


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
16 September 2024	
Date	Signature

CASE NO:37634/2020

In the matter between:

LOUISAH MAKHURANA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

REASONS

Mazibuko AJ

Introduction

1. On 1 May 2019, whilst driving a motor vehicle, the plaintiff, Ms Louisah

Mathebula, formerly Makhurana ("*Ms Makhurana*"), 48 years old, collided with another motor vehicle driven by an identified insured driver at the intersection of Solomon Mahlangu Drive and Ravele Street, Mamelodi East, Pretoria. As a consequence of the collision, Ms Makhurana sustained bodily injuries. She instituted a delictual claim against the defendant in terms of the Road Accident Fund Act¹ as amended.

Litigation history and background facts

2. On 14 March 2024, the matter served before me for determination of merits and loss of earnings, as the defendant has rejected the claim for general damages. It was common cause between the parties that Ms Makhurana sustained injuries as a result of the motor vehicle accident. Her back, head, neck, and two of her toes were injured. She lost four of her lower front teeth. It was also alleged that she was employed at Monabo Hygiene Services ("*Monabo*") as a cleaner and supervisor for other cleaners at the time of the accident.
3. By consent between the parties, the court granted the application for the evidence to be adduced by way of affidavits in terms of rule 38(2) of the Uniform Rules of Court.²
4. The oral evidence of Dr P. Kumbirai, the orthopaedic surgeon; Dr M.P. Seroto, the neurosurgeon; L. Selamolela, the clinical psychologist; S.D. Mogola, the occupational therapist; B. Selepe, the industrial psychologist; and J Sauer, the actuary, was dispensed with.
5. After the admission into evidence of the plaintiff's expert reports, the matter stood down until 24 June 2024 for the parties to clarify the issue of the employer's certificate and other related collateral documentation.

¹ Act 56 of 1996.

² Uniform Rules of Court, Act 59 of 1959.

6. On 24 June 2024, I was informed the proof of employment had yet to be filed. I granted the parties' request to stand the matter down until 27 June 2024 for Mr Phokwane, on behalf of the defendant, to familiarise himself with the employment certificate and other documentation provided by Ms Makhurana in support of her loss of earnings claim.
7. On 27 June 2024, the parties, respectively closed their case and made closing submissions. Ms Makhurana, through her counsel, Mr Rafedile, brought an application for the defendant to be absolved from the instance. The application was refused; instead, her claim for loss of earnings was dismissed with costs. Now, she has requested reasons for the court's order.

Plaintiff's case

Ms Makhurana

8. In order to prove her case, Ms Makhurana testified that at the time of the accident, she was employed at Monabo as a cleaner and also supervising other cleaners. She was no longer employed due to the accident, as she suffered from backache, forgetfulness, impatience and mental challenges. After the accident, she was taken to Mamelodi Hospital and later assessed by different experts she appointed. Her mother was taking care of her needs. Under cross-examination, she testified that the employment with Monabo was on a contract basis and that her salary was deposited into a banking institution.

Hospital records

9. According to the Mamelodi hospital records, she was admitted and treated for neuro observations and conservative management of the cervical spine injury following a car accident. She was discharged with medication and follow-up dates.

RAF 1 form

10. In her RAF 1 form, she indicated the type of compensation claimed as *Future medical expenses (undertaking)*, *Future loss of support (R500 000)* and *Non-pecuniary loss (general damages) at R1 000 000*. She did not claim loss of earnings.

Particulars of claim

11. In paragraph 9 of the particulars of claim, it was averred:

'As the result of the injuries she had suffered and will suffer damage in the amount of R1 500 000.00, which damage constituted as follows:

8.1	<i>Non-emergency medical expenses</i>	<i>R0</i>
8.2	<i>Future medical expenses</i>	<i>Undertaking</i>
8.3	<i>Past loss of income</i>	<i>R0</i>
8.4	<i>Future loss of income</i>	<i>R1 000 000.00</i>
8.5	<i>General damages</i>	<i>R 800 000.00</i>
	TOTAL DAMAGES	<i>R1 800 000.00.'</i>(sic)

Experts' reports

Orthopaedic surgeon

12. Dr P. Kumbirai is, by qualification, an Orthopaedic surgeon who assessed Ms Makhurana. He reported that he interviewed Ms Makhurana, who informed him that her highest level of formal education was matric. At the time of the accident, she was employed as a tea lady at UJM Builders. The job required frequent movements, and after the accident, she never returned to work. She has been unemployed since then. She complained of painful left foot, neck pain, lower back pain and pain in the right shoulder. He noted no deformities. His opinion was that no significant negative orthopaedic effect was foreseen.

