REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

CASE NO: 2469/2021

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

25 October 2024 [redacted]
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DATE SIGNATURE

In the matter between:

CHRISTABEL BELLAH SAMBO Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

Mazibuko AJ

Introduction

[1] The plaintiff, Miss Christabel Bellah Sambo (*Ms Sambo*), instituted a claim against the defendant, the Road Accident Fund (*RAF),* for damages she suffered as a result of injuries she sustained on 1 March 2019 when a motor

vehicle driven by an identified driver, travelling on D797 road, Sasol filling station, KaMhlushwa, Mpumalanga Province, collided with her.

Facts

[2] At the time of the accident, Ms Sambo was a pedestrian, 26 years of age and an intern plumber. Merits were settled at 100% in her favour.

[3] The parties agreed that the issue before the court for determination was quantum for past and future loss of income.

[4] The court granted the application, which was by consent between the parties, for the evidence to be adduced by way of affidavits in terms of rule 38 of the Uniform Rules of Court[1].

[5] The oral evidence of the orthopaedic surgeon, occupational therapist, clinical psychologist, and actuary was dispensed with.

Issue

[6] Whether Ms Sambo has made out a case for her claim of loss of earnings.

Evidence

<u>Oral evidence</u>

[7] The plaintiff testified and called one witness, the Industrial Psychologist, Mr David de Vlamingh.

Ms Sambo

[8] Ms Sambo testified that she sustained injuries due to the accident and received medical treatment. She held a National Certificate in Plumbing (NQF 4) Skills Programme through Mpumalanga Regional Training Trust ("MRTT") as a

[1] Act 59 of 1959

workplace trainer in learnership. At the time of the accident, she was an intern plumber receiving a stipend of R1 600 from November 2018. After the accident, she was home. She recovered over a period of three to four months.

[9] Upon returning to her plumber internship, she struggled to perform heavier tasks, such as using a wheelbarrow to carry sandbags weighing 25kg, and carrying plumbing pipes, geysers, and bricks for draining systems. She resigned after two weeks of her return as she experienced headaches and dizziness. She was using braces and walking devices. She could not complete her plumbing practical due to the sequelae of the accident.

[10] She then started to work as an Assistant Teacher on a contract basis until November 2022. She coped with typing on a computer for 30 minutes and other office-based work. She has been unemployed and financially supported by her parents since then. She commenced studying for a Diploma in Business Administration. However, she could not finalise it due to lack of finances.

[11] Under cross-examination, she conceded that her internship would commence in November 2018 and continue until 2021. However, due to Covid-19, it stopped in March 2020. She was away from the internship, recuperating at home from March 2019 until August 2019.

Industrial psychologist

[12] By qualification, Mr David de Vlamingh is an industrial psychologist. He assessed Ms Sambo on 13 February 2023. He testified on Ms Sambo's education and employment history. In his view, Ms Sambo would never be a plumber due to the accident. She can only do sedentary work following the accident. According to her erstwhile employer's certificate at the time of the accident, she received a monthly stipend of R1 600.00.

[13] He concluded that before the accident, Ms Sambo was fully able to perform her employment duties as an Intern Plumber, which can be regarded as medium physical demand with occasional heavy demand work. Uninjured, she would have been able to complete her internship successfully at the end of 2019. She would do a Trade Test and secure employment within three months, starting on 1 April 2020, as a young, inexperienced but qualified plumber.

[14] As a qualified Plumber, her income would have started at the Paterson B3 level, around R22 167 monthly in 2020. After gaining five years of relevant experience and practical skills, she would have progressed to the median of the Paterson C2 level, R45,833 per month in 2023.

[15] Her earnings would probably have peaked at the median of the Paterson C4 level, around R63,667 per month, by age 45. Thereafter, she would have continued to receive annual inflationary increases until her retirement at 65.

[16] Under cross-examination, he testified that plumbing fell under Artisan, and the trade test in plumbing was the pinnacle that could be attained. Between 2021 and 2022, for a period of six months, she was employed on a contract basis at a primary school as an assistant teacher, earning R3 500 per month.

