

SOUTH AFRICA / JUDGMENT

Chittagadu v RAF (34854/14) [2017] ZAGPPHC 1110 (8 August 2017)

[2017] ZAGPPHC 1110

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi

CASE / FILE NUMBER

34854/14

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 34854/14

8/82017

(1)

NOT REPORTABLE.

(2)

NOT OF INTEREST TO OTHER JUDGES.

(3)

REVISED.

In

the matter between:

RONICA

CHITTAGADU

PLAINTIFF

vs

ROAD ACCIDENT

FUND

DEFENDANT

JUDGMENT**KUBUSHI J****INTRODUCTION**

[1] The plaintiff instituted action against the defendant for damages in respect of bodily injuries she sustained in a motor vehicle collision. The merits part of the claim has been settled and the defendant has

accepted full liability for the damages sustained by the plaintiff. The dispute before me is only on quantum and then only on general

damages and loss of earnings.

[2] At the commencement of trial the plaintiff's counsel handed in a copy of the Minutes of the Second Pre-Trial Conference between the parties. He also handed in the following court Bundles: Index: Plaintiff's Document Bundle; Index: Plaintiff's Expert Reports Volume 1; Amended Index: Plaintiff's: Expert Reports Volume 2; Index: Joint Minutes; Index: Photos; Index: Notices Volume 6; and Index: Defendant's Experts Reports.

[3] The parties were agreed that only two witnesses will be led by the plaintiff, namely the plaintiff herself and the plaintiff's Industrial Psychologist. The evidence to be led in this regard pertained only to certain specific issues. I shall come back to this evidence later in the judgment.

[4] The parties were also agreed that other issues were to be argued by counsel on the basis of the expert reports filed of record. In terms of the pre-trial minutes the parties had an understanding that where the defendant has an expert report in the same discipline the defendant will defer to its expert. Where the defendant does not have an expert in the same discipline, the defendant admits the plaintiff's expert reports but defer in respect of these reports to comments made by the defendant's other experts about a subject in dispute.

INJURIES SUSTAINED

[5] The plaintiff, Dr Chittigadu, is a general medical practitioner and was at the time of the accident self-employed in private practice in Carletonville. She had been so employed since 2008. She was unable to work for six months after the accident and a locum was employed in her absence. She retained the locum to work as an assistant after returning to work. She is married and has two children. Her husband is the practice manager.

[6] It is common cause that Dr Chittigadu sustained serious multiple orthopaedic injuries with severe sequelae. She has permanent damage to her neck, left wrist, left and right knee, which may require knee replacement in future. She will, going forward, benefit from conservative and surgical treatment. Multiple unsightly scars are seen over various parts of her body. The plastic surgeon's opinion is that she will require extensive scar revision

surgery. According to the neurosurgeon, the plaintiff suffered a mild brain injury. Her working ability has as a result decreased significantly. The psychiatrist diagnosed her with an unspecified neurocognitive disorder due to her depression, anxiety, PTSD and chronic pain. From a psychological point of view, Dr Chittigadu is said to present with moderate neurocognitive deficits as well as significant trauma, mood and behavioural symptoms which impact all levels of her functioning.

LOSS OF EARNINGS

- [7] It is not in dispute that Dr Chittigadu suffered loss of earnings and that she should be compensated for that. The plaintiff's counsel contended for an amount of R2 303 294 as fair and reasonable compensation for the plaintiff's loss of earnings whilst the defendant's counsel contended for a lesser amount.

Basis of Calculation

- [8] Both parties relied on the actuarial calculations of Mr Loots (the plaintiff's actuary) but contended for different amounts as a basis for calculations. Mr Loots' actuarial calculations were on the basis of Joint Minutes of the parties' Industrial Psychologists. There were, however, some discrepancies in the Joint Minutes of the Industrial Psychologists

which the plaintiff sought to cure by introducing the evidence of her industrial psychologist. There were also some differentiations in regard to the basis for calculation, the question being whether a longer period, as in taking the plaintiff's average earnings for three years, or a shorter period of two years occasioned by the decrease of earnings during the year 2011, would be a valid basis point to start the calculations. The plaintiff sought to correct this differentiation by providing an explanation of the decrease by tendering evidence to that effect. The result was that the plaintiff gave evidence explaining the cause of the dip (decrease) that occurred in her earnings just before the collision; and her industrial psychologist, Ms Suzanne Schlebusch, in her evidence gave an explanation about the mistakes contained in the Joint Minutes she signed with the defendant's industrial psychologist.