Neurosurgeon

13. Dr M.P. Seroto, qualified as a neurosurgeon, assessed Ms Makhurana. According to his report, Ms Makhurana's highest level of education was a Diploma in business studies. At the time of the accident, she was a filing clerk and was not able to return to work due to back pain. She reported forgetfulness, short temper, signs of post-

traumatic stress disorder (anxiety, nightmares and fear of vehicles) and insomnia after the accident. He opined that her life expectancy would not be affected and that the maximal medical improvement had been reached.

Occupational therapist

14. Ms S.D. Mogola is, by qualification, an Occupational therapist. She stated in her report that during her interview with Ms Makhurana, she was informed that at the time of the accident, she was a cleaner at Monabo. Her job description included cleaning offices, mopping, dusting, packing cupboards and washing dishes. Apart from the physical and functional challenges, she reported home management problems, which include the inability to engage in heavy household chores and psychosocial difficulties, which entail the failure to control her anger, her short temper and her fear of driving. She cannot cope with her previous and future occupations, which will affect her work output.
15. Due to the accident, she cannot sit and stand for more than one hour without feeling tired. She endured the pain and inconvenience as a result of symptoms emanating from the injuries sustained during the accident.

Clinical Psychologist

16. Ms L. Selamolela, a qualified clinical psychologist, interviewed Ms Makhurana in September 2022. Her report states that Ms Makhurana was not employed during the accident. She complained of persistent headaches and displayed symptoms associated with head injury or traumatic brain injury, which include impaired judgment, memory difficulties, poor attention capacity, and poor abstraction ability. She presented with emotional and behavioural changes.

Industrial Psychologist

17. Ms B. Selepe is qualified as an Industrial psychologist. During the interview with Ms Makhurana, she was informed that her highest educational qualification was matric. At the time of the accident, she was employed as a cleaner at Monabo from 2018 to 2019, earning R3 400 monthly.

18. She opined that Ms Makhurana's job seems medium, with the heaviest weight handled at work, which involved standing, walking and bending. She opined she would have continued to work as a cleaner without any limitations until normal retirement age or even beyond. She may not return to her pre-accident level of functioning to engage in a wide spectrum of skilled and semi-skilled occupations or positions due to her serious long-term neurocognitive and neuropsychological impairment.

Actuary

19. The actuary calculated the past loss of earnings, considering that Ms Makhurana was employed as a cleaner at the time of the accident with monthly earnings of R3 400. He made provision for past loss of earnings pre-morbid in the amount of R 254 934, and from this amount factored a 5% contingency deduction, bringing the net past loss pre-morbid to R242 187. He noted that post-accident, Ms Makhurana could not resume her pre-accident employment or any employment; thus, no post-morbid postulation was projected.
20. Regarding future loss of income, he proposed a pre-morbid contingency deduction of 5% on the assumed or projected amount of R 1 554 547 had the accident not happened, bringing the total future earnings to R 1 476 820. On future post-morbid, a deduction of no earnings was projected as the claimant did not resume pre-accident employment or any employment. He stated that an amount of R 1 719 007 may be awarded to Ms Makhurana as a total loss of income per the Actuarial calculations.

Defendant's case

21. Through its counsel, Mr Phokwane, the defendant conceded the merits at 100%. The defendant did not contend Ms Makhurana's injuries. It was contended that she had not made out a case for loss of earnings as she did not provide any proof of her earnings and collateral information and documentation since she left her employment at Monabo months before the accident.

Issue

22. The issue for determination was the loss of earnings due to injuries sustained in the collision.

Legal framework

23. In *Mvundle v RAF*³, Kubushi J stated that:
"It is trite that damages for loss of income can be granted where a person has, in fact, suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or be limited in the number and quality of his/her choices should he/she decide to find other employment."
24. In *RAF v Guedes*,⁴ the court stated that:
"In assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in actuarial calculation. The deduction is the prerogative of the court."
25. In *Schwikkard PJ (et al.), Principles of Evidence*⁵, a basic principle that applies in civil matters is discussed, which is: *'In civil cases, the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities" but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.'*

³ Unreported North Gauteng High Court case number 63500/2009 (17 April 2012).

⁴ 2006(5) SA 583 paras 9-10.

⁵ (4 edn, JUTA 2016).

26. *"At the close of the case, when both parties have had the opportunity to present whatever evidence they consider to be relevant, the defendant will be 'absolved from the instance' if, upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. It means that the plaintiff has not proved her claim against the defendant. It is not a bar to the plaintiff reinstating the action (provided the claim has not by then prescribed), and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution from the instance is the proper order when, after all the evidence, the plaintiff has failed to discharge the normal burden of proof. Absolution from the instance is the proper order when, after all the evidence led, the plaintiff has failed to discharge the normal burden of proof." See Principles of Evidence.⁶*

Application for absolution

27. It was unclear, even on seeking an explanation, why Ms Makhurana elected to seek an order to absolve the defendant. Her counsel seemed to pursue the application with little enthusiasm. In principle, she conceded that she had not presented the court with sufficient evidence for her claim of loss of earnings.
28. It is not explicitly clear from authorities whether the plaintiff may bring an absolution application. What is clear is that at the close of the case, when both parties have had the opportunity to present whatever evidence they consider to be relevant, the defendant will be 'absolved from the instance' if, upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged.
29. Ms Makhurana testified that at the time of the accident, she was employed as a cleaner and sometimes supervised other cleaners. In her section 19(f) affidavit, she stated that she was not employed. The relevant paragraphs in her RAF 1 form relating to her employment or self-employment were left blank.

