



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

Case number: 42942/2015

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

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SIGNATURE

2021-11-17
DATE

In the matter between:

KGOMOTSO MABELANE PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

[1] The plaintiff claims damages against the Road Accident Fund for damages suffered as a result of the injuries she sustained in a motor vehicle accident that occurred on 24 September 2014. The plaintiff was a passenger in a motor vehicle when the insured driver lost control and collided with a house next to the road. On the issue of merits the plaintiff had to prove 1% negligence against the insured driver. Liability was settled in

that the defendant was ordered through the court order dated 12 June 2017 to pay 100% of the plaintiff's proven or agreed damages.

[2] The aspect of General Damages was also settled in the amount of R400 000.00 and an amount of R200 000.00 was also paid to the plaintiff as interim payment for past and future loss of earnings or earning capacity. The only issue for determination by this court is therefore that of past and future loss of earnings or earning capacity.

THE LEGAL POSITION

[3] The plaintiff's claim is governed by section 17 of the Road Accident Fund Act, 56 of 1996. In order to succeed the plaintiff has to prove that the injuries sustained in the accident diminished her estate. This principle was well captured by Straus AJ in **Van Heerden v Road Accident Fund [2014] ZAGPPHC 958** at paragraph 70 where the following was said: "now turning to the law in general on a claim for loss of future income. It is so that the mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury, which impaired the ability to earn an income, that there was in fact diminution in earning."

[4] At the time of the accident the plaintiff was 23 years of age and she is currently 29 years of age. From the accident she sustained the following injuries:

- Fractured right radius and ulna;
- dislocated left elbow;
- fracture humeral head right; and
- fracture right femur.

Dr Heymans, the orthopaedic surgeon, recorded that Ms Mabelane had a severe degree of pain and suffering following the injuries she sustained in the accident under discussion. She sustained a fracture of the greater tuberosity of the right femur and a dislocation of the right elbow. The left elbow was reduced, open reductions internal fixation of the greater tuberositas of the right humerus and the right radius and ulna fractures were done and an interlocking nail was inserted into the right femur. She was further treated conservatively. At present she complains about pain and discomfort in her right shoulder, right fore-arm, right thigh and left elbow with impaired movement of the elbow.

PRE ACCIDENT SCENARIO

[5] There is a contradiction with regard to whether the plaintiff was employed at the time of the accident or not. According to Rita van Biljon, the plaintiff's Occupational Therapist¹, from January 2013 to January 2014 the plaintiff was employed by Best Home and Electricity as a sales person. The reason for leaving was that "she did not earn enough money as it was commission based. From February 2014 to September 2014 she was unemployed. The Occupational Therapist goes on to say "according to the plaintiff she procured employment at a laundry department at an old age home called Sonop. She signed a contract that she planned to start employment on 28 September 2014". No proof was furnished of the said contract. However, Dr Pretorius, the Industrial psychologist², reports as follows:" prior to the accident Ms Mabelane completed Grade 11(2008). She failed Grade 12 2009. From 2010 until 2011 she secured employment at Mpho ya Bophelo as a General worker when her contract ended. She was then employed for one week as a Baker in Mooinooi as well as Best Home and Furnishers as a sales lady for 4 months... Ms Mabelane then secured employment at Barnets from early 2013 until the time of the accident (25/08/2014). The claimant indicated that the store closed down." This information could not be verified as the plaintiff could not furnish any proof. Dr Heymans, the plaintiff's Orthopaedic surgeon³ reported that "the patient was a sales lady employed by Best Home. After the accident she did not return to work. At present she is unemployed."

[6] From the reports by the experts the plaintiff could not prove that she was employed prior to the accident. I take cognisance of the fact that Barnes is a chain furniture shop and therefore it could have been easy to verify the information regarding the plaintiff's employment.

POST ACCIDENT POTNTIAL

[7] On the post-accident potential the industrial psychologist reports that "since the accident the claimant has been unable to secure employment and has remained unemployed (dependant on rental income from rooms she rent out). Considering her current level of her physical work capacity limitations, in combination with level of psychological functioning, as well as considering her employability profile(age, education, work experience, aspirations, etc.) as well as the characteristics of the labour market), the accident has rendered the claimant severely compromised competitor. Her work choices are limited.