- [9] In cross examining the witnesses, the defendant's counsel disputed the validity of the figures in the Joint Minutes of the Industrial Psychologists which Ms Schlebusch sought to correct in her evidence. This occasioned the necessity for the plaintiff to call her actuary to come and explain the figures further. Nevertheless, the defendant's counsel relented and ended conceding that the mistakes noted in the Joint Minutes of the Industrial Psychologists were condonable.
- [10] Mr Loots' calculations are based on two scenarios. Scenario 1 is premised on Ms Schlebusch's opinion that the plaintiff will retire at the age of 70yrs pre-morbid and at 65yrs post-morbid. Scenario 2 is premised on Mr Van Blerk's (the defendant's industrial psychologist's) opinion that the plaintiff will retire pre-morbid at 65yrs and post-morbid at 65yrs. During argument, the plaintiff's counsel contended for an amount in scenario 1, that is an amount of R2 350 582 as the present value of the loss of earnings as at 1 August 2017. In

the alternative, counsel contended for the amount in scenario 2, that is R193 398 as the present value of the loss of earnings as at 1 August 2017. The defendant's counsel, on the other hand, contended for an amount of R1 671 131 as the present value of the loss of earnings as at 1 August

2017. It only became apparent, after I had pertinently made enquiries from the parties' counsel about the different amounts contended for, that counsel were arguing their respective points from different actuarial reports. The argument by the plaintiff's counsel was based on Mr Loots' report dated 31 July 2017 whereas the defendant's counsel was relying on Mr Loots' report of 20 July 2017. The defendant's counsel ended conceding that the report dated 31 July 2017 should be utilised as a basis for the calculations.

Contingencies

- [11] What then became an issue were the contingency percentage deductions. The parties were in agreement that in the circumstances of this case contingency deductions were necessary and that such deductions were in the prerogative of the court. Nevertheless, the parties were not agreed as to the percentages that should be applied for the deductions. The plaintiff suggested an amount of 15% deduction pre-morbid and 25% post-morbid with a 10% differential on scenario 1; the total amount is R2 303 294. In the alternative, and based on scenario 2, the plaintiff's counsel opted for 15% pre-morbid deduction and 50% deduction post-morbid; the total amount is R2 145 090. To the contrary, the defendant's counsel suggested a deduction of 5%

pre-morbid and 20% post-morbid with a 15% differential on both scenarios.

- [12] I am inclined to accept that the plaintiff would have worked, pre-morbid, up to the age of 70yrs. In coming to this conclusion, I considered the fact that there is evidence she would have wanted to work until that age. The trend is that professionals do not retire early but tend to work until late in their lives especially when they are self-employed, like the plaintiff. Other factors to consider are that her children are still young and that she is the primary bread winner.

- [13] In the circumstances I find that the amount of R2 303 294 contended for by the plaintiff as fair and reasonable compensation for her loss of earnings. The defendant's counsel wanted to introduce the actuarial calculations of Rosewood - its actuary. I have accepted that these calculations should be ignored because they do not reflect the correct starting

figures.

GENERAL DAMAGES

- [14] For general damages, the plaintiff contends for an amount of R900 000. In support of this contention the plaintiff relied on three cases namely,

14.1 Nonkwali v Road Accident Fund (Eastern Cape High Court, Mthatha: Case No. 771/2004) date of judgement: 21 May 2009, the injured person was an unemployed female in possession of a three-year teaching diploma. She sustained the following injuries: a pelvic ring disruption involving her left

inferior pubic ramus, pubic symphysis and left sacro-iliac joint, a close fracture of the mid-shaft of her right tibia, a subluxation C2 on C3, not associated with spinal cord or nerve root damage and fractures of her fifth, sixth and seventh left ribs. She also

sustained a head injury with compound fracture of the left parietal bone which was found to be a traumatic brain injury of at least

moderate severity with accompanying diffuse axonal damage. The plaintiff was found to be unemployable in the open labour market and was unlikely to benefit from the Government policy pertaining to disabled persons having regard to the sequelae of her brain injury. The present value of the amount she was awarded is R766 000.

