



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 77531/2014

- 1) Reportable: No
- 2) of interest to other judges: No
- 3) Revised: yes

04 September 2024

Johanna Leso

Date

In the matter between:

ROSINA RAMATSO BOSHOMANE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

REASONS FOR JUDGMENT

LESO AJ:

1. This matter was set down to be heard on 30 July 2024 however it was postponed until 31 July 2024 for reasons which I will explain after I have given reasons for my judgment. On 31 July 2024 the court made the orders after confirmation by the plaintiff's counsel as follows:

- 1.1 That the plaintiff may produce evidence in terms of Rule 38(2) of the Uniform Rules of Court;
 - 1.2 That the Defendant was declared to be liable for payment of 70% of the proven and/or agreed damages suffered by the plaintiff;
 - 1.3 That the defendant furnishes the plaintiff with undertaking in terms of section 17(4)(a) pertaining to the motor vehicle accident, the liability of the defendant is limited to 70%.
 - 1.4 The defendant shall pay to the plaintiff the sum of R R1 670 157.36.
 - 1.5 In the event of the aforesaid amount not being paid within 180 days, the defendant shall be liable for interest on the amount at the rate of 11.75% per annum, calculated from the 15th calendar days after the date of this order to the date of payment.
 - 1.6 The Defendant shall pay the Plaintiff`s taxed party and party costs on the High Court scale.
2. The terms and conditions for payment of the above monies including the costs that form part of the court order and shall not be repeated.
 3. The above order was made on the face of the settlement offer which was tendered by the defence on 12 July 2024 wherein the defence conceded to 70%

merits in favour of the plaintiff, undertaking in terms of section 17(4)(a) on conditions that the defendant receives confirmation of contingency fee and the confirmation of the plaintiff's claim for General Damages. The amount tendered in respect of the General Damages was not accepted by the plaintiff.

REASONS FOR ORDER ON RULE 38 APPLICATION

4. For the fair administration of justice, the matter was adjourned for the defendant's counsel to upload the report for consideration by the court as well as the consideration of the defence request to cross-examine the witness after the defence counsel opted to abandon the expert report prepared by the Industrial psychologist appointed by the defence. On 31 July 2024 the court dealt with the rule 38 application filed by the plaintiff and dismissed the respondent's request to cross-examine the plaintiff's witness (Industrial Psychologist after the Counsel opted to abandon the defendant's expert report (Industrial Psychologist). The defence request was dismissed on the basis that the request did not comply with the procedure for procuring the witness for trial as set out in rules 38(1)(a)(ii) and (ii). The other reason for dismissing the request by the defence was based on the fact that such a request was found to be unreasonable.
5. Rule 38(2) provides for *viva voce* examination of the witnesses at the trial court and dictates a reasonable request for examination of the witnesses to be made. Rule 38(2) provides as follows: "*The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem to meet: Provided that where it appears to the court that any other*

party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit”, the request must be reasonable.(my emphasis)

6. It is clear from the above rule that such a request for the attendance of a witness for cross-examination must be reasonable. The fact that the defendant's assessment of the future employability of the plaintiff differs from the plaintiff's assessment does not require interrogation of the witness. There was no basis to prolong the hearing by allowing cross-examination of a witness because the defendant had suddenly obtained a report that differed from the plaintiff's expert report. The plaintiff is also disadvantaged because the plaintiff's attorney could not consider the report to prepare for trial.
7. The defendant's counsel was not helpful on the other issues raised by the court relating to the head of damage(s) in dispute and issues that were agreed upon by the parties in a pre-trial meeting which was held on 02 July 2024 because she had been recently briefed on the matter.
8. The application in terms of rule 38(2) was granted and the plaintiff's counsel proceeded on affidavits of the experts.

