

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 2013/43205

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

.....
DATE

.....
SIGNATURE

In the matter between:

SIMELANE, NONHLANHLA ROSE**PLAINTIFF**

And

ROAD ACCIDENT FUND**DEFENDANT**

J U D G M E N T

WRIGHT J

1. The plaintiff, Ms Simelane is 46 years old. In 2006 she was injured in a vehicle accident. Ms T Seboko, counsel for Ms Simelane and Ms L Abrahams, counsel for the Fund informed me that Deputy Judge President Mojapelo had determined the merits at 100% in favour of Ms Simelane. The Fund conceded that it would be obliged to furnish Ms Simelane with a certificate under section 17(1) of the Road Accident Fund Act 56 of 1996 to cover future medical

expenses. Ms Simelane abandoned a claim for past medical expenses. The Fund abandoned a special plea of prescription. It was agreed between the parties that the only issues to be determined by me are:

- 1.1 General damages - (the parties agreed that the Fund had accepted that Ms Simelane's injuries were sufficiently serious to allow me to assess the quantum of general damages.) See the proviso to section 17(1).
- 1.2 Past loss of earnings
- 1.3 Future loss of earnings.
2. By agreement I admitted in evidence the following reports prepared for Ms Simelane:
 - 2.1 Dr S.M Kasumba – Specialist Surgeon
 - 2.2 Dr E Shnaid – Orthopaedic Surgeon
 - 2.3 Thandiwe Gama – Industrial Psychologist
 - 2.4 Dr BK Cheyip – Specialist Neurologist
 - 2.5 Mamotshabo Magoele – Occupational Therapist
 - 2.6 Lindelwe Grootboom – Neuro/Clinical Psychologist
3. The defendant admitted the correctness of these reports.
4. I admitted in evidence the report of an Actuary, Mr W Loots, prepared for Ms Simelane. The Fund conceded the admissibility of this report. The Fund conceded further that the conclusions, methodology and arithmetic of Mr Loots were correct if his assumptions are correct.
5. A pre-trial conference was held at the offices of the Fund in Pretoria on 9 December 2014. Present were Ms Simelane's attorney, Mr Oguike and Mr Rachuene, an attorney representing the Fund at the time. Between then and the commencement of trial the Fund changed its attorneys. Ms Seboko submitted that the Fund, during the pre-trial conference had agreed that if the Fund did not, subsequent to the pre-trial conference, file any expert reports, the contents of all the expert reports filed on behalf of Ms Simelane by the time of the pre-trial conference were correct. Prior to the pre-trial conference

no expert reports had been filed for the Fund. All the expert reports for Ms Simelane had been filed prior to the pre-trial conference.

6. Ms Seboko relied in particular on paragraph 16 of the minute which reads *“Defendant has not appointed an expert till date and both parties agreed that if the Defendant is not able to obtain medico-legal reports as at when due, the expert reports of the Plaintiff will be used”*. Ms Seboko submitted that, given that the Fund never filed any expert reports, the word *“used”* at the end of the quoted words meant admitted as correct. After some debate with both counsel about the meaning of the words I called Mr Oguike to testify. He conceded that English is not his first language. He comes from Nigeria and his home language is Ibo. He said that what was understood by him and Mr Rachuene was that all the plaintiff’s experts’ reports would be admitted as correct in the absence of counter reports from the defendant. He conceded that no attorney had signed the minute on behalf of the Fund. He said that Mr Rachuene had undertaken to sign the minute but had been replaced by a different firm of attorneys. I accept Mr Oguike’s bona fides. However, I ruled that the report of Mr Loots was admissible in evidence but that the Fund had not admitted its correctness.
7. I did so because there is a difference between using a document as evidence and admitting that its contents are correct.
8. The expert reports referred to above (excluding that of Mr Loots) reveal the following:
 - 8.1 In 1995 Ms Simelane was involved in a car accident and suffered a fracture of the pelvis and lumbar spine. The injuries sustained by Ms Simelane in the accident in 2006 and their consequences are as follows.
 - 8.2 Immediately after the accident she started vomiting, felt feverish and could not move. She sustained a laceration through the right eyebrow and was in a lot of pain.
 - 8.3 When taken to hospital she was assessed as having severe injuries involving her head, chest and abdomen and fairly severe pelvic injuries.

