



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

CASE NO: 302/2024

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

22/08/2028

DATE

SIGNATURE

In the matter between:

MAHLANGU SFISILE BRUNHILDA DOROTHY

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Managa AJ

Introduction

[1] The plaintiff, Ms Mahlangu, is an adult female employed as a road worker at the Department of Public Works, Roads and Transport, Mpumalanga Province.

[2] The plaintiff has instituted a claim against the defendant for injuries sustained in a motor vehicle accident that occurred on 3 October 2020 at approximately 23h00 near Carolina, Mpumalanga Province. She was a passenger in the motor vehicle driven by one Ntokozo Precious Zulu, the insured driver, with Registration Number JRP 565 MP. At the time of the accident, the plaintiff had been employed as a road worker for 13 years.

[3] The defendant has conceded merits 100% in favour of the plaintiff. The issue of general damages is postponed *sine die*.

[4] The issue for determination is the plaintiff's loss of future income. The plaintiff filed expert reports of the Actuary, N Waisberg, the Occupational Therapist, Mr S Dhlamini; the Orthopaedic Surgeon, Dr RS Ngobeni; and the Industrial Psychologist, Ms PG Baloyi ("Ms Baloyi"). On the other hand, the defendant did not file any expert report.

Plaintiff's case

[5] The plaintiff called one expert witness, an Industrial psychologist, Ms Baloyi. She referred to the report of the Orthopaedic Surgeon, which states that the plaintiff "sustained soft tissue injury of the lumbar spine. He states that she is neurologically intact, however she has tenderness on palpation of the lumbar spine with reduced ranges of motion and her X-rays show spondylosis of the 15/51 vertebrae".

[6] The expert testified that the plaintiff reported that pre-accident, she received bonuses, and post-accident, she did not receive any.

[7] She testified that the foreman told her that the plaintiff would not be promoted currently and is not fit for her pre-accident job. She testified that the plaintiff's supervisor indicated that the plaintiff is not permanently employed but is rather temporarily employed.

[8] The expert testified that the plaintiff was unable to do her pre-accident job, and she is not suited for her current job. The plaintiff is accommodated in her current position. However, should the company decide to fill the vacant post of transport officer, she will be in the cold or limbo, and at risk of losing her job. This is because she cannot meet the physical demands of the job she did pre-accident.

[9] The plaintiff indicated that she resumed her pre-accident employment and was offered a position as a transport officer to accommodate her condition since the Neurosurgeon declared her suited to execute light duties only. She is therefore responsible for filling trip sheets and allocating cars to staff. She works in the office, Monday to Friday from 07:45 to 16:15. She indicated that she is occupying the position until the department finds someone.

[10] She reported that an income of R13 831.37 (including housing allowance) was verified. She also qualified for a 13th cheque and her notch is R147 036.00.

[11] The plaintiff reported that she did not receive any performance bonus post-accident. Her foreman reported that she will no longer qualify for a promotion, given her post-accident condition. Further, expert reports indicate a reduction in her physical capacity, which renders her unsuited for her pre-accident work.

[12] She does not have the relevant qualifications or work experience for her post-accident residual physical capacity and will therefore struggle to re-enter the job market.

[13] The plaintiff's supervisor, Ms Mpila, described her as a hand worker who executed her duties well. She further reported that she had a chance of being promoted to level 5. She reported that she met the requirements. She, however, mentioned that she would not know when that would be since it depended on the availability of posts and whether her application would be considered or not.

Expert evidence

[14] The expert conceded that she never verified that the said foreman was indeed employed by the Department of Public Works, nor did she obtain any documentary proof to that effect. She merely took her word and had a telephonic discussion with her. She testified that the number of the said foreman was given to her by the plaintiff.

[15] She testified that the plaintiff was permanently employed by the Department of Public Works. She also confirmed that the plaintiff was first employed by the government in 2010 and has been doing the same job since.

