REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: A264/2022
HEARD: 24 APRIL 2024
DECIDED: 25 OCTOBER 2024

1) REPORTABLE: NO
2) OF INTEREST TO OTHER JUDGES: NO
3) REVISED.

[redacted]
SIGNATURE

25 October 2024
DATE

In the matter between:

ZOLISWA LONIA QULU Appellant

And

ROAD ACCIDENT FUND Respondent

This judgement has been handed down remotely and shall be circulated to the parties by way of email / uploading on caselines. The date of hand down shall be deemed to be 23 October 2024.

ORDER

1. The appeal is upheld with costs, such costs calculated on Scale C.
2. The order of the court *a quo* is set aside and replaced with the following:

   2.1 The respondent is ordered to pay the appellant the amount of R 562 519.00 in respect of loss of earnings;

   2.2 The respondent is ordered to provide the appellant with an undertaking in terms of Sec 17 (4) (a)

JUDGMENT

CORAM: BALOYI-MBEMBELE AJ (BAM J & MNISI AJ concurring)

Introduction

1. This is an unopposed appeal against the order granted by this court on 21 September 2022, (Makhoba J) sitting as court of first instance. The sole issue before this court is whether the court *a quo* was correct in its refusal to award damages in respect of the appellant's loss of earning and an undertaking to cater for the appellant's future treatment as recommended by the experts. The appeal is with leave of the court *a quo*. The defendant took no part in the proceedings in the court *a quo*.

Background

2. The appellant sued out a summons to recover damages she had sustained following a motor vehicle accident on 14 June 2018. At the time, the appellant was 51 years and working as a casual cleaner while also selling cooked food on the road-side as her main means of generating income. Evidence accepted by the trial court indicates that the appellant was a pedestrian when an unknown vehicle collided with her. Following evidence, the court found that the respondent was liable for 100% for the appellant's proved or agreed damages. However, the court refused to award damages in respect of loss of earnings on the following grounds: (a) The appellant will able to work until the retirement age 65; (b) She did not sustain any fracture or dislocation; (c) There is no medical proof or diagnosis of the appellant's complaints about pain; and (d) The injury sustained was not serious, hence she was discharged on the same day.

Grounds of appeal

3. Before us, the appellant contended that the court a quo misdirected itself in disregarding the expert evidence placed before it. The expert evidence placed before the court a quo comprised an Orthopaedic Surgeon's report, Dr JP Marin; Occupational Therapist's, Ms Van Wyk, including that of the Industrial Psychologist, Ms Nicolene Kotze. The evidence was received by way of affidavits as provided for in Rule 38 (2) of the Rules.

4. Dr Marin had examined the appellant on 2 July 2021. In his report dated 11 July 2021 he recorded that the appellant had sustained soft tissue injuries of the lumber spine and injury to her right knee, which resulted in residual pain. Dr

Marin recommended future intervention by way of physio, biokinetics, medication and occasional visits to a general practitioner until the appellant had been fully rehabilitated.

5. Ms Van Wyk had examined the appellant on 21 May 2021. In her report of 18 August 2021, she noted that the appellant had undertaken casual work as a cleaner at British Tobacco and also generated income as a street vendor, selling hot food. After the accident, she did not go back to cleaning but continued with selling. Ms Van Wyk opined that although the appellant's injuries were not severe, she would require time to heal before getting back to her pre-accident physical abilities.

6. Ms Kotze, the Industrial Psychologist, had examined the appellant on 15 September 2021. She confirmed in her report dated 29 October 2021 the appellant's earnings as a cleaner by speaking to one Ms Grobler at British Tobacco. She noted that the monthly income of R2 500 for two to three days a week matched what is generally offered for casual cleaners. In terms of street vending, the appellant stated that she drew income of R4 000 monthly. The figure of 6 500 (R2 500 from cleaning + R4 000 from street vending) was thus used as basis for calculating the appellant's loss of earning.

7. Our courts have confirmed that the exercise of quantification of a claimant's losses is not an exact science. In *Road Accident Fund* v *G S O Guedes* the court reasoned:

'The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example Southern Insurance Association Ltd v Bailey NO. 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 .'[1]

8. In essence, the trial court exercises a discretion and attempts to achieve the best estimate of a plaintiff's loss.[2] The appellant had provided actuarial calculations by way of a report prepared by J Sauer, dated 3 November 2021. The computation had resulted in the amount of R794 554. 00. In our view, the court misdirected itself in abjuring the expert reports placed before it. Those reports made it plain that the appellant had suffered injuries that required various interventions, before she could regain her pre-accident physical abilities, albeit she had not sustained any fractures or dislocations. The court chose not to refer to the expert reports.

9. The question to be answered then is this, what is the nature of the discretionary power that was open to the lower court to exercise in coming to its conclusion. It is worth considering the law on this score. In T*rencon Construction (Pty) Limited* v *Industrial Development Corporation of South Africa Limited and*

[1] [2006] SCA 18 (RSA), paragraph 8.

[2] See *Southern Insurance Association v Bailey NO* 1984(1) SA 98 (A) and *Road Accident Fund v Guedes* (611/04) [2006] ZASCA 19; 2006 (5) SA 583 (SCA) (20 March 2006).

Another, Khampempe J, writing for the court dealt with this issue. The quote is slightly long but it is worth quoting in full:

'[83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply-rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.

[84] In *Media Workers Association*, the Court defined a discretion in the true sense:

> "The essence of a discretion in [the true] sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."

[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in Knox, a discretion in the loose sense —

> "means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."

> [87] This Court has, on many occasions, accepted and applied the principles enunciated in Knox and Media Workers Association. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.
>
> [88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—
>
> > "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."
>
> An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.'[3]

10. The trial court had a true discretion to exercise as to what amount of damages it could award in respect of the appellant's loss of earnings. Since the trial court had misdirected itself failing to make an award, and thus exercising no discretion at all, this court is at large to make its own award, taking into

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[3] [2015] ZACC 22, paragraph 83 – 85.

account the actuarial calculations. Having considered the circumstances of this case, the actuarial calculations provided two scenarios, 10% spread applied on average which is R562 519.00 would be reasonable and fair. The respondent will thus be ordered to pay the appellant the amount of R562 519.00 and issue an undertaking to cater for the appellant's future treatment.

Order

1. The appeal succeeds with costs, such costs calculated at Scale C.
2. The order of the court a quo is set aside and is replaced with the following:

2.1 The respondent is ordered to pay the appellant the amount of R 562 519.00 in respect of loss of earnings;

2.2 The respondent is ordered to provide the appellant with an undertaking in terms of Sec 17 (4) (a).

[redacted]

M.C. BALOYI-MBEMBELE
ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

I agree

[redacted]

BAM J
JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

I agree

[redacted]

J MNISI

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

Appearances:

For the Appellant:	**Adv J.F Grobler SC**
Instructed by:	Wehmeyers Attorneys
	Waterkloof, Pretoria
For the Respondent:	No appearance
Date of Hearing:	**24 April 2024**
Date of Judgment:	**25 October 2024**