

SOUTH AFRICA / JUDGMENT

Aphane v RAF (8786/2015) [2017] ZAGPPHC 981 (3 November 2017)

[2017] ZAGPPHC 981

COURT

North Gauteng High Court, Pretoria

BEFORE

L Vuma

CASE / FILE NUMBER

8786/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NUMBER: 8786/2015

NOT

REPORTABLE.

NOT OF

INTEREST TO OTHER JUDGES.

REVISED.

3 NOVEMBER

2017

In the

matter between:

APHANE,
THEMBANA
JOHN PLAINTIFF
and
ROAD
ACCIDENT
FUND DEFENDANT

JUDGMENT

VUMA. AJ

- [1] This is a claim for past and future loss of earnings against the Road Accident Fund ("RAF") as a result of injuries sustained by the plaintiff in a road accident that occurred on 27 January 2012.
- [2] The parties submitted that merits were conceded 100% and that all the plaintiff's other heads of damages were settled. The plaintiff's injuries were admitted and they are detailed in, inter alia, the orthopaedic surgeon Dr Kumbirai's report, the occupational therapist Ms B Ngwato's report, the clinical psychologist MEG Kalane's report and the industrial psychologist Mr M.C. Kgosana's report as follows:
- 2.1 A mild head injury;
- 2.2 A severe back injury;
- 2.3 Abdominal pains soft tissue injuries and still experience pains; and
- 2.4 Also lost two teeth.
- [3] No evidence was led by either party and despite the fact that no expert reports were formally admitted, the plaintiffs expert reports were referred to by both parties.
- [4] Mr Mosiane, who appeared for the defendant, proceeded on the basis that the plaintiff's own expert reports were conflicted in that whereas the occupational report states that after the collision he returned to work two weeks after the accident and was doing three different odd jobs, on the contrary both the industrial and actuarial reports state that after the accident the plaintiff never returned to work. He argued that to the extent that the occupational report states that

the plaintiff returned to work post the accident, that on its own is indicative of the fact that the plaintiff is still employable. He further submitted that in the light thereof what the court needed to determine is the extent of the plaintiff's loss of earning capacity and that in this regard the court should apply a 10% contingency deduction in respect of his future loss of earnings.

- [5] In his reply to the above, Mr Thabede, who appeared for the plaintiff, stated the following:
- He confirmed that the only outstanding issue was both the past and future loss of earnings;
 - Merits have been settled 100% in favour of plaintiff;
 - He added that the general damages have also been settled at R300 000-00; and
 - The defendant has offered a section 17(4) Undertaking.

- [6] He further conceded that there were indeed discrepancies in the experts reports and that in a bid to address same, the parties have agreed that a 10% contingency be applied regarding the question whether or not the plaintiff did return to work post the accident. This was confirmed by Mr Mosiane.
- [7] Mr Thabede further stated that the parties have also agreed that the calculations appearing on page 119 of Koch Consulting Actuaries report ("Koch's report") where there are two projections under paragraph which reads "results" be used. In terms of the said two projections, the plaintiff's past income is stated as R66 642-00 and his future income as R 829 914-00. By agreement between the parties, a 10% contingency was applied on the plaintiff's above-stated past income, bringing same to an amount of R59 977-08. This was confirmed by Mr Mosiane.
- [8] Regarding the plaintiff's future loss of earnings, Mr Thabede submitted that at the time of the accident the plaintiff was 27 years old employed as farm worker. He never returned to work due to the post-morbid condition, having tried to work but could simply not cope. It was further argued that according to the Koch report the plaintiff was no longer employable and that despite same, the plaintiff was willing to agree to a higher post-morbid 60% contingency in respect of future

loss of income as the said contingency will equally address the concerns raised by the defendant's counsel. He submitted that such a moderately higher post-morbid contingency deduction compensates for the risk of future loss of earnings given his lower back injuries and lack of education. Also, the fact that he was post the collision now primarily dependent on sympathetic employment supported a post-morbid higher contingency deduction and the fact that he would be disadvantaged in an open labour market should weigh in his favour.

- [9] He further referred to paragraph 13.2 on page 114 of the industrial psychologist report wherein it is stated that whereas the plaintiff previously depended on his physical ability to generate an income, he, however, may no longer be able to secure alternative employment and will therefore remain unemployed, possibly until normal retirement age, due to the accident. He was growing cabbages prior, which job entailed prolonged standing, walking and lifting of heavy objects. His highest level of education is standard 3. Mr Thabede dismissed the argument by Mr Mosiane that the injuries the plaintiff sustained in a prior accident also contributed to his current condition, arguing that the injuries sustained by the plaintiff in the accident in casu were primarily on his back which is what was mainly impacting on his employability or otherwise.
- [10] Mr Thabede proposed the following scenario in respect of the plaintiff's future loss of income: that the Koch's report's amount of R829 914-00 be used as the baseline, upon which the parties' agreed 10% deduction be applied to address the contradictions in the experts reports regarding the question whether or not the plaintiff returned to work

post the accident; upon the difference thereof which is R746 231-00 , a 60% post-morbid contingency deduction be applied, which will bring the nett loss by the plaintiff in respect of future earnings to R414 573-00.