[16] She could not verify how long it would take for the plaintiff to be promoted, although she stated that the foreman informed her that the plaintiff qualified for promotion and that there is a possibility of being paid in terms of Level/Grade 5.

[17] When asked what the title of the said job is or its requisite qualification, the expert conceded that she did not know and she merely explained that it was not the job of being a foreman.

[18] The expert testified that, according to the foreman, the said promotion was guaranteed. However, when probed in terms of her report, where the foreman alleged that the promotion is subject to a vacancy/availability of the job and the plaintiff's suitability, she conceded that due process ought to be followed. She further conceded that the government department has processes such as medical boarding, and the plaintiff would have to be taken through them.

[19] Apart from failing to verify the identity of the person who identified himself as a foreman, the expert failed to consult with the officials in the Human Resources department.

[20] She conceded that the plaintiff does not have a matric certificate. The expert's evidence relating to bonuses did not cover a certain period, to wit, 2010, 2011 and 2014. She indicated that the period relied upon was furnished by the plaintiff.

Importantly, the expert conceded that the plaintiff's salary increased after the accident.

[21] When probed on the concept of promotion, given that the plaintiff has worked for 10 years without the said promotion, she struggled to provide a factual answer, only deferring to her opinion that, according to her, she was going to be promoted at the age of 45. The expert testified that there was no past loss of earnings as the plaintiff was paid in full during recuperation. And the future loss of earnings is calculated from the date she returned to work.

[22] The expert testified that the promotion the plaintiff apparently qualified for was for a position, the title and required qualifications of which were unknown to her. This is despite her recording in her report at page 74 under paragraph 8.1.2 line 7 that, "according to her foreman", she would qualify for a promotion to a foreman post, which is level 5. She reported that she met the requirements. This could not be verified with their HR department.

Mpila Sellina – (Foreman)

[23] The witness testified that she has not been working for the Department of Public Works since October 2023. She testified that she was the plaintiff's supervisor during her pre-accident position.

[24] She indicated that the plaintiff will be promoted if there is a position, and she qualifies for such a position. In relation to the impact of her injuries on her position, she indicated that the plaintiff is not going to be dismissed because of her condition. There is a process in the government to address such a situation.

[25] She testified that she could not verify whether the plaintiff received bonuses in 2011 and 2014, as pay slips are confidential. She therefore does not have documentary proof to that effect.

[26] She testified that the plaintiff was not doing the job she was hired to do, and she is not receiving the bonus after the accident. She says that the plaintiff was placed on light duty due to an instruction from the medical officer.

[27] She testified that the plaintiff did not struggle at all, save to say that the current job requires a matric certificate and a computer certificate.

Analysis of the evidence

[28] Glancing through the evidence adduced by the parties, it is clear that the issue turns on whether the plaintiff has a claim for loss of future income under the circumstances set out herein. The high watermark of the plaintiff's case is that her earning capacity has been diminished by the injuries she suffered. The principle is discussed in the Supreme Court of Appeal judgment, *Rudman v Road Accident Fund*,¹ where Jones AJA stated:

"[11] In my opinion, the learned Judge in the Court *a quo* has not misdirected himself in his understanding of these authorities or in his application of the law to the facts. His judgment correctly emphasises that where a person's earning capacity has been compromised, 'that incapacity constitutes a loss, *if such loss diminishes the estate*' (Rumpff CJ in the above quotation from *Dippenaar's* case) and 'he is entitled to be compensated *to the extent that his patrimony has been diminished*' (Smalberger JA in *President Insurance Co Ltd v Mathews*). (The emphasis is from the trial Judge's judgment.) In his view, Rudman's disability giving rise to a diminished earning incapacity was proved, but the evidence did not go further and prove that his incapacity constituted a loss which diminished his estate.