14.2 Bernell Schmidt v Road Accident Fund (Witwatersrand Local Division: Case No. 4834/2005 date of judgment 23 June 2006. Plaintiff sustained numerous fractures to all the upper and lower limbs. She also sustained an injury to the knee with raptures of the anterior cruciate and medical ligaments. She underwent multiple surgical procedures. The amount of R439 523 awarded to her as compensation translates into the present value of R1 177 000.

14.3 Roe v Road Accident Fund (South Gauteng High Court: Case No: 16157/2009 date of judgment 1 April

2010. He sustained the soft tissue injury to the neck, facial

injuries with fracture of the cheek and some of the teeth came loose, a comminuted fracture of the right femoral shaft, comminuted

fractures of the right tibia and fibula, a fracture of the right patella, a fracture of the humeral shaft, a supra- intra fracture

of the left distal humerus, a degloving injury over the lateral aspect of the right foot and a fracture of the upper incisor teeth.

The amount he was awarded translates into the current value of R955 000.

[15] In awarding general damages in this instance, I am in agreement with the defendant's

counsel that the three judgments the plaintiff is relying on, are not mirror images of the current case. The plaintiff in those judgments suffered more serious injuries than Dr Chittigadu.

Similarly, the judgments I have been referred to by the defendant are also not on all fours with the current matter. I am mindful of the fact that previous judgments are used only as a guide when determining general damages but the facts of those judgments are far out in comparison with the facts of the current matter and are, as such, not helpful.

[16] In the circumstances of the present matter I have, however, to consider that the plaintiff is seriously scarred and will have to undergo plastic surgery in the future to remove the scars; she also have to go for a knee replacement surgery. I as a result am of the opinion that the fair and reasonable amount for compensation of the plaintiff for general damages is the amount of R750 000.

[17] In the premises the following order is issued:

1. The draft order marked "XY" and initialled, duly amended, is made an order of court.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Counsel for Plaintiff

: Adv. D Mills

Instructed by

: Sylvia Venter Attorneys

Counsel for Defendant : Adv. Sekula

Instructed by

: Maluleke Msimang Inc

Date heard

: 01 August 2017

Date of judgment

: 08 August 2017

PRETORIA, ON THIS THE 8th DAY OF AUGUST 2017

BEFORE HER HONOURABLE

Case No: 34854/2014

RONICA CHITTIGADU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

After having heard counsel, the Court orders as follows:

1.

CAPITAL:

1.1 The defendant is ordered to pay to Plaintiff the amount of R3053294 (Three Million and Fifty Three Thousand Two Hundred and Ninety Four Rand) in delictual damages following injuries the plaintiff sustained in a motor vehicle accident which occurred on 28 January 2013, which amount is payable by Defendant to Plaintiff on/or before 28 September 2017;

1.2 Payment of the above amounts can be made by depositing same into Plaintiffs' attorneys of record's trust account, the details of which are as follows:

ACCOUNT HOLDER :SYLVIA VENTER PROKUREURS

BANK

:FNB

TYPE OF ACCOUNT :TRUST

ACCOUNT NUMBER :[....]

BRANCH

:HATFIELD

BRANCH CODE :252145

REFERENCE

:DP0009

2.

INTEREST:

2.1 The Defendant will not be liable for interest on the outstanding amount.

2.2 Should the Defendant fail to make payment of the capital amount on 28 September 2017, Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10.50% per annum as from the date of this order to date of final payment.

3.

UNDERTAKING :

The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for 100% of the costs of the future accommodation in a hospital or nursing home or treating of or rendering of a service to her or supplying of goods to her, pursuant to the injuries sustained by the Plaintiff in the motor vehicle accident which occurred on 28 January 2013, after the costs have been incurred and on proof thereof.