REASONS FOR ORDER ON GENERAL DAMAGES

9. The Plaintiff claimed that she suffered intangible loss as a result of a motor collision accident that occurred on 03 March 2014. The injuries sustained by the

plaintiff are reflected on the RAF1 Form and other expert reports listed below as follows:

9.1 Orthopaedic surgeon

9.2 Occupational Therapist

9.3 Industrial Psychologist

9.4 Actuary

10. According to Kumbirai (orthopaedic surgeon), plaintiff sustained injuries as follows:

10.1 Fracture of the right tibia/fibula (segmental).

10.2 Blunt chest trauma.

10.3 Right shoulder pain.

11. The expert reports that the plaintiff received a clinical and radiological examination, intramedullary nailing of the right tibia, pain and antisepsis management, rehabilitation, physiotherapy and crutches however she still complains of painful right leg/tibia/fibula which is exacerbated by prolonged standing, walking, lifting of heavy weights, running and cold weather. She reports difficulty kneeling down and anxiety attacks when in tight traffic situations. Although the expert calculated the plaintiff's WPI at 3% WPI, he opined that her injuries have resulted in serious long-term impairment/loss of body function. The Orthopaedic Surgeon recorded that the injuries sustained by the plaintiff had a negative impact on her lower limb dynamics, inclusive of strength, endurance and balance.

12. In conclusion, counsel for the plaintiff submitted that having regard to the injuries the amount of R700 000.00 is a fair and reasonable amount for compensation.

The amount was justified with different case laws, to cite a few; in *Roe v The Road Accident Fund 2010 JDR 0445(GSJ)* the Plaintiff sustained a commuted fracture of the right femoral shaft, commuted fracture of the right tibia and fibular, fracture of the right patella, fracture of the left humerus shaft injury to the right foot and upper tooth fractures. The court awarded R 650 000 in respect of damages which translates into R1 007 386 in 2018 terms. In *Abrahams v RAF 2014 (7J2) QOD 1 (ECP)*, the plaintiff suffered a badly communicated fracture of the right proximal femur, fractures of the right distal fibula and patella, fracture of the right medial malleolus and mild concussive traumatic head injury. As a result, the Plaintiff was rendered unemployable. The current value of the damages awarded in this case is R 777,000.00. Reference to various case laws is commonplace to arrive at an amount that may afford the injured person some comfort and solace for the hurt he or she has suffered and will continue to suffer even though the comparative case laws upon which the plaintiff relied do not fit hand in glove with the facts of the plaintiff's case. The court must determine every case on its merit a fair and reasonable amount for compensation in respect of this loss. The problem with this loss is that the loss is non-patrimonial and the comparative case laws are the best way to determine a fair and reasonable amount for compensation in respect of this loss.

13. Having said the above, I am satisfied that the plaintiff has discharged the burden of proof with respect to the loss of amenities of life. The defendant is liable to compensate the plaintiff for the above-proven loss in the amount of R700 000.00 and this amount is subject to apportionment of 30%.

REASONS FOR ORDER ON LOSS OF EARNINGS

14. The Plaintiff claimed that she suffered loss of earnings as a result of a motor collision accident which was caused by the negligence of the insured driver. To this end, the inquiry was whether the plaintiff has lost from his patrimony and the extent to which she has suffered a loss. The plaintiff claimed the amount of R2 454 723.00 after a 30% deduction merits apportionment.
15. The Industrial psychologist appointed by the plaintiff postulated the plaintiff's loss of earnings by using the plaintiff's past and present employment history, the educational background and the impact of her injuries on her career and future employment. The occupational therapist, MJ Dhlamini conducted an assessment on the plaintiff and reported on the plaintiff's work potential and opined that her work as a domestic worker and a childminder falls within medium to occasionally heavy physical demand parameters because it required prolonged periods of standing and walking, repetitive upper and lower limb movements, bilateral hand use, frequent below knee level reach work, vision, hearing as well as high levels of neurocognitive and executive functioning.
16. Pre-accident in an uninjured state, vocational history revealed that the claimant was functional as she was working as a domestic worker/childminder earning an amount of R2500.00. The plaintiff did not have proof of this income however she deposed an affidavit to that extent. On pre-morbid career path and earning potential, the experts predicted that the plaintiff would have continued in this role or a similar role because she was 23 years old at the time of the accident, in the exploration career phase and did not reach her career ceiling. The expert

predicted that It was likely that she would have changed careers in some type of unskilled and semi-skilled trainable occupation.