[17] He conceded that though Ms Sambo initially wanted to be a lawyer, that needed more cognitive capability, and so did the Diploma in Business Management. He could not clearly explain what informed his postulation beyond the C2 level and the measures used to place Ms Sambo in a median quartile. Also, to be compensated for the difference between the plumbing and office administration, except that she registered for the Diploma in Business Management and dropped it for the plumbing, and when she returned to it, she could not continue as she did not have funds to finance the studies.

Expert reports

Orthopaedic surgeon

[18] The court was referred to a report compiled by an orthopaedic surgeon who assessed Ms Sambo. It revealed that she sustained the following injuries: a fracture T11 and T12 of the thoracic spine, compression fractures of the lumbar spine, acceleration/deceleration to the cervical spine, soft tissue on the elbow, left knee (internal derangement of the knee joint) and major post-traumatic depressive disorder.

[19] She complained of neck pain, stiffness of the neck, headaches, pain between shoulder blades, and colder weather pain. To alleviate the pain, she takes pain medication, two tablets once to twice a week. There is moderate spasm of the neck muscles. The cervical spine demonstrates no visible fractures. The thoracic and lumbar spines demonstrate wedge compression fractures. She could be treated with non-surgical treatment, pain medication and anti-inflammatory drugs.

[20] He concluded that she was ill-suited to do her work as a plumbing intern or a plumber as she could not carry bags of cement or pipes and could not bend or squat to lay pipes. She can do administrative work but with adequate thoracic support.

Clinical psychologist

[21] The clinical psychologist concluded that the accident was a traumatic life event for Ms Sambo, which resulted in physical and psychological injuries. It strained her already limited psychological resources and coping abilities, resulting in symptoms of stress and trauma, as well as depression, as it occurred shortly after her brother's death.

[22] She opined that Ms Sambo suffered from severe symptomology, which indicated a significant loss in psychological functioning. She tends to become easily overwhelmed. She displayed symptoms of PTSD, which include changes in memory, attention, planning, and problem-solving.

[23] She concluded that Ms Sambo appeared cognitively intact and did not report significant or apparent changes in her cognitive functioning following the accident. In her present psychological condition, she is mainly unsuitable for employment. However, this is expected to be short-term, as access to the recommended interventions will improve her functioning and ability to secure and sustain employment.

Occupational therapist

[24] The Occupational therapist noted that she was right-handed and wearing a knee guard, with moderate to severely restricted movement of the right shoulder and elbow. A flexion contracture is present at the elbow, and she uses an elbow guard. The right-hand grip strength is moderately impaired.

[25] In her opinion, she will benefit the most from an intense rehabilitation treatment program for her pain. She is suited to tasks of a sedentary selected light physical nature to lessen the strain on her affected joints to avoid speedy deterioration of the affected joints and delay surgery for as long as possible. With the recommended treatment, her physical condition will most likely improve, and it is anticipated that she will experience a reduction of pain in future.

Actuary

[26] The actuary stated that they expressed no opinion on the assumed income but

simply did calculations based on their interpretation of the Industrial psychologist's recommendations. The actuarial calculation was done and presented as follows:

Past Loss:

Pre-morbid:	R897 255.00
Post-morbid:	R24 200.00
Total:	R873 055.00

Future Loss:

Pre-morbid:	R11 579 376.00
Post-morbid:	R 7 546 002.00
Total:	R 4 033 375.00

[27] The defendant did not lead any evidence nor did they appoint experts. They informed the court they would rely on the plaintiff's experts and exercised their right to cross-examine where necessary.

Parties' submissions

[28] Ms Sambo, through her counsel, Ms Delport, submitted that the court was required to accept the expert evidence as the defendant called no expert witnesses to counter the quantum claim. She submitted that a 10% pre-morbid and 0% post-morbid deduction was fair with respect to past loss of earnings. Concerning future loss of earnings, she stated a 25% pre-morbid and 35% post-morbid on future loss of earnings was fair and reasonable. She further argued

that an amount of R4 562 960.20 in respect of loss of earnings was fair and reasonable.

[29] The defendant, through its counsel, Ms Sigwavhulimu, argued that the past loss was not 24 200 but R9 600 as all the interns enrolled with Ms Sambo were terminated due to COVID-19 in March 2020. The Industrial psychologist did not give a fair postulation as her postulations were without evidence, as raised during cross-examination. She suggested a contingency of 15% and 20% in relation to pre-morbid and post-morbid with respect to future loss of earnings and argued that R578 968.20 as a final award to Ms Sambo was fair and reasonable.

