



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes



16 /09/2024

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SIGNATURE

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DATE

Case No: 696/2020

ELIZABETH NOMBUSO NGWENYA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

This judgment was handed down electronically by circulation to the parties/and or parties' representatives. The date and time of hand-down is deemed to be 16 September 2024 at 10h00.

JUDGMENT

Ryneveldt AJ

Introduction

[1] This is a matter in which the Plaintiff filed a lawsuit against the Defendant for losses incurred as a direct result of an accident that happened on 19 May 2018, while the Plaintiff was a passenger in a motor vehicle as envisaged by the Road Accident Fund Act 56 of 1996 (the Act).

[2] Merits have been conceded in favour of Plaintiff, and a section 17(4) undertaking of the Act as amended has been tendered to the Plaintiff for future medical and hospital expenses.

[3] In its ruling on the severity of the Plaintiff's injuries, the Health Professional Council (HPCSA) on 2 April 2024, concluded that the Plaintiff's injuries do not satisfy the whole person impairment measures criterion of Regulation 3(1)(b)(ii). During the closing argument, the Plaintiff's counsel stated that the Plaintiff would accept the HPCSA's decision and would not be pursuing the issue of General Damages any further.

[4] The parties agreed that the matter before this Court would only deal with past and future loss of income-earning capacity and that the evidence presented would only address this issue.

Trial Evidence

[5] The Defendant had not appointed any experts and/or expert reports and consequently accepted that the physiotherapy and actuary reports of the Plaintiff be admitted as evidence in terms of Uniform Court Rule 38(2), section 34(2) of the Civil Proceedings Evidence Act 25 of 1965, and section 3 of the Law of Evidence Amendment Act 45 of 1988.

[6] During the trial, the Plaintiff, the Plaintiff's Occupational Therapist, Orthopaedic Surgeon, and Industrial Psychologist gave oral evidence. The Defendant did not call any witnesses.

[7] The Plaintiff testified during her examination in chief that she is a 57-year-old unemployed female, with her highest qualifications being a Bachelor in Education Honors degree. After 26 years of service, she decided to leave the teaching profession in 2016 to pursue her dream of working for herself. She remained self-employed until the accident occurred in 2018, and due to the injuries sustained, she was not able to continue her farming business for 2 months due to constant pain.

[8] The Plaintiff additionally stated in her examination in chief that she was admitted to Kiaat Hospital on the day of the accident and discharged the next day, 20 May 2018. After being discharged from the hospital, she discovered that her leg, back, shoulder, and left hand were painful, so she returned to the same hospital the following day after being discharged and was referred to a physiotherapist. She had physiotherapy every two weeks, but it did not alleviate or stop the pain.

[9] Before the accident, the Plaintiff testified (examination in chief) that she had a garden, where she planted produce for the market doing most of the farming work herself, from which she generated a monthly income of about R7 000,00. The Plaintiff further stated that she did not issue any sale invoices and that all her sale transactions were on cash-only basis.

[10] The Plaintiff further acknowledged that she had people helping her with her farming business, but she was unable to retain them following the accident because she lacked the funds to pay them.

[11] Under cross-examination, the Plaintiff conceded that the hospital records submitted to the Defendant fully set out the injuries she sustained in the accident.

[12] During the cross-examination, the Plaintiff provided additional testimony, admitting that she occasionally had to perform physical labour in addition to her supervisory role in her farming business, albeit with some pain, and she disputed her

own Occupational Therapist's findings that stated she could continue to function as a supervisor in her own business.

[13] Being questioned further, Plaintiff admitted that in fact, she had documented her cash income however her attorneys never requested access to the books.

[14] The Plaintiff's Orthopaedic Surgeon, Dr. Oelofse, gave evidence, in his examination in chief stating that the Plaintiff's pathology was caused by trauma rather than aging in that thoracic spine fractures are the most overlooked fractures in orthopaedics. According to him, the Plaintiff sustained a T4, T5, and T6 compression fracture, evidence he reiterated during his cross-examination.

[15] When questioned by the Plaintiff's counsel about the type of work the Plaintiff could do, Dr. Oelofse deferred to the Occupational Therapist while substantiating that the Plaintiff could undertake light duty back-friendly employment, and under cross-examination, he conceded that the Plaintiff could still work.

[16] In her examination in chief, the Occupational Therapist, Ms. Wiltshire, attested the Plaintiff's pre-morbid medium-duty functional and physical capacities as well as her post-morbid light to sedentary duties. Her employment as a farmer is categorised as being within the medium-duty range of functioning. She further stated that the Plaintiff does not meet the full scope of her premorbid functionality as a farmer.

