

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 67298/2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
28 OCTOBER 2022

In the matter between:

H M Z[....]

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

van der Westhuizen, J

[1] The plaintiff instituted an action for damages relating to alleged injuries sustained in a motor vehicle accident that occurred on or about 1 October 2018. At

the time of the accident, the plaintiff was a passenger in a bus when the driver apparently lost control of the vehicle. The plaintiff was 26 years old on the date of the accident.

[2] On a previous occasion, the defendant conceded liability for a 100% of the proven or agreed damages suffered. Apparently, the defendant further conceded liability for general damages and offered an amount of R300 000.00 in respect thereof. The defendant further offered a certificate in terms of the provisions of section 17 of the Road Accident Fund Act. The plaintiff does not claim for past medical expenses. The only issue before the court was the claim for loss of earnings.

[3] The matter was set down for adjudication on 10 October 2022. When the matter was called, there was appearance on behalf of the defendant. The plaintiff had prepared an application for the striking off of the defendant's plea due to the non-compliance with a court order. Counsel appearing on behalf of the defendant was unaware of the said striking off-application. I allowed the matter to stand down to Wednesday, 12 October 2022, to enable counsel for the defendant to consider the striking off-application and to prepare for the trial.

[4] When the matter was called on 12 October 2022, counsel for the plaintiff indicated that the plaintiff would not pursue the striking off-application. The only rubric of damages to proceed was that of loss of earnings.

[5] The plaintiff alleged in her particulars of claim that she had sustained the following injuries:

- (a) Soft tissue injury left lower limb;
- (b) Soft tissue injury lumbar spine;
- (c) Suspected blunt head trauma;
- (d) Neck injury;

(e) Injury to the right leg;

(f) Cuts and bruises.

[6] Counsel for the defendant submitted that the record of the matter reflected that no hospital records were produced by the plaintiff, or were available. All evidence in respect of the injuries suffered due to the accident and the subsequent treatment, were provided by the plaintiff to all of the experts appointed to assist her in her claim against the defendant. In that regard, the expert report by Dr LF Oelofse, the orthopaedic surgeon, clearly reflected that no hospital records relating to the accident and the injuries suffered and the treatment provided were available. He further recorded that only limited records were available in respect of the initial injuries and treatment provided. He mostly obtained the information recorded in his report from what was to be found in the RAF1 and RAF4 forms and from the information supplied by the plaintiff on the day of his assessment of her. The latter took place on 12 March 2020.

[7] Dr Oelofse recorded in his report that according to the RAF4 form, the injuries recorded therein related to: blunt head trauma; soft tissue injury of the lumbar spine; and soft tissue injury to the left lower limb. He further recorded that the plaintiff was treated conservatively and provided with a prescription for antibiotics, analgesics and non-steroidal anti-inflammatories.

[8] On behalf of the plaintiff, an attempt was made to file a purported affidavit dealing with the issue of hospital records. In that regard, only page 5 of that document was filed on *CaseLines*. That portion of the document consisted of a paragraph 5 and bore the signature of the deponent and the commissioning details. It only bore the date recorded as 10 October. No year was recorded. The said paragraph 5 reads as follows:

“I have attempted to locate the hospital records of the day of the accident, however, the hospital has to date not obtained same. I was advised to open a new file, which I did when I went for a check-up.”

[9] The evidentiary value of the aforesaid document is negligible. It lacks particularity. It is not explained why the deponent personally was obliged to open a “new file” and not the hospital. The specific hospital is not stated. The date of the check-up is not stated. The document raises more questions than it provides answers.

[10] Considering the expert reports filed on behalf of the plaintiff, the following is revealed:

(a) A medico-legal examination undertaken by IDV Consortium (Pty) Ltd, Dr Isak Vorster, was done on 26 November 2019, more than a year after the collision, and recorded by him to have occurred on 10 October 2018. It does not provide any information on whether the recorded details were obtained from other medical reports, or from the plaintiff. Presumably, the facts of the injuries and treatment provided were forthcoming from the plaintiff;

(b) A radiologist’s report by Drs Booysens Zulu and Partners Inc. dated 28 November 2019 was provided to Dr I Vorster. The referring doctor was Dr I Voster. The report is similarly dated more than a year after the date of the accident;

(c) The RAF4 form was completed by the aforesaid Dr I Vorster and bore the date of 26 November 2019, the same date upon which the said doctor examined the plaintiff. It recorded the date of the accident as 10 October 2018;

(d) An Occupational Therapist report was filed by Karen Nieuwoudt. It recorded an assessment undertaken on 10 March 2020. The report recorded the accident to have occurred on 1 October 2018. The report further recorded that the documentation made available to the said occupational therapist were:

(i) A letter of instruction from the plaintiff’s attorneys, Messrs Van Niekerk Attorneys dated 10 December 2019;

(ii) A RAF4 Serious Injury Assessment report by Dr LF Oelofse dated 12 March 2020;

(iii) A RAF4 Serious Injury Assessment report by Dr ID Vorster dated 26 November 2019;

(iv) A Medico-Legal report by Dr ID Vorster dated 26 November 2019;

(v) A Medico-Legal report by a physiotherapist, Gerda Cilliers, dated 25 March 2020;

(vi) A Medico-Legal report by a clinical psychologist, Leon Roper, dated 26 March 2020;

(vii) A Medico-Legal report by an orthopaedic surgeon, Dr LF Oelofse, dated 12 March 2020.