Discussion

[30] Experts' reports give opinions on facts and documents provided to them by claimants. I have concerns about accepting the industrial psychologist's evidence and actuarial report without reservations if regard is given to the evidence before the court. Regarding past loss of earnings, the loss was stated at R24 000. However, it was clear Ms Sambo lost earnings from September 2019 to February 2020 as the internship stopped in March 2020 due to Covid-19. There is uncontested evidence that Ms Sambo was contracted as an assistant teacher until November 2022, earning R3 500 per month. She left at the end of her contract. There can be no loss attributed to RAF in this regard.

[31] The assumption that Ms Sambo would have done a Trade Test and secure employment within three months, from 1 April 2020, as a young, inexperienced, but qualified plumber cannot be correct. The uncontested evidence before the court is that the internship was scheduled to run from 2018 until 2021. The internship programme was stopped in March 2020 due to Covid-19. Ms Sambo, together with her colleagues the interns in her then class, would not have received any stipends after March 2020, so there can be no loss due to the accident. If any, it would be due to Covid-19. Therefore, the actuarial postulations of an income loss of R266 000 per year calculated from 1 April

2020 are incorrect and are based on no facts nor collateral evidence. Therefore, they cannot be accepted.

[32] It is trite that when the court considers an appropriate quantum, it would be guided by previous comparable cases. In respect of future loss of earnings, Robert Koch, *on page 100 of The Quantum Yearbook*, states that a sliding scale used is 0.5% per year of employment to retirement, that is, 25% for a child, 20% for youth and 10% for middle age. Ms Sambo was about 31 years old at the time of calculation and, therefore, falls within the 20% sliding scale based on the Robert Koch Quantum yearbook.

[33] The determination of the general contingency deduction to be made falls squarely within the discretion of the court, which must decide what is fair and reasonable.[2]

[33] A contingency deduction is made so that any possible and relevant future event which might otherwise have caused or influenced the extent of the damages sustained by the plaintiff is considered.[3] Contingencies have been described as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement, and other unforeseen factors.[4] The courts have recognised, however, that the fortunes of life are not always adverse; they may be favourable.[5]

[34] As they stand, the actuarial calculations are based on the scenario in which Ms Sambo will be employable and earn the income she would not have earned pre-morbid. There was no evidence supporting the fact that she was unemployable. In fact, after the termination of the internship, she was employed

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[2] Fulton v Road Accident Fund 2012 (3) SA 255 (GSJ), at paragraphs [95] to [96]; and Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd [2016] 4 All SA 153 (GJ), at paragraph [147].

[3] Erdmann v Santam Insurance Co Ltd [1985] 4 All SA 120 (C); Ncubu v National Employers General Insurance Co Ltd [1988] 1 All SA 415 (N); and Burns v National Employers General Insurance Co Ltd [1988] 3 All SA 476 (C).

[4] Road Accident Fund v Guedes 2006 (5) SA 583 (SCA), at paragraph [3].

[5] Southern Insurance Association v Bailey NO, n 1, supra, at 117B.

as an assistant teacher. There is unchallenged evidence that she is compromised by the injuries sustained. She could not pursue her plumbing career due to the accident. Her performance is impacted and compromised. However, she can pursue other career paths. She is currently unemployed and can only do sedentary work.

[36] Having considered the evidence before me, which must influence the assessment of the general contingencies to be applied and the content of the expert reports. The court does not accept the actuarial calculations of a 10% spread (5% / 5%) for the past loss of earnings between April 2020 and November 2022. However, Ms Sambo may be compensated from September 2019 for the past loss of earnings.

[37] Regarding future loss of earnings, I could find no justification for applying the median scale. In my view, the lower quartile is justified, considering the plumbing industry. Ms Sambo is compromised, and her future earnings from plumbing and any other work will be affected due to the accident. However, whilst recuperating in 2022, she could still secure sedentary employment. Sadly, the experts' reports do not show an accurate picture as per the given facts and evidence. The postulations do not recognise the interruption caused by COVID-19; it is as if all was due to the accident, contrary to Ms Sambo's evidence and the uncontested evidence and common facts before the court.

[38] In Hersman v Shapiro and Company[6], the court stated the following:

'Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages.