17. Post-accident, in an injured state, the expert reported that the plaintiff's residual work capacity revealed that she was currently functioning at a diminished level of physical functioning when compared to her pre-accident level of functioning as a result she was unable to resume her pre-accident occupation as a domestic worker. It is reported that post-accident, the plaintiff is suitable for unskilled to trainable in semi-skilled occupations, operating in the open labour market, within an empathetic employment setting, where reasonable accommodation can be provided for her physical deficits.
18. The fact that the plaintiff reported that she has never been able to resume her pre-accident occupation due to the injuries sustained in the accident in question and had remained unemployed by the time of the assessment in March 2024 does not mean that the plaintiff is unemployable
19. To determine the quantum, the expert projected two possibilities of the plaintiff's career projection. In line with the finding in paragraph 18, I accept She kept working as a domestic worker and would earn in line with the yearly increases as determined by the minimum wage, she would earn R59483.00 per annum in 2024 with the consideration of the minimum wage for domestic works in the amount of R25.42 per hour. She could work in an unskilled to semi-skilled role, given her age at the accident, she would earn between the median level and upper quartile of the semi-skilled bracket (R83 000.00 per annum - R218 000.00 per annum in 2024 terms) after that she would have received year-on-year

inflationary increases and would have continued working up to retirement age of 65 years.

20. The plaintiff's attorney employed the services of an actuary, to quantify the aspect of loss of earnings:

- 20.1 This court has no basis for tempering with the actuarial calculations on the past loss because the calculations are based on the actual loss. The contingencies applicable are also fair and reasonable considering the age of the plaintiff and other relevant facts considered in the application of the contingencies. I find that the total of R 549 920.00 after the application of 5% contingency is a fair and reasonable compensation for the plaintiff's past loss.

- 20.2 On the future loss the court did not confirm the Contingencies of 15% which were considered by the actuary mainly because the court has a discretion that must be exercised judicially in determining contingency deductions in loss of earnings claims. The general practice is that the contingency deductions will provide for any future events or circumstances which is possible but cannot be predicted with certainty. The court found that the application of 30% contingency deductions in future loss of earnings claims of R 2 655 092.00 is fair and reasonable.

21. After calculations by the court and the plaintiff's counsel and attorney, the court found that the total amount of R1 670 157.36 is a fair and reasonable compensation for the loss suffered by the plaintiff.


ORDER ON COSTS

22. The court awarded a costs order having exercised its discretion and the general rule that the successful party is entitled to costs of costs follows suit.

CONCLUSION

23. It is necessary for the court to commend the conduct of Adv C. Mothata (counsel representing the defence) which I found to be unprofessional and unethical during the proceedings before this court on 30 and 31 July 2024.
24. This matter was set down to be heard on 30 July 2024 and was allocated 2 to 3 hours for the plaintiff and the defendant's counsel appeared to proceed on general damages and loss of earnings. The court had to stand the matter down because the defence counsel had another matter in another court despite having a trial in my court. The plaintiff's counsel applied in terms of Rule 38(2) to proceed on the affidavits by the experts however the defendant's counsel opposed the application only to the extent of the admissibility and the admission of the Industrial Psychologist report.
25. The report which defendant's counsel intended to rely on was not before the court for consideration and the plaintiff's attorney objected to the report of the defence on the basis that the plaintiff's attorneys could not consider it in preparation for the hearing and that the defence confirmed that the matter is ready for trial and that the defence has no experts.

26. The counsel for the defendant opted to abandon the report and requested to be allowed to cross-examine the plaintiff's witness who was not in court at the time. The court granted the plaintiff leave to lead experts' evidence through affidavit Rule 38(2) and rejected the defence request to cross-examine the plaintiff experts. The plaintiff's counsel proceeded with his submissions on General damages the court made a ruling and the plaintiff's counsel proceeded with the damages on loss of earnings wherein the court applied different contingencies. When the court was about to finalize an order the defence counsel stood up right behind the plaintiff's counsel pointing out that she was not allowed to make submissions.
27. I cannot dismiss the counsel's claim that she was in court throughout the proceeding. It is without doubt that the counsel was sitting in a position where the court could not see her because she was busy drafting an application to request reasons for judgment which was emailed to the clerk a few hours after the court finalised the matter.



JT LESO
Acting Judge of the High Court

Delivered: the reasons for the judgment were prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives, by email and by uploading it to the electronic file of this matter on Caselines.

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