4.

COSTS:

The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court Scale, which costs will include, but will not be limited to, the following:

4.1 the costs of all expert reports, medico-legal reports, actuarial reports, radiological reports, RAF 4- reports, addendum reports and joint minutes of all experts of whom notice has been given and/or whose reports have been furnished to the Defendant and/or its attorneys and /or whose reports have come to the knowledge of the Defendant and/or its attorneys as well as all reports in their possession and/or contained in the Plaintiff's bundle of documents. This shall include,

but not be limited to, the following experts of whom notice has been given, namely:

4.1.1 DR HB ENSLIN, Orthopedic Surgeon;

4.1.2 DR JPM PIENAAR, Plastic & Reconstructive Surgeon;

4.1.3 DR JA SMUTS, Neurologist;

4.1.4 DR J EARLE, Neurosurgeon;

4.1.5 DR M JOUBERT, Psychiatrist;

4.1.6 DR HB ENSLIN, RAF 4 and narrative report, orthopedic surgeon;

4.1.7 MS A BURGER (ANNOET ROSSOUW), Occupational Therapist;

4.1.8 MS M BOSMAN, Neuropsychologist;

4.1.9 MS S SCHLEBUSH, Industrial Psychologist;

4.1.10 MR W LOOTS, Actuary.

4.2 The full fees of Adv D Mills, senior counsel, in respect of preparation, consultations, pre-trial conferences, travelling time and expenses and day fees for 1 August 2017;

4.3 the reservation, qualifying and preparation fees, if any, for 1 August 2017 of the following experts:

4.3.1 DR HB ENSLIN, Orthopedic surgeon;

4.3.2 MS A BURGER (ANNOET ROSSOUW), Occupational Therapist;

4.3.3 MS S SCHLEBUSCH, Industrial Psychologist.

4.4 the reasonable travelling, subsistence and transportation costs including e-toll fees incurred by and on behalf of the Plaintiff for attending the medico-legal examinations of both parties.

4.5 the costs consequent to all of the Plaintiff's trial bundles, expert reports, pleadings and notices, all indexes, document bundles, hospital record bundles and witness bundles, including the costs of 5 (five) full copies thereof;

4.6 the costs of holding all pre-trial conferences, expert consultations, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof as well as all reasonable costs, including but not limited to travelling expenses, incurred by the Plaintiff's attorneys and counsel in order to attend such pre-trial conferences/ consultations;

4.7 the costs of and consequent to compiling all minutes in respect of pre-trial conferences;

4.8 the costs of and consequent to the parties of both parties attending joint meetings, as well as costs of and consequent to compiling minutes of joint meetings between the experts;

4.9 the costs of and consequent to the holding of all expert meetings between the medico-legal experts appointed by the Plaintiff.

4.10 the reasonable travelling costs of the Plaintiff, who is hereby declared a necessary witness.

4.11 The reasonable taxable costs of one consultation with the Plaintiffs in order to consider the offer of the Defendant, the costs to accept it, have it made an order of court and to procure performance by the Defendant of its obligations in terms hereof.

4.12 The cost incurred in obtaining payment and/or execution of the capital amount mentioned in paragraph 1 above and/or delivery of the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 mentioned in paragraph 2 above.

5.

TAXATION:

5.1 Plaintiff is ordered to serve the Notice of Taxation of Plaintiff's party and party bill of costs on Defendant's attorneys of record.

5.2 The Defendant is ordered to pay the Plaintiff's taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties.

6.

CONTINGENCY FEE AGREEMENTS:

The Plaintiff and the Plaintiff's attorneys of record entered into a contingency fee agreement.

SIGNED AT PRETORIA ON THIS THE 1st DAY OF AUGUST 2017.

REGISTRAR

For the Plaintiff:

Attorney: Sylvia Venter Attorneys

(012 492 2868)

Counsel: Advocate D Mills (SC)

For the Defendant:

Attorney: Maluleke Msimang Inc

(012 323 3845)

Counsel: Advocate Sekula

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