

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 7776/2022

DATE: 22-11-2024

DELETE WHICHEVER IS NOT APPLICABLE

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

(2) OF INTEREST TO OTHER JUDGES: YES / ~~YES~~

(3) REVISED.

DATE 22/11/2024

SIGNATURE [Signature]

10 In the matter between

NYATHI MQONDISE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

WEIDEMAN, AJ: The accident from which this claim arose occurred on 23 May 2021. The plaintiff, a Zimbabwean
20 citizen born on 9 February 1988, was riding a motorcycle.

Liability and quantum are in dispute.

At the commencement of the hearing on 20 November 2024, counsel moved an application in terms of Rule 38(2), which was granted. See CaseLines 24-1 to 24-6.

As far as negligence is concerned, the plaintiff's statutory section 19(f) affidavit is on CaseLines 19-1. A vehicle approached from the front and suddenly and without indicating its intention to do so, executed a turn across the plaintiff's path of travel. It occurred at a time when it was too late for the plaintiff to take any evasive action and the collision occurred.

The OAR is at CaseLines 19-3 to 19-6 and it contains no information to gainsay the plaintiff's version. It being a
10 default proceeding the defendant did not participate and there is no evidence before court to challenge the plaintiff's *prima facie* version of events. In the circumstances the only possible order on liability is that the defendant is 100 percent liable for such damages as the plaintiff may be able to substantiate.

The only aspect before Court on quantum is the plaintiff's claim for loss of income, alternatively earning capacity, if any, and the evidence will be considered only on the basis as it may be relevant for this purpose.

20 According to the orthopaedic surgeon, Dr Theron, the plaintiff sustained the following injuries:

Forehead laceration, upper lip lacerations, and a fracture of the right distal radius. CaseLines 04-3.

It should however be noted that the injuries as listed by Dr Theron are in conflict with the injuries recorded in

paragraph 6 of the amended particulars of claim on CaseLines 2-15 where the injuries are recorded as:

1. Head injury with facial abrasions;
2. a fractured right humerus; and
3. multiple bodily abrasions.

There is a significant difference between a humerus fracture and a distal radius fracture.

Both the orthopaedic surgeon, Dr Theron and the occupational therapist, Clarah Sivhabu, were of the opinion
10 that the wrist injury would significantly affect the plaintiff's ability to work. His only pre-accident experience was as a packer and a delivery driver both of which he would struggle to perform after the accident.

According to the industrial psychologist, Dr Strydom, at the time of the accident, the plaintiff was employed by Pizza Perfect in Primrose - CaseLines 04-42. This information appears to be correct as Dr Strydom consulted telephonically with the plaintiff's previous manager.
CaseLines 04-42.

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Three payslips appear under pocket 23 - CaseLines 23-1 to 23-3. All three payslips are for the Golden Grill and Pizzeria and the employee's name is reflected only as 'Lucky'. The link between these payslips and the plaintiff has not been drawn and their relevance remains unknown.

As part of the lodgement documents in pocket 5 there is a Workman's Compensation Commissioner's progress report at CaseLines 05-24 and a final report at 05-25. These clearly refer to the plaintiff. The difficulty is that the progress report is dated 13 April 2021 and the final report 27 April 2021. These WCC documents refer to an accident on 28 March 2021 and at which time his employer is reflected as CS Continental Meat Market. It should be
10 noted that the accident from which this claim arose occurred on 23 May 2021, a month after the Workman's Compensation Commissioner's final award.

Three potential employers, Pizza Perfect, Golden Grill and Pizzeria and CS Continental Meat Market are reflected in the documentation which also refer to another accident two months before the accident *in casu* which was severe enough to make him unfit for duty for the period 28 March 2021 to 3 April 2021. None of this is mentioned in any of the expert's reports and these conflicts remain unexplained.

20 The plaintiff is a foreigner. It is logical that the evaluation and assessment of the plaintiff's claim cannot be conducted on the same basis as it would have, had he been a South African citizen. There are three documents which an industrial psychologist must address when considering the claim of a foreigner, especially a driver:

1. Passport: is it valid? Has it expired? What is the process and requirements for renewing it? *In casu*, the plaintiff does have a valid passport. CaseLines 05-33. It had been issued on 16 February 2020 and is valid to 15 February 2030.