I believe that this conclusion is correct. The fallacy in Mr *Eksteen's* criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives

¹ *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA)

rise to pecuniary loss. Thus, in *Union and National Insurance Co Ltd v Coetzee*, which is referred to in the passage quoted above from *Dippenaar's* case and which deals with a lump sum award for loss of earning capacity, Jansen JA makes the point that

'n (b)epaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdienvermoë mee nie of altyd 'n vermindering van gelyke omvang nie - dit hang o.a. af van die soort werk waarteen die gebrek beoordeel word'. (My emphasis.)

This is what is emphasised by the learned trial Judge in the passages quoted from his judgment which he has underlined.

...

[16] The question is whether or not Rudman has proved that he is entitled to an award of this nature. Like the plaintiff in *Coetzee's* case, his mobility is restricted and he suffers from other physical handicaps as well, but this does not necessarily translate into a reduction of earning capacity causing loss. Has he proved such a reduction? What is the probability of Rudman ever leaving his farm in order to seek a livelihood elsewhere? The answer involves a consideration of a variety of possibilities. In considering them it must be remembered that in the final analysis an award cannot be based upon speculation. It must have an evidential foundation. There is in this case no evidence at all that Rudman may for some reason be forced to have recourse to the open labour market to earn a living. The evidence indicates the contrary. The Rudman enterprise continues to flourish under his stewardship. The chances are that this will continue. The evidence of experts is that the future prospects for the professional hunting industry in the Eastern Cape are good, better than anywhere else in the country. There is every reason to suppose that the Rudman game farms will continue to generate profits. There is no reason to suppose that the future prospects for the Rudman mohair enterprise, which is described as one of the largest, if not the largest in the world, are anything but sound. The financial statements of the trust and the company show continued growth and a healthy relationship between assets and debts, one which makes it unlikely that this farming empire will disintegrate for financial reasons. Rudman's personal liabilities are small in relation to his assets. The Rudman family – father, mother, two sons and a daughter – is closely knit and supportive. All contribute to the family farming operation. All appear to accept the family policy of working for the good of the family as a whole, rather than concentrating on an increase in personal wealth. There is no

hint of the possibility of Rudman branching off on his own for personal family reasons. On the facts, the risk of Rudman ever being forced to seek a living on the open labour market, or the possibility of his ever choosing to do so, is so remote that in my view it must be disregarded."

[29] The evidence which was led by the supervisor, the expert and the plaintiff, only establishes that the plaintiff suffered injuries. It does not provide evidence that the estate of the plaintiff will be diminished by such disability. The plaintiff continues to work for the department, albeit in a different position, which accommodates her physical condition. There is no evidence that the plaintiff's disability will lead to her dismissal by the department.

[30] Furthermore, I was not provided with any evidence which substantiates that the change in positions has diminished her estate.

[31] There are two issues raised by the plaintiff in relation to the damages claimed, to wit, she will no longer receive bonuses because of her disability and the fact that she was due for promotion to a level 5 position. The evidence adduced by the expert regarding the prospect of not receiving a bonus is scant. It does not suggest that the plaintiff consistently received bonuses from the department pre-accident.

[32] Even if the above is the position, the fact that the plaintiff was accommodated in another position does not mean that she is not eligible for bonuses if she performs. Both the expert and the plaintiff indicated that the plaintiff is comfortable with the current position. It is therefore reasonable to expect the plaintiff to perform optimally so that she can get bonuses.

[33] In relation to the possibility of promotion of the plaintiff, the evidence of the expert does not suggest that the plaintiff was due for promotion. The plaintiff's alleged promotion is contingent on the availability of the position and her qualifying for it. The fact that the plaintiff worked for 10 (ten) years without promotion does not necessarily entitle the plaintiff to a promotion as a matter of right. I, therefore, do not agree with the plaintiff's argument.

[34] In conclusion, there is no merit that the plaintiff will suffer future loss of income as a result of her disability.

[35] In the result, I make the following order:

- 1 The action is dismissed.
- 2 Each party is to pay its own costs.




P MANAGA

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

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