[17] The Plaintiff's supervising function on the farm, according to Ms. Wiltshire, includes certain physical chores, therefore if she works in this capacity, she should avoid lifting heavy objects. The Plaintiff's career as a teacher according to Ms. Wiltshire can be classified as being light to medium duty, and thus the Plaintiff does not meet the physical demand as a teacher. Ms. Wiltshire further conceded that the Plaintiff can continue the farm business in a supervisory capacity during cross-examination.

[18] According to the Plaintiff's Industrial Psychologist Mr. Moodie, the Plaintiff is unemployable for all intents and purposes due to the injuries sustained in the accident coupled with her age.

[19] During cross-examination, Mr. Moodie admitted that he did not ask the Plaintiff where her farm was located, and this could have impacted her farming business income from month to month. For him the R7 000,00 income was based on what the Plaintiff told him, which he found not to be excessive and within the normal range of income for the business the Plaintiff was conducting before the accident. In furtherance, Mr. Moodie conceded that he did not receive any proof of income from the Plaintiff to verify the R7 000,00 income as stated to him by the Plaintiff.

[20] In light of the evidence admitted under section 3 of the Law of Evidence Amendment Act 45 of 1988, Rule 38(2), and section 34(2) of the Civil Proceedings Evidence Act 25 of 1965, the Plaintiff's Physiotherapist opined that the Plaintiff's injuries will negatively affect her productivity and that can however be improved if she receives the necessary treatment.

Analysis

[21] The primary question or finding in this matter is whether the Plaintiff's injuries incurred in the accident have any impact on her earning ability, and if so, to what extent her injuries affect her productivity as a farmer, a position she held before the accident.

[22] The court in *Southern Insurance Association v Ballie NO*¹ eloquently stated the following concerning loss of earning capacity:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends upon the soundness of the assumptions, and these

¹ *Southern Insurance Association v Ballie NO* 1984 (1) SA 98 (A) at 99A-C.

may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.”

[23] The court in *Gwaxula v Road Accident Fund*,² stated that it is imperative that the court in its decision achieve equity and fairness to the parties and recognize the reality that there is no hard and fast rule regarding contingency allowances. It went on to say that “there are also unforeseen contingencies based on factors such as errors in the estimation of future earnings and life expectancy, loss of earnings due to unemployment and sickness, retirement at an earlier age and hazards of life. The list can never be exhaustive”.³

[24] With the aforementioned, contingency only comes into play, once a court makes a finding that indeed a party’s earning capacity has been impacted directly by an incident.

[25] Considering the Defendant has not presented any expert evidence and that the only evidence presented was that of the Plaintiff’s experts, I am left with no alternative but to consider the expert opinions of the Plaintiff’s experts regarding the Plaintiff’s earning capacity.

[26] While I must consider the Plaintiff’s expert evidence, I must also emphasize that the said evidence must be evaluated and legally assessed for its veracity, and on whether the experts’ opinions are based on the facts presented to them, or whether the experts tried to make a case where there is none. As can be observed in a plethora of matters decided in our courts, courts continuously hold the view that the discretion of the Court cannot be usurped by expert evidence, especially actuaries, as their evidence only serves as a guide.⁴

² *Gwaxula v Road Accident Fund* [2013] ZAGPJHC 240.

³ *Ibid* para 25.

⁴ *Coetzee v Road Accident Fund* [2021] ZAFSHC 193 para 15

[27] Based on the evidence presented during the trial by the Orthopaedic Surgeon, Occupational Therapist, and Physiotherapist, I see no basis for this court to conclude that the accident did not have a negative impact on the Plaintiff's earning capacity; thus, the central question is to what extent did the accident impact the Plaintiff's earning capacity.

[28] Given the information gleaned from the medical expert reports, the Industrial Psychologist postulates an injured party's loss, from which an actuary then calculates a loss based on the factual basis provided to him/her.

[29] As already determined, the accident had a negative impact on the Plaintiff's earning capacity; however, with regard to the Industrial Psychologist's report and the evidence presented by him in Court, I find that the Industrial Psychologist, Mr. Moodie, has not made the necessary and must-needed inquiries to assist this court with its findings; for example, he conceded during his evidence that he merely based his opinion on the other expert evidence and what the Plaintiff intimated to him, without making any further inquiries surrounding the Plaintiff's farming business, a far cry from what is required from him as an expert in his field.