2. Visa: does the plaintiff have a visa allowing him to legally work in South Africa? If so, did the work engaged in comply with the visa requirements? If there is no visa, why not? Is it possible to secure a visa to work? If so, what are
10 the requirements and does the plaintiff meet these requirements? *In casu* counsel made a point of drawing the Court's attention to an asylum seeker temporary visa and which is uploaded on CaseLines at 22-1. The point was to show that at the time of the accident the plaintiff was both legally in South Africa and had the right to work. Counsel is of course correct. That was the status at the time of the accident. However, the enquiry does not end there.

The Court enquired as to the reasons which would necessitate a Zimbabwean citizen to seek asylum in South
20 Africa. If I understood counsel correctly then an answer was declined because counsel was of the opinion that the visa was irrelevant for the proceedings before Court.

This is not correct. The document uploaded on CaseLines 22-1 indicates that it expired on 26 July 2021, two months after the collision. In addition to granting the plaintiff the

right to work it also indicates that unless it is extended or the application for asylum is successful, the plaintiff has to leave the Republic of South Africa on or before 26 July 2021.

At the stage when the industrial psychologist interviewed the plaintiff, the temporary asylum seeker permit had expired. Before an industrial psychologist may postulate a career path for the plaintiff in South Africa he or she must address the factual basis that would allow the plaintiff to
10 remain – and work in South Africa, had the accident not occurred.

3. Driver's licence. As at 19 November 2024, the date that the matter was on the roll, no driver's licence had been uploaded on CaseLines, yet the plaintiff was working as motorcycle delivery person. Dr Strydom recorded in her report that the plaintiff had a Code 10 license. This is not relevant to the plaintiff's occupation at the time of the accident as this code of license does not allow a person to ride a motorcycle.

20 At the time of completing her report Dr Strydom could not have evaluated the plaintiff's position in any other way other than that he worked as a motorcycle delivery person, without a valid licence. The effect of this is however not addressed or considered at all in her report.

On page 7 of her report, CaseLines 04-44, Dr Strydom

further expressed the opinion that, had the accident not occurred, the plaintiff could have worked to age 70 or 75, health permitting. Given the fact that he only worked as a packer and a motorcycle delivery person, counsel was asked if he was aware of any research confirming that individuals in these types of occupations were employed after 60 years of age. Counsel indicated that he was not in a position to comment on Dr Strydom's opinion on retirement age and cannot defend her report on this aspect.

10 If the evidence suggests that the plaintiff will be obliged to return to his country of origin, then his future loss of income, if any, has to be determined in his country of origin and in accordance with the prevailing labour market there.

The aim of the Law of Delict, particularly in personal injury matters, is, and has always been, to place an injured plaintiff in the same position that he would have been, had the accident not occurred. When it comes to human beings it is not possible to undo the damage caused by an injury sustained in an accident and all that a court can do is to
20 compensate with an award sounding in money.

For such an award to be made a court has to be placed in a position to be satisfied that all the elements of a delict have been proven. Once that is done, the next step is to quantify what the award should be. Where possible, this should be done mathematically, mostly with the assistance of

actuaries. If it is not possible to do so, then case law allows for the possibility of a lump sum to be awarded, the value of which will be determined by the Court's opinion of what is fair and just to both parties. If neither is possible the Court has three alternatives, to dismiss the claim, to grant an order of absolution from the instance or to refuse the application for default judgment.

The plaintiff's visa to work expired on 26 July 2021. The plaintiff had a valid claim for past loss of income for the
10 period 23 May 2021 to 20 July 2021, effectively 2 months, amounting to R8 000.

There is case law support for an argument that even if income was illegal, which the plaintiff's would be after the expiry of his permit, the monetary value of the potential income equates to the plaintiff's earning capacity. According to the plaintiff's actuarial calculation, CaseLines 04-56, this amount, including the R8 000 legal income would be R91 818.00. This amount will be awarded.

There is no evidence before Court that the plaintiff would
20 have been able to remain in South Africa indefinitely and to legally work here. His future loss of income must therefore be determined based on what he could earn over the remainder of his working life in his country of origin, engaging in such economic pursuits as may be available to him there. There is no evidence before Court that would

enable the Court to quantify any future impairment of earning capacity and the claim for future loss of income is dismissed.

The Court's order is as follows:

1. In respect of the plaintiff's claim for accrued or past loss of income, the Court awards the sum of R91 818.00.
2. The plaintiff's claim for future loss of income is dismissed.
3. To the extent that the plaintiff is partially successful and
10 other aspects of the matter are still to be determined, the plaintiff's party and party costs, insofar as it relates to the issues before this Court, will be awarded on the High Court scale without counsel's fees on scale B.

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WEIDEMAN, AJ

JUDGE OF THE HIGH COURT

DATE: 22/11/2024