

SOUTH AFRICA / JUDGMENT

J and Another v Road Accident Fund (4651/2010) [2017] ZAFSHC 241 (21 December 2017)

[2017] ZAFSHC 241**COURT**

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

4651/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII****Note: Certain**

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

Policy**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 4651/2010****In**

the matter between:

A.
G. J. D.
J. 1st
Plaintiff
L.
M. D.
J. 2nd
Plaintiff
and
ROAD
ACCIDENT
FUND Defendant
HEARD

ON: 24,
25
&
27
OCTOBER
2017

JUDGMENT

BY: CHESIWE, AJ

DELIVERED ON: 21 DECEMBER 2017

- [1] The plaintiffs have instituted action against the defendant for damages arising from injuries sustained in a motor vehicle accident which occurred on 16 March 2007.
- [2] The first plaintiff, A. G. J. D. J., is the mother/guardian of the second plaintiff L. M. D. J.. The first plaintiff instituted action on behalf of the second plaintiff as she was a minor at the time the accident occurred.
- [3] The parties have settled all the issues. The 2nd plaintiff's claim is settled in totality. The first plaintiff's loss of earning capacity has not yet been settled.
- [4] The issue for the determination for the court is the first plaintiff's loss of earning capacity.

PLAINTIFF'S EVIDENCE

- [5] The plaintiff, now Mrs B., was self-employed by selling soap and shampoos to other quest houses and also assisted in the running of her spouse's quest house, Birdshaven. She testified that she earned R6000, 00, but on busy months she could easily earn between R10 000- R12 000, 00. After making these products, she would usually as an extra service deliver it to her clients. After paying all her expenses she remained with R6000, 00.
- [6] The plaintiff testified that she does not have any proof of income as she gave her first attorney of record all her original documents. The attorney, Mr Kruger died and she could therefore not trace the documents. Under cross examination by counsel for defendant. She explained that after Mr Kruger passed away she went to his offices, but they could not assist her with her original documents that showed her income as R6000,00. She further testified that she received information that the documents were with the Law Society of the Free State. She was later informed by the Law Society that all the files of Kruger Attorneys were handed over to Van Aard Attorneys and that is where she received the copies.

- [7] Counsel for the plaintiff in closing argument submitted that the plaintiff has done everything possible to get the original documents of her proof of income. However, under oath the plaintiff testified that she earned R6000, 00. He submitted that the plaintiff has proven her claim based on the actual calculations and that the court to accept that the plaintiff earned R6000, 00.
- [8] Counsel for the defendant. Mr Mopeli argued that the plaintiff is reasonable educated, she is therefore expected to have a bank account or submit SARS documents which will show the plaintiff's proof of income. He submitted that in 2007 an amount of R6000 was a large amount and needed to be deposited into a bank account. He submitted that the defendant had offered an amount of R179 010, 00, but the plaintiff declined the amount. Therefore the court should award the plaintiff a fair and reasonable amount as the plaintiff still have earning capacity.
- [9] As far as the issue of past and future loss of earnings are concerned, the court depends in most instances on the actuarial

calculations, as well as the percentages of contingencies to be applied.

- [10] Mr Zietsman handed up the case of Road Accident Fund v Maasdorp case no 1552/1999 NCD which deal with the absence of any income records which make strict mathematical or actuarial calculations impossible. The court may, nevertheless determine the first plaintiffs loss of earning capacity arithmetically on the basis of estimation, but not proved earnings.
- [11] In Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) from 111H - 112H, Nicholas AJA said:

"An 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 that the court can do is to make an estimation, which is often a very rough estimation of the present value of the loss. It has open to it two possible approaches. One for the judge to make round estimation of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical on the basis of assumption resting on evidence. The validity of this approach depends of course upon the soundness of the assumption, and these may vary from the strongly probable to the speculative. It manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non-possums attitude and make no award."

- [12] The plaintiff came forth as a truthful and honest witness. She told that court she did not submit SARS documents as the R6000, 00 she received was below the then tax threshold. She further said she could not deposit the money in the bank as at the time of the accident she was staying with her two (2) children and had to take care of them. She used the money to buy her ingredients for making the soaps and shampoos. She remained with no cash to make any deposit into the bank. The court has no reason to doubt her with regard to her

income.

[13] In *Pitt v Economic Insurance Co Ltd* 1957

(3) SA 284 (N) where it was stated that:

"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense."

Counsel of the defendant emphasised that the court should use its discretion to award a fair, just and reasonable amount.

[14] For purposes of easy mathematical calculations the actuary based his calculations on the different expert reports as well as information as received from the plaintiff.

[15] The Joint Minute meeting of Ms Kemp and Ms Moagi they both agreed that the plaintiff, with assistive devices and frequent alternating

between sitting and standing she should be able to perform sedentary work tasks. However, she will require a sympathetic employer who will accommodate frequent postural changes. They further agreed that the plaintiff will struggle to obtain and sustain employment in the open labour market.

CONTINGENCIES

[16] Counsel for the plaintiff submitted that higher contingency be applied in order to accommodate the issue of lack of proof of income and that the plaintiff's claim is based on the actuarial calculation. Counsel submitted

that a fair and reasonable percentage would be that contingency of 30% be applicable. Counsel for the defendant submitted

that the plaintiff still have earning capacity, though it is reduced earning capacity and the court to take into consideration that the plaintiff did not submit proof of income.

