

SOUTH AFRICA / JUDGMENT

Jacobs v The Road Accident Fund (4558/2012) [2019] ZAFSHC 42 (2 May 2019) [2019] ZAFSHC 42

COURT

Free State High Court, Bloemfontein

BEFORE

L.B.J Moeng

CASE / FILE NUMBER

4558/2012

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4558/2012

In the matter between:

KARIN JACOBS

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT:

MOENG, AJ

HEARD ON:

24 and 26 APRIL 2019

DELIVERED ON: 2 MAY 2019

- [1] The plaintiff claims damages in the amount of R 3 130 484. 99 from the defendant arising from bodily injuries sustained in a road accident which occurred on 29 July 2009 at the corner of Watkey and Rhodes Avenue Bloemfontein, between the insured motor vehicle and a motorcycle ridden by the plaintiff.
- [2] On 29 July 2014 the issues of negligence and liability were settled and the parties agreed that the defendant would be liable for 95% of the plaintiff's agreed or proven damages. The parties could however not agree on the extent of the plaintiff's general and special damages. The matter now serves before me for determination of the quantum of the claim.
- [3] The 2005 amendments to the 1996 Road Accident Fund Act and regulations limited the Fund's liability to compensate victims of accidents by providing that it would pay general damages only if a 'serious injury' was sustained. I was informed at the commencement of the proceedings that the Fund has rejected the report relating to the plaintiff's injuries as it was not satisfied that such injuries were serious. The dispute resolution mechanisms as referred to in the regulations have not yet been concluded and the Fund has resultantly referred the matter to its health department for assessment.
- [4] It is trite that the decision on whether an injury is serious enough to qualify for general damages is conferred on the Fund and not the court. The following passage from Road Accident Fund v Duma and Three Similar Cases 2013

(6) SA 9 (SCA) is instructive in this regard;

'The decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not the court. That much appears from the stipulation in reg 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund and not the court is satisfied that the injury has been correctly assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious.'

- [5] This court could admittedly not adjudicate the issue relating to the plaintiff's general damages and same was separated from the rest of the issues. What has to be decided is whether the Fund is liable to compensate the plaintiff for her past and future medical and hospital expenses, as well as her past and future loss of income.
- [6] The plaintiff, Janene White (Industrial Psychologist), Paul Greeff (Counselling Psychologist) and Willem Boshoff (Munro Actuaries) testified in support of the plaintiff's case, whereas the defendant did not adduce any evidence in rebuttal of the plaintiff's case. From what I could deduce, the only issue that the defendant seriously challenged relates to the orthopaedic opinion that, if accommodated, provision should be made for the plaintiff to go on five years

earlier retirement. No effort was made to challenge the rest of the issues relating to the plaintiff's past and future medical and hospital expenses, as well as her past loss of income.