[30] The Supreme Court of Appeal in *Bee v Road Accident Fund*⁵ reiterated that expert witnesses "are required to lay a factual basis for their conclusions and explain their reasoning to the court". A court uses this factual basis to evaluate any past or prospective loss of income, by considering all relevant facts and circumstances,⁶ which are ordinarily referred to as contingencies.

[31] Contingencies are things that cannot be precisely quantified or otherwise prepared for, but they might affect the damages claimed. Typically, they're covered by subtracting a certain percentage of the total amount or particular claims⁷. From a

⁵ *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 22.

⁶ *AA Mutual Insurance v van Jaarsveld* 1974 (4) SA 729 (A).

⁷ *De Jongh v Gunter* 1975 (4) SA 78 (W) at 80F.

broader viewpoint, contingencies are the perils that often plague the lives and conditions of ordinary people.⁸

[32] The Supreme Court of Appeal in *RAF v Guedes*⁹ stated that:

“The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just.”

[33] The Occupational Therapist stated in her report that, notwithstanding the Plaintiff's incapacity to carry out all the responsibilities of a farmer, due to the injuries sustained in the accident, the Plaintiff might probably carry on with her farming business in a supervisory capacity until her retirement age of 65. An opinion confirmed by the Industrial Psychologist in his report.

[34] In the current situation, I believe the Plaintiff's typical contingency should be as follows:

1. **For past loss of income-uninjured earnings**, a 5% contingency deduction should apply to R493 584,00 which equates to R468 904,80.
2. For injured earnings, 45% contingency deduction should apply to R493 584,00 which equates to R221 112,40, which gives a total past loss of R689 016,20.
3. **Future loss of income- uninjured earnings**, 10% contingency deduction should apply to R764 308,00 which equates to R687 877,20.
4. Injured earnings, 60% contingency deduction should apply R764 308,00 which equates to R305 723,20 loss, which gives a total future loss of R993 600,40.
5. The total loss of earnings past and future is R1 682 616,60.

⁸ *AA Mutual Insurance Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A).

⁹ *RAF v Guedes* 2006 (5) SA 583 (SCA) para 8.

[35] During the Defendant's closing argument and cross-examination, the Defendant maintained that the Plaintiff had not proven her case because the information contained in the hospital records contradicted the medical expert evidence. As a result, the Defendant presented a *novus actus interveniens* defence, which has not been gainsaid by any counter-medical experts.

[36] The court in *Minister of Safety and Security v Van Duivenboden*¹⁰ pointed out that:

"A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics."

[37] The Plaintiff's Orthopaedic Surgeon's (Dr. Oelofse) testimony is unchallenged as it stands. Dr. Oelofse provided a sound medical explanation for why the Plaintiff sustained the injuries stated in his report. I thus have no basis to reject his evidence in the absence of any counter-medical expert evidence. The Defendant has not proven its *novus actus interveniens* defence on a balance of probabilities, and thus this defence cannot succeed.

[38] In these circumstances, I believe it is reasonable to compel the Defendant to pay the Plaintiff's taxed or agreed party and party costs on the High Court scale.

Order

The Defendant is ordered to:

1. Pay the Plaintiff an amount of R579 587,60 (five hundred and seventy-nine thousand five hundred and eighty-seven rand and sixty cents).

¹⁰ *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) para 25.

2. Provide the Plaintiff with a section 17(4)(a) undertaking for as far as it has not been done already.
3. Pay the Plaintiff's agreed or taxed party and party costs, scale A, subject to the discretion of the taxing master, inclusive of the costs and expenses occasioned by the consultations with the experts and their reports:
 - (a) Dr. Oelofse, Dr. Deacon Specialist Orthopaedic Surgeons – Report dated 18 November 2021
 - (b) Mr. Michael – Report dated 18 November 2021
 - (c) Ms. Wiltshire, Occupational Therapist – Report dated 29 June 2022
 - (d) Mr. Moodie, Industrial Psychologist – Report dated 16 September 2022
 - (e) Mr. Mphuti, Clinical Psychologist & Neuropsychologist – Report dated 8 February 2023
 - (f) Johan Sauer Actuaries – Report dated 8 August 2023
4. Pay Interest to the Plaintiff at 11,75 % per annum should payment not be made within 180 days from the date of this Court Order.



RYNEVELDT AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES

For the Plaintiff: Adv. J.C. van Eeden

Instructed by: Appelgryn Potgieter Attorneys

For the Defendants: Mr. T.O. Mgwenya

Instructed by: State Attorneys- Mbombela-Nelspruit

Date of hearing: 11, 12, and 20 June 2024

Date of judgment: 16 September 2024