[6] 1926 TPD 367

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 of course upon the soundness of the assumptions, and these 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.'

[39] The court has, therefore, considered all the evidence, factors and the experts' reports and decided to make a round estimate of an amount which, in its view, is fair and reasonable, notwithstanding that the basis of the Industrial psychologist's postulations was not reliable as they were not based on the available evidence. His report was admitted into evidence, and made concessions regarding the inaccurate calculation of the past loss.

[40] The Industrial psychologist was persistent about his election of the C2 level and quartile, as well as the Diploma in Business Administration issue in calculating the loss, even when he was referred to the available evidence contrary. He did not appear to independently assist the court but seemed to be assisting the plaintiff's case. Generally, experts are not for parties as such but to independently assist the court according to their exposure and speciality regardless of who among the parties appointed them. The court believes that

an appropriate award for the plaintiff's total loss of earnings must be in the amount of R2 100 000 (two million one hundred thousand rand).

[41] Concerning costs, the plaintiff has been successful, and there is no reason why she should not be entitled thereto.

[42] Consequently, the following order is granted.

Order:

1. The defendant is to pay 100% of plaintiff's proven or agreed damages.

2. The defendant is ordered to pay the plaintiff the amount of R2 100 000 **(**two million one hundred thousand rand), with respect to loss of earnings, within 180 days from the date of this order.

3. The above-mentioned amount is to be paid to the plaintiff's Attorneys, Frans Schutte & Mathews Phosa Inc.
   Trust account with account number 030355818
   At Standard Bank, White River.

4. Should the defendant fail to make payment as set out in paragraph 2 above, then, in this instance, the defendant shall be liable for payment of interest, calculated from 15 days after the date of granting this order, at the *tempore morae* rate.

5. The defendant will furnish to the plaintiff with an unlimited Undertaking in terms of section 17(4)(a) of Act 56 of 1996 to pay the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her arising from injuries sustained by her in a collision which occurred on 1 March 2019, after the costs have been incurred.

6. The Defendant shall pay the plaintiff's taxed or agreed party and party costs on a High Court scale of the instructing- and correspondent attorneys, as agreed between the parties, and such costs shall include the following:

6.1 The day fees of counsel on scale B, Adv. I E M Delport, as well as reasonable preparation fees, including consultations with industrial psychologist and plaintiff and drafting of heads of argument in preparation for trials, as set down for 19 August 2024 and 20 August 2024, respectively;

6.2 The reasonable costs of the plaintiff's Attorney for the first Judicial case management on 28 February 2024 and special judicial case management on 30 April 2024, which includes drafting of practice note, pre-trial minute and indexing and paginating of bundle and reasonable photocopies relating thereto, attended and appearance by plaintiff's Attorney including preparation for same.

6.3 The costs of all medico-legal, actuarial, addendum, joint reports and opinion letters, obtained and/or served by the plaintiff, as well as such reports furnished to the defendant or it's Attorney or in the defendant's possession, including the costs of any special investigations (X-rays, MRI scans, blood test etc.) requested by the relevant expert.

6.4 The reasonable costs consequent to attending the medico-legal examinations.

6.5 The costs relating to confirmatory affidavits by medico-legal experts and the reservation fees of all medico-legal experts and specifically the fee of the industrial psychologist for trial as set down for 19 August 2024 and 20 August 2024, respectively.

6.6 The cost of consultations with the plaintiff to consider the Offers of settlement (if any).

6.7 The costs of interpreter for trial on 19 August 2024.

7. Should the Defendant fail to make payment of the taxed or agreed costs within 180 days, then the defendant will be liable for payment of interest

on the taxed costs or agreed costs calculated from 15 days from the date of the taxation or settlement at the tempore morae rate.

8. There is a valid contingency fee agreement.

[redacted]

N.G.M. Mazibuko

Acting Judge of the Mpumalanga Division, Mbombela

This judgment was handed down electronically by circulation to the parties' representatives by email.

Representation:	
For the Plaintiff:	Ms IEM Delport
Attorneys for the Plaintiff:	Frans Schutte & Mathews Phosa INC
For the Defendant:	Ms D.E. Sigwavhulimu
Attorneys for the Defendant:	State Attorney (Mbombela)
Heard:	19 August 2024
Date of Judgment:	25 October 2024