- [7] The following documents were handed into the record as Exhibit A to C respectively: Joint minutes between the Orthopaedic Surgeons Drs. Oelofse and Bogatsu, Occupational Therapists Mrs. L Liebenberg and Mrs. S Moagi as well as the Industrial Psychologists Janene White and Moipone Kheswa. Plaintiff's trial bundle which inter alia dealt with her past medical expenses was also handed in during her testimony.
- [8] It is not in dispute that the plaintiff, a 46 year old female, is a member of the South African Police Services. She started her career in the police service on 1 August 1998 as a student constable and progressed to the position of Warrant Officer in 2007. She was a detective prior to the accident. She was transferred to an administrative position after the accident as she could not meet the operational demands of detective work due to her physical condition after the accident. She is currently stationed at the Crime Intelligence Unit as an Analyst. She has as a result of her transfer to an administrative position lost a number of allowances that operational members receive.
- [9] She testified that her current position requires of her to sit in front of a computer for prolonged periods. This causes her back to go into spasms and she as a result endures extreme pain which radiates down her legs. Her foot is constantly swollen and she has to wear special shoes. She suffers from recurrent migraines as well as neck and shoulder pain. She testified that ten years later, the pain has become more intense.
- [10] The Orthopaedic Surgeons agreed in their joint minute that the plaintiff sustained spinal, left forearm, right hand, right ankle as well as foot injuries for which she was hospitalised and received medical treatment after the accident. They further agree that provision should be made for different forms of future treatment and medication. They further agree that the injuries had a profound impact on her amenities of life and will continue to do so in the future.
- [11] They agree that her orthopaedic injuries:
- (i) have resulted in significant losses of her employment capacity and independence, (ii) that she is now an unfair competitor in the open labour market, (iii) that she must be accommodated in a light duty and sedentary environment, (iv) that she will never be able to do physical labour and
 - (v) if accommodated, provision must be made for five years earlier retirement.
- [12] The Occupational Therapists agree that the plaintiff does not meet the full operational requirements of her pre and post-accident work as a detective and that her limitations render her vulnerable in an open labour market. They agree that she is best suited for sedentary work and that even with such sedentary work, rest breaks would be essential resulting in decreased work speed. They lastly agree that based on her prognosis of a degeneration of the spine and the degenerative joint disease of the right lower limb as well

as possible future surgery, she will not be able to continue performing full range light work until normal retirement age.

- [13] Janene White, an Industrial Psychologist testified that she compiled two reports and a joint minute with Moipone Kheswa. She deferred the issue relating to the post-accident retirement age in her 2015 report and likewise did so in her March 2019 addendum report. She deferred this aspect in her 2015 report as it was not indicated by the first Orthopaedic Surgeon, Dr. Ziervogel and also deferred same in her addendum report as Dr. Bogatsu likewise did not indicate same.
- [14] She testified that Dr. Oelofse, in his report dated 31 October 2017, opined that if accommodated in a light duty/sedentary position, the plaintiff will be able to work to the retirement age of sixty years but if not accommodated in a light duty/sedentary position, she will only be able to work for another five years. She was provided with a joint minute in April 2019, compiled on 6 November 2018 by Drs. Bogatsu and Oelofse. From this minute, the Surgeons agreed that if accommodated, provision must be made for five years earlier retirement. It is upon this agreement that she concluded in her joint minute that provision must be made for five years earlier retirement. She proposed a higher contingency for the ongoing influence of the orthopedic and psychological deficits and the plaintiff's significantly restricted ability to compete in the open labour market.
- [15] Paul Greeff, a registered Counselling Psychologist conducted clinical interviews and assessed the plaintiff. He testified that prior to the accident; the plaintiff was involved in a traumatic incident in 2007 where a perpetrator attempted to shoot her. She was diagnosed with major depression and was admitted to a private psychiatric facility and she was treated accordingly. He could however not tell whether that depressive episode contributed to her current state of depression.
- [16] The plaintiff conversely testified that the said treatment was successfully concluded and she was promoted to another position thereafter. She says she would not have been promoted had her condition not improved. Greeff further testified that the plaintiff had feelings of worthlessness and ineffectiveness as she could not perform the duties that she was employed for in the police services. This, according to his updated report led to recurrent depression on a moderate level as opposed to his first diagnosis of mild recurrent depression. The plaintiff's condition therefore deteriorated.
- [17] Willem Hendrik Boshoff is a Fellow of the actuarial society of South Africa. He was instructed to estimate the capital value of the potential loss of earnings suffered by the plaintiff. The claim and his resultant calculations were premised on the basis that the plaintiff did not receive service allowances from September 2009, that she is expected to retire five years earlier, that she has been rendered a vulnerable employee and that she might suffer losses that are not directly quantifiable hence such losses will be addressed via contingencies. The contingencies that he was instructed to apply were 10% for the position before the accident and 30% for the position post the accident.

