2023, 18 months plus later, she was still working for the same company in the same capacity but instead of earning R2 800-00 per month she was now earning R5 500-00 per month.

We also find in the industrial psychologist's report on case lines 07-73 the following:

"Paid work is never maintained through accommodation but rather through satisfactory work performances especially in the private sector."

The suggestion is that the plaintiff is still in the same employment at the same company but at nearly double the income. In considering the industrial psychologist's report, I was looking for a description of what a merchandiser does, what does this work actually entail, and why does everybody say that there are curtailments as a result of the fractured clavicle in performing the work of a merchandiser.

But nowhere do I find a definition, or a proper description of what the plaintiff actually did at the time of the accident or at the time of her last known salary of R5 500-00 per month at October 2023. I tried to Google merchandiser but got so many different definitions that I still do not know what a merchandiser does.

What is also disappointing is that despite the plaintiff being in fixed employment at the same company, in going through the industrial psychologist's report, there is
10 no indication that any effort has been made to secure a copy of her contract of employment.

I have difficulty in believing that she would have been appointed on a verbal nod and a hand shake and that there is no written contract of employment. It might be but then one would expect an indication that he had consulted with the employer and there is no written contract of employment.

There is no description of what her duties actually entail in the industrial psychologist's report. There is no
20 indication whether her position is at all at risk. There is no indication that she had ever been given any warnings or any disciplinary proceedings which makes it problematic to understand, why, at the same company, years after the incident, at more than double the salary, she all of a sudden becomes unemployable.

It makes no sense and the industrial psychologist report does not assist in clarifying these uncertainties. There is no indication whether a medical boarding procedure would be possible or appropriate. Once an employer takes back an employee with physical limitations it becomes, from a labour law perspective, impossible to dismiss the employee for inadequate performance as a result of those limitations.

The employee can be medically boarded but not
10 dismissed because the employer took the employee back with the physical limitations. There is no discussion whether this is at all part of her employment milieu. Then there were addendum reports by the industrial psychologist including an addendum based on the fact that many, many years ago the plaintiff secured a qualification in the security industry, a security certificate.

But there is no evidence before court that she ever applied for a position in the security industry. There is no indication that any such application was refused because of
20 her physical limitation. There is no indication at all other than the procurement of the certificate, that she ever attempted to venture into the security industry.

Yet the industrial psychologist simply, because the certificate exists, sets out a scenario which leads to a multi-million Rand calculation and there is no factual evidence to

support any of the premises used by the industrial psychologist. On that basis, the premises and the report of the industrial psychologist is of no assistance to the Court and it cannot be accepted.

The difficulty then is how does one deal with the claim? I am willing to allow the plaintiff the benefit of the doubt as far as accrued or past loss of income is concerned. She was injured, she was off work, she did sustain a loss of income.

10 Do I know what that figure exactly is? no I do not. Can I accept as fact the figure contained in the actuarial report? no I cannot. However, on the basis that I have a discretion I am going to allow the plaintiff a claim for past loss of income as per the calculation and which is the sum of R262 654-00.

As far as the plaintiff's claim for future loss of earnings is concerned I do not have information in front of me which would assist me in arriving at a finding which is fair to both the plaintiff and the defendant.

20 I cannot deny that the plaintiff will have impediments and these are noted as per the various medical legal reports to which I have referred. She is compromised in her choice of occupation, she is an unfair competitor, she is a vulnerable competitor, and she has reduced life expectancy.