- [11] Mr Thabede submitted that the said amount in respect of future loss of income should be added to the agreed past loss of income totalling R59 977-08 , which will then bring the total payable amount in respect of both past and future loss of income to R474 550-80.
- [12] It is common cause that matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies. As was held in the matter of *De Jonqh v Gunter* 1975 (4) SA 78 (W) 80F, such matters are usually provided for by deducting a stated percentage of the amount or specific claims.
- [13] In the matter of *Burns v National Employers General Insurance Co Ltd* 1988 (3) SA 355 (C) 365, it was held that contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage.
- [14] As was held in the matter of *AA Mutual Association Ltd v Magula* 1978 (1) SA 389 (W), the percentage of the contingency deduction depends upon a number of factors, which factors are usually taken into account

over a particular period of time, generally until the retirement age of the plaintiff.

- [15] Colman J provided a useful exposition in *Burger v Union National South British Insurance Co* 1975 (4) SA 72 (W) 75, of the approach to be adopted by the Court:

"A related aspect of the technique of assessing damages is this one; it is recognised as a proper, in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said on a preponderance of probability that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind."

- [16] In the final analysis, what has to prevail is what was held in the matter of *Shield Insurance Co Ltd v Hall* 1976 4 SA 431 (A) 444 , that the provision for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair.
- [17] Bearing the above in mind, I am therefore inclined to agree with Mr Thabede that based on the nature of the injuries the plaintiff sustained and the expert reports referred to, a 60% post-morbid contingency is fair and reasonable. I am mindful that in applying an appropriate contingency to the plaintiff's post-morbid earnings, his employability prospects need not be established as a probability but merely as a possibility.

[18] It is common cause that contingencies of whatever nature generally serve as a control mechanism to adjust the loss to the circumstances of the individual case in order to archive justice and fairness to the parties. As was held in the matter of Hall v RAF 2013 (6J2) QOD 126 (SGJ) , the question of the contingencies deductions to be applied, as is the calculation of the quantum of a future amount involving, in casu, loss of earning capacity, is often difficult. The Court has a

wide discretion based on a consideration of all the relevant facts and circumstances.

[19] As stated above, it is common cause that the defendant did not have any actuarial report. In arriving at the total nett loss figure of R66 642-00 and R829 146- 00 (the past and future loss of earnings respectively, the plaintiff's actuary had made no general contingencies deductions in respect of both the pre-accident for past loss of earnings and post-accident future loss of earnings. With regard to the past loss of earnings the parties have agreed to a 10% contingency deduction bringing the agreed amount to R59 977-80. However, in respect of future loss of earnings the plaintiff's counsel had suggested a 60% contingency deduction on the basis that the plaintiff may never be employed again in an open market except for some sympathetic employment, if any. On behalf the defendant it was suggested that a 10% contingency deduction be made since the plaintiff might well get employed in the future.

[20] As already stated in paragraph 18 above, it is my view that the defendant's assumptions regarding the plaintiff's future employability prospects are somewhat over-optimistic. It is for these reasons that I find 60% contingency to be a fair and reasonable deduction for plaintiff s future loss of earnings on the amount of R746 231-40 which brings the amount due to the plaintiff to a total of R414 573-00. Mr Thabede submitted that 60% contingency means that there is 40% possibility that the plaintiff can still be employed, since the occupational therapist states subject to treatment he may be able to return to work.

[21] In the result I make the following order:

1. That the defendant make a payment to the plaintiff in the amount of R714 573- 00 (SEVEN HUNDRED AND FOURTEEN THOUSAND FIVE HUNDRED AND SEVENTY THREE RAND) being in respect of:
 - 1.1 R 414 573-00 for future loss of earnings.
 - 1.2 R59 977-80 for past loss of income.
 - 1.3 R300 000-00 for general damages.
2. Interest on the aforesaid amount at the current legally prescribed rate of 10.5% from a date 14 days after the date of judgment to date of payment.
3. By agreement between the parties an Undertaking in terms of section 17(4) of the RAF Act 56 of 1996.
4. The defendant is ordered to pay the plaintiff's costs of the suit.

L VUMA

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard: 7 August 2017

Judgment

delivered: 2 November 2017

Appearances:

For Plaintiff: Adv M.I. Thabede

Instructed by: Chueu Incorporated

For Defendant: Adv P.T. Mosiane

Instructed by: Moche Attorneys

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Prepared on 23 October 2026 · Esheria