[17] It is now well settled that contingencies, whether negative or positive are an important control mechanism to adjust the loss

suffered to the circumstances of the individual case in order to achieve equity and fairness to both parties. There is no hard and fast rule regarding contingency allowances.

[18] In aligning myself with the finding of the court in the matter of *Road Accident Fund v Reynolds* 1812/2005 (unreported WLD case no A5023/04) the court said:

"Thus allowing for contingencies is one of the elements in exercising the discretion to award damages."

[19] In *Southern Insurance Association Ltd v Bailey* NO 1984

(1) SA 98 (A) the court said:

"Contingencies may consist of a wide variety of factors. They include matters such as the possibility of error in the estimation of a person's life expectancy, the likelihood of illness, accident or unemployment which would have occurred in any event and therefore affects a person's earning capacity."

[20] Consequently, after listening to the arguments and submissions from both sides and considering the actuarial report, it is my view and finding that an appropriate contingency deduction to be applied would be as calculated in the actuarial report with an applicable contingency of 30%.

[21] Therefore the plaintiff loss of income is calculated as follows

Past loss R1 377 000 – 10% contingency

= R1 239 300,00

Future loss R2 131 300 – 30% contingency

= R1 491 910

TOTAL LOSS = R2 731 210,00

[22] The plaintiff's counsel handed in a draft order with no opposition from the defendant's side that fully set out what the court order should look like. I have perused the draft order and there is no contentious issue in it.

[23] This draft order is therefore, marked x and authenticated with my signature and dated, and it will fully depict the capital amount payable.

ORDER

[24] The order is granted in terms of the draft order marked "x" which is made an order of court and the draft order is annexed to this judgement to form an integral part hereof.

[25] The plaintiffs shall allow the defendant fourteen

(14) court days to make payment of the taxed costs.

S CHESIWE, AJ

On behalf of plaintiff: Adv Zietsman

Instructed by:

Honey Attorney

Bloemfontein

On behalf of defendant: Adv Mopeli

Instructed by:

Madiba Attorney

Case number: 4651/2010

In the matter between:

A. G. J. D. J. 1st PLAINTIFF

L. M. D. J. 2nd PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

BY AGREEMENT BETWEEN THE PARTIES the following order is made:

1. The defendant is liable for payment to the first plaintiff, in respect of general damages, in the amount of R 250 000.00, resulting from a motor vehicle collision that occurred on 16 March 2007.
2. The defendant is liable for payment to the second plaintiff in the amount of R 1 340 780.00, resulting from the same motor vehicle collision that occurred on 16 March 2007.
3. Defendant provides first and second plaintiffs with an undertaking in terms of Section 17(4) (a) of Act 56 of 1996 for the costs of future accommodation of the Plaintiffs in a hospital or nursing home or treatment of or rendering of a service to her/them or supplying of goods to her/them arising out of the injury sustained by her/them in the motor vehicle accident on 16 March 2007, after such costs have been incurred and upon proof thereof.
4. The defendant to pay the plaintiffs' taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

4.1 The costs attendant upon the obtaining of payment of the amounts

referred to in this order;

4.2 The reasonable preparation / qualifying / accommodation / travelling

and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiffs attending their

medico legal examinations:

4.2.1 Camel Schoombee (industrial psychologist);

4.2.2 Ms Elecia Kemp (van Zyl) (occupational therapist);

4.2.3 Dr LF Oelofse and Dr LA Oelofse (orthopaedic surgeons);

4.2.4 Munro Actuaries.

4.3 The counsel's costs of preparing for, and attending to pre-trials,

and costs associated with necessary consultations with the plaintiffs, the plaintiffs' attorneys, the plaintiffs' witnesses and

the plaintiffs' experts;

4.4 The attorneys' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiffs, the plaintiffs' attorneys, the plaintiffs' witnesses and the plaintiffs' experts;

4.5 The travelling costs occasioned by the plaintiffs and the plaintiffs' witnesses to attend to necessary consultation with her/their attorney and expert witnesses.

5. The payment provisions in respect of the foregoing are ordered as follows:

5.1 Payment of the capital amount shall be made without set-off or deduction, within 30 (thirty) calendar days from date of the granting of this order, directly into the trust account of the plaintiffs' attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys

- Trust Account

Bank

- Nedbank, Maitland Street, Bfn

Branch Code

- 11023400

Account No.

- [...]

Reference

- HL Buchner/J02660

(please quote the reference at all times)

5.2 Payment of the taxed or agreed costs shall be made within 14 (fourteen) days of taxation, and shall likewise be effected into the trust account of the plaintiffs' attorney;

5.3 No interest will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;

5.4 Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at 10.5% (the statutory rate per annum), compounded.

6. In the event that costs are not agreed the plaintiffs agree as follows:

6.1 The plaintiffs shall serve a notice of taxation on the defendant's attorney of record; and
AFTER HAVING CONSIDERED THE MEDICO-LEGAL

REPORTS submitted into evidence, by agreement between the parties, and after having considered the evidence, the following order is made:

1. The defendant is liable for payment to the first plaintiff, in respect of past and future loss of earning capacity, in the amount of TOTAL R2 731 210 (1239300 + 1491910 = R2731 210)

By order of this court

THE REGISTRAR

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2017/241.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/j-and-another-v-road-unknown-topic-afshc-2017>

Prepared on 23 October 2026 · Esheria