- 8.4 She suffers from osteoarthritis of the lumbosacral spine and left pelvic joint.
- 8.5 She underwent a total abdominal hysterectomy due to chronic pelvic pains which only started after the accident.
- 8.6 She had a fractured left pelvis and a soft tissue injury to the left ankle.
- 8.7 She had a head injury with loss of consciousness.
- 8.8 She was in a coma in ICU for one month.
- 8.9 She had traction applied to the pelvis.
- 8.10 She had a laparotomy of the abdomen.
- 8.11 She needed to use crutches during her recovery.
- 8.12 She experiences headaches.
- 8.13 Her left ankle swells in cold weather.
- 8.14 She has become forgetful to some extent. She has become somewhat rigid in her approach to problem solving.
- 8.15 She cannot walk long distances or sit or stand for long periods.
- 8.16 She cannot run or climb stairs.
- 8.17 She cannot lift heavy weights.
- 8.18 She has difficulty doing daily household chores.
- 8.19 She may require a spinal fusion.
- 8.20 From being an active full time nurse she has to work light duty. This prognosis is fixed.
- 8.21 She will need physiotherapy.
- 8.22 Her ability to participate competitively in the open labour market has been reduced as a result of the accident.
- 8.23 The prognosis for her left ankle, lumbar spine and pelvis is poor.
- 8.24 Her present injuries have been aggravated by the 1995 injury.
- 8.25 The 1995 accident never impacted on her performance at work.

- 8.26 She recuperated at home for six months after the accident before going back to work.
- 8.27 She qualified as a professional staff nurse in 1996. Thereafter she completed a year course in midwifery. She completed a Nursing Degree in 2010.
- 8.28 Ms Gama, the Industrial Psychologist stated in paragraph 7.1 of her report *"Given her professional choice of nursing, the writer believes that even if the accident had not occurred, Rose would have continued in her nursing job for as long as possible, whilst equipping herself with the necessary qualifications to upgrade her status/rank in nursing. She would have still obtained her nursing degree as she still did post morbid, and continued to work as a professional nurse, probably even reaching status of being matron depending on how she would have used the opportunities available to her, even educationally. She indicated that she intends to complete her masters levels in her field, and this would have probably still been her aim regardless of the accident. With a masters degree she would have qualified to reach levels of being a matron in charge."*
- 8.29 In paragraph 8.1 of her report, Ms Gama stated *"Given her intentions of even reaching managerial levels within Nursing, if she had to obtain a masters degree level and was probably eligible for promotions, she would have still progressed beyond the scale to the equivalent of C5 of the Paterson scales by the time she reached her ceiling."*
- 8.30 There is a high probability of Ms Simelane not reaching her pre-accident employment potential.
- 8.31 She suffers from urinary urgency.
- 8.32 She suffers from chronic tension type headaches.
- 8.33 She has limited forward flexion in her lower back.
- 8.34 She suffers from lower back pain after sitting for 45 minutes.
- 8.35 Her standing and walking endurance are mildly affected.

- 8.36 She experiences burning pain on the lower left limb when standing and walking longer than 60 minutes.
- 8.37 She walks with a normal gait.
- 8.38 She struggles to get in and out of the bath.
- 8.39 She dresses independently but struggles to put on socks and to tie shoe laces.
9. Ms Simelane testified. Post-accident she cannot work properly. She inconveniences her colleagues. She cannot lift patients from bed to bed. She can no longer work in ICU or in theatre. Her husband left her because of her decreased libido caused by the accident. She has lost income since the accident because she cannot return at night to the hospital where she works if she gets a call, after she has returned home in the evening, to come back to the hospital to do emergency work. She has been told by supervisors that her chances of promotion are very limited because of her condition. She has not received any promotion post-accident which has resulted in any increase in pay. A number of her colleagues have been promoted in circumstances where she has not. She suffers pain daily. She does earn overtime pay but this is a set sum and is also earned by her colleagues. She earns this pay by working beyond her normal hours of 8am to 5pm Monday to Saturday. In such cases she simply stays on at work after 5 pm.
10. The Fund presented no evidence.
11. In my view Ms Simelane has not proved any past loss of income, that is between the date of the accident and 1 October 2014. She received her salary throughout. She also received regular increases for inflation. She received overtime pay. She mentioned that she does not return to the hospital on call in emergencies. I accept that she would have had there been no accident. However, there is no evidence, either from Ms Simelane or any of her experts as to how much time she has forgone. There is no evidence as to what rate she would have earned had been able to respond to calls. It is not at all clear, from a reading of Mr Loots' report and that of Ms Gama, the Industrial Psychologist, how the alleged past loss of income has been calculated. In her

evidence Ms Simelane mentioned that the mere fact that one was promoted did not imply a salary increase.

12. Similar considerations apply to the claim for future loss of income. Ms Simelane mentioned the possibility of retiring at age 50. None of her experts dealt with the question of early retirement.
13. No loss of income has been proved.
14. On the question of general damages, Ms Seboko moved for R1,5m. Ms Abrahams suggested that the amount to be awarded should be less than R700 000. Both counsel should be complimented on their heads of argument and on having presented, as best they could, cases which were not easy to present. I think that R 500 000 is appropriate.
15. The parties have prepared a draft order and it is for me to fill in the blanks. I make an order in terms of the draft marked X.

GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

On behalf of the Plaintiff: Adv T Seboko

Instructed by: CH Oguike Attorneys

011 333 0619

On behalf of the Defendant: Adv L Abrahams

Instructed by: Tau Phalane Inc

011 333 0183

Dates of Hearing: 20, 23 and 24 February 2015

Date of Judgment: 24 February 2015