⁶ Section I Proof Without Evidence, Chapter 32, The Standard and Burden of Proof and Evidentiary Duties in Civil Trials, paragraph 32.6.

30. Regarding the employment certificate, a letter dated 31 May 2024 from the HR Administrator, Mr Tshepo Morake of Monabo, her erstwhile employer, was by agreement between the parties admitted into evidence. The letter reads:

'This letter is to confirm Louisah Mathebula: ID NO.[...] was employed by Monabo Hygiene Services as a Temp / Reliever from the 26/02/2018 and left on 31/10/2018. She started off at different sites then she was based at a site where she was holding for someone during the 8months period(sic).'

She was paid according to the number of days she worked, to estimate the amount she'd receive on a monthly basis it was more or less around R 2 000.00 – R2 200.00. (sic).'

31. Her evidence concerning the highest qualification she attained differs from one expert to another. To the orthopaedic surgeon, she stated she was a tea lady with matric. To the neurosurgeon, she had a Diploma in Business Studies and was a filing clerk at the time of the accident. Even if to her credit, I may accept that a cleaner may simultaneously fulfil the duties of a filing clerk. Unto the occupational therapist and the Industrial psychologist, she had matric, and she was employed as a cleaner at Monaba at the time of the accident. Regarding her qualifications, no documentation was presented, either for matric or the Diploma. These differences and contradictions, in my view, are material as they could not be explained, especially when evaluating evidence concerning a claim for loss of earnings.
32. The court must consider the whole body of evidence and make a determination. Given the completed RAF 1 form, her section 19(f) affidavit, her erstwhile employer's certificate and what she informed her experts concerning her employment status, and did not avail her bank statements into which the salary was deposited. What I find probable and consistent with proven facts is that she was not employed at the time of the accident, as she had long left her erstwhile employment at Monabo. Further, she did not possess a matric certificate.

Conclusion

33. It is correct that she had failed to discharge the onus for her claim of loss of earnings and concedes to that by implication when she brings the application for the absolution of the defendant.
34. The question then was whether, under the circumstances and considering the whole body of evidence, it was competent to absolve the defendant or dismiss the claim. The evidence presented before me is unlikely to change. Even if Ms Makhurana intends to reinstate the claim at a later stage, without prejudging, she might be met with prescription. See *Liberty Group Ltd v K & D Marketing & Others*.⁷
35. Even when I consider the absolution application in the interest of justice, by considering prospects of success in the future. Given the evidence and the number of opportunities, even when the trial had commenced, availed to Ms Makhurana to gather documentation and information about her employment at the time of the accident, there appear to be no prospects of success. Therefore, her claim for loss of earnings stands to be dismissed with costs as she had not made out a case in that regard.
36. Even if I may be wrong in dismissing the claim instead of absolving the defendant, as sought by her. The matter deserves to be finalised. The effect of absolution from the instance and dismissal of the claim may appear similar and sound equivalent. However, in my view, dismissal of the claim brings about finality with an unpretentious effect compared to absolution, whose outcome is operable. Ms Makhurana's application for an order absolving the defendant must fail, and her claim for loss of earnings must be dismissed.
37. As a result, the following order is granted;

⁷ (1290/18) [2020] ZASCA 41, paragraph 10.

Order:

1. The defendant is liable to compensate the plaintiff for 100% of the proven delictual damages suffered as a result of the motor vehicle collision which occurred on 8 August 2019.
2. The plaintiff's application to absolve the defendant from the claim for future loss of earnings is refused.
3. The plaintiff's claim for loss of earnings is dismissed with costs.

A black rectangular redaction box covering the signature of the judge.

N. Mazibuko

Acting Judge of the Gauteng Division, Pretoria

This judgment was handed down electronically by circulation to the parties' representatives by email.

Representation:

Counsel for the Plaintiff:

Mr Rafedile

Attorneys for the Plaintiff:

FM Malesa Attorneys

Counsel for the Defendant:

Mr K. Phokwane

Attorneys for the Defendant:

State Attorney (Pretoria)

Heard:

14 March 2024, 24 June 2024 & 27 June 2024

Date of Judgment and Order:

27 June 2024

Written reasons:

16 September 2024