¹ Case lines 033-25 page 11 paragraph 5.2 of the report

² Case lines 033-83 page 9 of the report

³ Caselines 033-11 page 11 of the report

[8] In the absence of information regarding her pre morbid employment status I am unable to make an informed decision in respect of her estate. In **Rudman v Road Accident Fund [2002] ZASCA 129** at paragraph 11 the following was said: *"in my opinion the learned judge in the court a quo has not misdirected himself in his understanding of these authorities or his appreciation 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."*

[9] John Sauer, the Actuary, made the following comment before calculating the plaintiff's loss of earnings: *"According to the addendum report of Dr W Pretorius (Industrial Psychologist) dated 2017/06/27, paragraph 8.5.1 Ms K Mabelane earned an income, as a General worker, of R 36000 per annum in 2014/08/25 monetary term. We project this income with linear increases until 2017/01/01. From then on she could have earned an average income of R54 000 (R49 000+ R59 000) per annum in 2017/0/01 monetary terms."*

[10] From the reports of both the Industrial Psychologist and the Occupational Therapist the plaintiff was employed as a sales lady at the time of the accident and not as a general worker. I have to emphasise that the plaintiff could not produce any shred of evidence regarding her employment. I can safely conclude that the experts who interviewed the plaintiff could not independently verify the information regarding this aspect, namely regarding her employment. Conveniently the plaintiff told the experts that Barnes, the furniture shop which employed her, closed down and therefore she could get information confirming her employment.

[11] In order for the actuary to calculate properly there must be accurate information to work on. In the absence of this information the calculations are bound to be wrong because a wrong basis shall have been applied. Although the aspect of calculating a loss of earnings is based on projections and postulations, these must be premised on the correct information presented by the plaintiff and independently verified through collateral information by the experts. As things stand the court does not know whether the plaintiff was employed at the time of the accident or not, and if she was indeed employed, by whom.

[13] The principle of how to approach the award of damages in a loss of income claim was developed in the widely quoted judgment of **Southern Insurance Association v Bailey** where it was held: *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All the court can do is to make an estimate, which is often a rough estimate, of the present value of the loss."*

[14] Dealing with a similar situation Petersen AJ in *Mlotshwa v Road Accident Fund* [2017] ZAGPPHC 109 said the following at paragraph 18 *"I agree with the salutary practice proposed in the above quoted paragraphs of Bailey. It has mustered approval in numerous judicial pronouncements and is widely accepted as the best practice available. I wish to add, however, what the learned Judge said further at page 379, which is omitted in Bailey. The two sentences which follow immediately upon the quote in Bailey are apposite:*

"...It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where best evidence available has been produced, though it is not entirely of a conclusive character and does not permit a mathematical calculation of the damage suffered, still, if it the best evidence available, the Court must use it and arrive at the conclusion based on it."

[12] It is the plaintiff's duty to put facts before the court in order for the court to arrive at a fair and equitable decision. In this case the plaintiff failed to prove that she was employed at the time of the accident, and if she was, how much was she earning. This is the information that was supposed to be readily available, but as I said earlier, even the experts have given contradictory accounts on this aspect.

[13] In the premises I am not satisfied that the plaintiff presented sufficient information regarding her employment in respect of her employment status and therefore I cannot speculate. The plaintiff's claim for loss of earnings should thus not succeed at this stage.

[14] Consequently I make the following order:

14.1 absolution from the instance.

14.2 No order as to costs

**KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA**

Delivered: this judgment was prepared and authored by the judge whose name is reflected 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 his matter on Caselines. The date for handing down is deemed to be 17 November 2021.

HEARD ON	:	04 August 2021
FOR THE PLAINTIFF	:	Adv Marx
INSTRUCTED BY	:	Booyens Attorneys
FOR THE DEFENDANT	:	No Appearance
DATE OF JUDGMENT	:	17 November 2021