(e) The report by Dr Oelofse recorded the accident to have occurred on 1 October 2018. His RAF4 form also recorded the date of the accident as 1 October 2018;

(f) The neuro-clinical psychologist, also recorded the date of the accident to have occurred on 1 October 2018 in his report;

(g) The Industrial Psychologist, Frieda van der Westhuizen, recorded in her report that the accident occurred on 1 October 2018. She had at her disposal the orthopaedic report of Dr Oelofse from which she gleaned the apparent injuries and the reports by Dr Vorster, Ms Cilliers, Mr Roper, Ms Nieuwoudt, the RAF4 forms by Drs Vorster and Oelofse respectively, and the RAF1 form by Dr Vorster;

(h) Likewise, Ms Cilliers recorded the date of the accident to have occurred on 1 October 2018. In her report, Ms Cilliers stated that she had at her disposal hospital records that apparently indicated that the plaintiff was

an outpatient on 1 October 2018. She also recorded that limited hospital records were available;

- (i) The actuarial report by Johan Sauer also recorded the date of the accident as that of 1 October 2018.

[11] From the aforementioned reports, there appears to be a discrepancy between the reports by Dr Vorster and the rest of the experts in respect of when the accident occurred. The date of the accident relayed to the experts could only have come from the plaintiff. The plaintiff's particulars recorded that the accident occurred on 1 October 2018. The obvious discrepancy in respect of the date on which the accident occurred was not explained.

[12] It is further apparent that most of the information relating to the injuries suffered as a result of the accident and the subsequent treatment immediately after the accident, were obtained directly from the plaintiff. No hospital records were available to corroborate the plaintiff's version. The hospital records at the disposal of Ms Cilliers indicating treatment of the plaintiff as outpatient on 1 October 2018 were not favoured to the other experts and were not made available to the court or filed on *CaseLines*.

[13] The plaintiff chose not to testify. Only legal argument was presented on behalf of the plaintiff in respect of the loss of earnings. The respondent did not call any witnesses either. Judgment was reserved after hearing legal argument.

[14] The thrust of the earning capacity of the plaintiff post-accident, as reported by the experts, is one of diminished capacity, thereby affecting her future earnings.

[15] To succeed in a claim for loss of earnings, the plaintiff is obliged to show a direct correlation between the injuries sustained in the accident and the impairment of earning capacity. The injuries sustained in the accident must be proven to be the direct cause for the loss of earning capacity. That has not been proven by the plaintiff. The lack of hospital records indicating the injuries suffered and present on admission to the hospital immediately after the accident as well as the subsequent

treatment, causes a flaw in the link to impairment of the loss of earning capacity. This is exacerbated by the fact that all the experts were obliged to opine on the facts in respect of the injuries and subsequent *sequelae* provided by the plaintiff. The apparent discrepancy in respect of the date of the accident as recorded earlier, does not assist in any manner.

[16] Speculation whether the injuries alleged by the plaintiff to have been sustained in the accident upon which the experts were to opine upon in respect of any impairment or not upon the plaintiff's earning capacity cannot be a basis upon which a court could and should make an award. The plaintiff is to prove her damages. No causal link between the accident and the alleged injuries has been proven. Dr Oelofse, in his report assumed that the injuries related to the accident. In that regard he stated the following:

"Please note that there are limited records available for perusal with regards (sic) to the patient's initial injuries and treatment. Most of the information in this report was taken from the RAF1, RAF4 and the patient's account of events. It is presumed that this information is true and correct."

[17] An assumption is not a fact.

[18] The official accident report filed on record reveals a two page list of all the passengers on board the bus. The list further indicated the ages of the passengers, their cell phone numbers and address. That list recorded 5 passengers who had the surname Z[....], namely:

- (a) P[....] Z[....], no age stated, no cell phone number was recorded and no address provided;
- (b) N[....]2 Z[....], aged 37 years, a cell number was recorded as well as an address;
- (c) A[....] Z[....], aged 11 years, a cell number was recorded (the same as that for N[....]2) and the same address as that of Nonthando;

(d) N[....] Z[....], 17 years of age, no cell phone number was recorded and address that was the same as that of Nothandu;

(e) B[....] Z[....], no age recorded, however a cell phone and address was recorded that was the same as that of N[....]2.

[19] None of the aforementioned persons had the names of the plaintiff. The plaintiff's address stated in the pleadings differed from the addresses of the persons on the passenger list referred to above.

[20] A document entitled witness statement recorded the names of fellow passengers. None of the names listed referred to the plaintiff.

[21] The ineluctable result is that the plaintiff has failed to prove her claim under the rubric of loss of earnings.

I grant the following order:

1. The plaintiff's claim for loss of earnings is dismissed.
2. No order is made in respect of costs.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

Date of Hearing:

12 October 2022

On behalf of Applicant:

Ms A Jansen

Instructed by:

Van Niekerk Attorneys Inc.

On behalf of Respondent:

Ms T K Gaokgwathe

Instructed by:

The State Attorney

Judgment Handed Down:

28 October 2022