- [18] He looked at her career path had the accident not taken place and had regard to her current position post the accident. His calculations were based on the reports of Janene White and those of Drs. Bogatsu and Oelofse as well as the salary advices provided. The plaintiff's past uninjured income or the but for the accident injuries was calculated to be R 2 770 800 and for post the accident or the injured earnings was calculated to be R 2 737 200 to which the RAF cap, a contingency and apportionment deduction was applied, resulting in a net past loss of R 31 920. Her future earnings but for the accident was likewise calculated to be R 4 644 000 and for post the accident was calculated to be R 3 077 000 to which the RAF cap, a contingency and apportionment deduction was applied, resulting in a net future loss of R 1 540 900. This in essence concluded the plaintiff's case.
- [19] As indicated earlier, the plaintiff's evidence regarding her past and future medical and hospital expenses as well as her past loss of income was not challenged. The accuracy of the actuarial calculations and the reasonableness of the respective contingencies, save for the issue of the early retirement, was likewise not challenged. The evidence in this regard is therefore undisputed. I do not deem it necessary to deal with same any further and I will regard these issues as proven.
- [20] Counsel for the Fund argued that plaintiff's claim for future loss of income should be dismissed. He equally argued that the only loss of income that the plaintiff suffered is the allowances that she forfeited after having been transferred to an administrative position. He placed considerable emphasis on the report by Dr. Oelofse that the plaintiff will be able to work until the retirement age of sixty years if she is accommodated in a sedentary position.
- [21] I believe that it will be prudent to place this argument in context. It is common cause that plaintiff obtained two Orthopaedic Surgeon reports from Drs. Ziervogel and Oelofse, whereas the defendant obtained a report from Dr. Bogatsu. Both Drs. Ziervogel and Bogatsu, in their reports dated 16 May 2012 and 5 March 2018 respectively, did not express an opinion on whether the plaintiff will be able to work until the retirement age of sixty years. Dr. Oelofse, in his report dated 31 October 2017, opined that if accommodated in a light duty/sedentary position, the plaintiff will be able to work to the retirement age of sixty years but if not accommodated in a light duty/sedentary position, she will only be able to work for another five years.
- [22] Subsequent to these reports, Drs. Oelofse and Bogatsu compiled a joint minute on 6 November 2018 and they agreed that if accommodated, provision must be made for five years earlier retirement. It is based on this joint minute that the Industrial Psychologist Janene White noted that provision must be made for five years earlier retirement. One should likewise not lose sight of the joint minute compiled by the Occupational Therapists, Messrs. Liebenberg and Moagi in which they agree that the plaintiff will not be able to continue full range light work up until normal retirement age as a result of a degeneration of the spine and degenerative joint disease of the right lower limb.

- [23] During deliberations, counsel for the Fund sought to distance the Fund from the agreement reached by its expert and sought to rely on what Dr. Oelofse concluded in his prior report. Counsel indicated at the commencement of the proceedings that the joint minutes should be read in conjunction with the initial reports. In so doing he in my view did not seek to repudiate Bogatsu's agreement in the joint minute but simply sought an interpretation that would accord with what Oelofse had opined. This opinion is admittedly contrary to the joint minute.
- [24] The purpose of a joint minute is undeniably to limit the issues to be tried and which expert evidence has to be presented. The joint minute was completed as early as November 2018 and in the absence of an indication from the Fund that it did not wish to be bound by the agreement entered into by its expert, the plaintiff was entitled to assume that the matters agreed to between the experts were not in dispute. It would in my view be prejudicial for a litigant to agree with another that a certain aspect is common cause only for his adversary to renege at the trial and take a stance that is contrary to the agreement.
- [25] Where experts in a joint minute reach an agreement on an issue, they signify that such an issue need not be adjudicated upon as the initial dispute simply does not exist. Unlike in an expert report where the factual basis upon which the expert opinion hinges is indicated, parties to a joint minute do not indicate such factual basis. They in essence simply agree that a fact or opinion is not in dispute and it will in the normal course of events not be open for a court to cut the veil of such an agreement and question the veracity of the facts or opinion contained therein. By having reached an agreement, they put the dispute beyond the need for adjudication.
- [26] What counsel for the Fund seeks to achieve is for me to go beyond the agreement and accept facts or opinions that are at variance with the latter agreement. I do not believe that the circumstances warrant such an approach. If the Fund intended to retract their concession on the earlier retirement issue, they should have done so timeously and called Dr. Bogatsu. It was not for the plaintiff to call Dr. Oelofse as the dispute had been resolved in the joint minute.
- [27] Sutherland J succinctly sets out the position regarding the effect of such agreements between experts in *Thomas v BD Sarens (Pty) Ltd* (2007/6636) [2012] ZAGPJHC 161 (12 September 2012) at para 11 and 12:

'Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very latest, at the outset of the trial. In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference'.

- [28] The majority in *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) held that ‘effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached by the litigants' respective experts. There would be no incentive for parties and experts to agree on matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue’.
- [29] The majority in addition held that ‘the position where experts in the same field reach an agreement differs from the position where experts differ on their respective opinions. In cases where they differ in opinion, a court must determine whether the factual basis of a particular opinion, if in dispute, has been proved and must have regard to the cogency of the expert's process of reasoning’. This is conversely not the position where they are in agreement.
- [30] I am satisfied that the issue regarding the plaintiff’s earlier retirement was agreed to by the experts and such agreement should stand. I am therefore satisfied that the plaintiff proved her entitlement to future loss of income. In the result the following order is made:
1. The plaintiff’s claim for general damages is postponed for later adjudication;
 2. The defendant is directed to pay the plaintiff an amount of R 1 639 649.11 (one million six hundred and thirty nine thousand six hundred and forty nine rand and eleven cent) as set out hereunder;
 - a. R31 920.00 in respect of past loss of income;
 - b. R 1 540 900.00 in respect of future loss of income;
 - c. R66 829.11 in respect of past medical and hospital expenses;

Resulting from a motor vehicle collision that occurred on 29 July 2009

3. The defendant shall provide plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 for 95% of the costs of her future accommodation in a hospital or nursing home or her treatment or the rendering of any service to her or supply of goods to her arising out of the injuries sustained by her in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate her in respect of the said costs after such costs have been incurred and on proof thereof;
4. The defendant is liable for payment of the plaintiff’s 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;
 - a. The costs attendant upon the obtaining of payment of the amounts referred to in this order;
 - b. The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:

- i. Dr JF Ziervogel (Orthopaedic Surgeon);
 - ii. Dr LF Oelofse (Orthopaedic Surgeon);
 - iii. H Labuschagne (Occupational Therapist);
 - iv. L Liebenberg (Occupational Therapist);
 - v. P Greeff (Clinical Psychologist);
 - vi. J White (Industrial Psychologist);
 - vii. Munro Actuaries (Actuaries)
5. Payment of the capital amount shall be made without set off or deduction, within 30 (thirty) days from the granting of this order, directly into the account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are as follows:

Honey Attorneys – Trust Account

Nedbank – Maitland Street Branch Bloemfontein

Branch Code: 11023400

Account number: [...]

Ref: HL Buchner/J02646

6. 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 plaintiff's attorney;
7. No interests will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;
8. Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interests will accrue at 10,25% per annum compounded;
9. In the event that costs are not agreed to, the plaintiff agrees as follows:
 - a. The plaintiff shall serve a notice of taxation on the defendant's attorney of record and;
 - b. The plaintiff shall allow the defendant fourteen (14) court days to make payment of the taxed costs.

L. B.J Moeng, AJ

On behalf of the plaintiff: Adv. PJJ Zietsman

Instructed by: Honey Attorneys

BLOEMFONTEIN

On behalf of the defendant: Adv. MM Mopeli

Instructed by: Maduba Attorneys

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Prepared on 11 October 2026 · Esheria