

SOUTH AFRICA / JUDGMENT

Janse van Vuuren v Road Accident Fund (5428/2015) [2017] ZAFSHC 218 (9 November 2017) [2017] ZAFSHC 218

COURT

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

5428/2015

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 5428/2015

In

the matter between:

GERRIT
JACOBUS JANSE VAN
VUUREN
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant
HEARD

ON:

15, 16 AND 18 AUGUST 2017

JUDGMENT

BY: CHESIWE, AJ

DELIVERED ON: 09 NOVEMBER 2017

[1] The plaintiff instituted action against the defendant as a result of the motor vehicle accident which occurred on 30 November

2013. The defendant conceded the merits for 90% of the plaintiffs proven damages.

[2] The plaintiff was on a motorcycle when he was hit by a motor vehicle. He was transported to Pelonomi Hospital. The plaintiff sustained the following injuries: Head injury, Left rib 2-4 fracture, Right rib 1-3 fracture, Gade 2 liver injuries, Pulmonary contusion, Left Haemothorax with an intercostal drainage. The plaintiff was discharged in April 2013 and had to use a walking frame till January 2014.

[3] The defendant admitted and conceded to the reports of Ms Rolene Hovsha, Clinical Psychologist and Dr Hans Relling, Neurosurgeon.

[4] The issues for determination by the court is for general damages, past and future loss of income and past medical expenses.

PLAINTIFF EVIDENCE

[5] Plaintiff called the first witness Dr Ziervogel, orthopaedic surgeon. He testified that he examined the plaintiff on the 9 October

2015. He confirmed the plaintiff's injuries. He stated that the plaintiff has an abnormality on the lower thoracic area, the plaintiff is unable to stand up right, there is an irritation of the lower lumbar region from L4 - LS. Further that the plaintiff has a scissor walk. The plaintiff was called into court to show the court how he walks and how a scissor walk looks like. He explained scissor walk as when the knees rub against each other. Plaintiff also walks by leaning forward. Dr Ziervogel explained that it is due to the plates in the hips which do not allow the plaintiff to walk upright.

He indicated that the plaintiff does work that involves a lot of walking. The plaintiff cannot be employed in a job that involved

sitting. If the plaintiff has to be employed in a sitting job, then he must be supplied with a special orthopaedic chair, since the plaintiff's hip movement is only up to 75%. No cross examination was conducted by the defendant.

- [6] Ms Susan Van Jaarsveld the Industrial Psychologist testified that the plaintiff is not in a position to compete in the open labour market. The plaintiff fits in medium level for the fact that the plaintiff is not qualified and only has grade 12. She explained that based on the previous work history and employment, the plaintiff can only perform physical work. Therefore the plaintiff will find it difficult to find employment in the open market now or in the future. The defendant posed no question to the witness.
- [7] The plaintiff testified and informed the court that after passing grade 12, he went to work at Merino Inn in Colesberg. He moved on to work at Wimpy and had an income of about R2000.00. He left Wimpy and got employed at Suiderkruis where he had an income of R4500.00. He left that employment and went to work at BKB Korporasie where he earned R12 000, 00. He left that employment and moved to Birdair, an American Company that was involved in building the stadiums in 2010 for the soccer world cup. He had an income of R3200 per week (R12 800 pm). That contract ended after the stadiums were completed. The plaintiff and a partner later opened a scarp dealer business where he earned R20 000, 00. This business was closed down as the partner withdrew his capital. At the time of the accident he was employed at Inkosi Auto Parts where he earned R100.00 per day. He was only at that company for 3 three to four weeks when he was involved in an accident.
- [8] He testifies that before the accident he played social rugby. He played rugby even at school level he took part in the Cruywangen

Rugby week. He used to go for hunting, fishing and camping. After the accident he is unable to participate in sport, he cannot play and run with his child. He gets frustrated as a result his relationship with his partner ended due to being angry all the time. Not much was put to the plaintiff or disputed during cross

- examination by the defendant.

- [9] Mrs Johanna Janse van Vuuren, mother to the plaintiff testified that before the accident the plaintiff had a happy and good personality. He got along with everyone. He talked a lot and socialised and was a very calm person. After the accident, the plaintiff has a weak memory; he is forgetful and even forgets people's names, or where he put his car keys. She said the plaintiff has changed, he is aggressive and argumentative. He was a perfectionist, but post-accident he has to be reminded to bath. He is unpredictable and argues with his brothers all the time as a result the brothers do not visit the family home a lot. She confirmed that the plaintiff was in a coma and was admitted in ICU from the day of the accident throughout the whole of December. No cross-examination was conducted by the defendant.
- [10] Mr Ryan Immelman, the actuarial testified that the plaintiff was earning R100 per day at the time of the

accident. That the employer's certificate shows that the plaintiff would have become a permanent employee and his rate would have

increased to R150 per day. He explained that based on his calculations for past and future income but for the accident, the plaintiff earnings would have increased after 1 August 2016 due to the effect of inflation at the rate of 5.37% per annum compound. He confirmed that based on the reports of Ms Van Jaarsveld and Dr Ziervogel the plaintiff is unemployable will not be able to compete within the open labour market. No cross-examination was conducted by the defendant.

- [11] The plaintiff closed its case and the defendant also closed its case without calling any witnesses.
- [12] Counsel for the plaintiff in closing argument submitted that though the plaintiff could not provide proof of income he gave under oath his employment history and his income with the different employers. He submitted that the figures that the plaintiff gave matches with the figures he gave to the different expert. He submitted that the evidence of the plaintiff was not attacked by the defendant and the court should therefore accept that it was the plaintiff's income. Counsel further submitted that a higher contingency deduction would not be necessary as the plaintiff income was not challenged. He submitted that the court should not apply a bigger deduction than the 15% as applied in the actuarial report. He further submitted that the plaintiff has a whole person impairment of 44%. The plaintiff has lost a lot. He cannot play rugby, he was a hunter and a fisherman, and walks bended and leaning forward. The plaintiff has severe depression and it is confirmed by both psychologists of the plaintiff and the defendant. Counsel stated that the plaintiff was admitted in ICU for eight weeks, which indicated that he had serious injuries.
- [13] Counsel for the defendant in the closing argument submitted that the general damages are in dispute and the court should award a fair and reasonable amount. The defendant referred to comparable case of *Pitt v Economic Insurance Co Ltd*[1] 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 our largesse from the horn of plenty at the defendant's expense"[2]. Counsel for the defendant emphasised that the court should use its discretion to award a fair, just and reasonable amount.
- [14] The determination of general damages has never been an easy task as there is neither mathematical nor scientific formula nor formulation to compute monetary value on pain and sufferings, loss of amenities of life and disability[3] applied strictly. Two cases can never be the same, hence the need for judicial adjudication in cases for general damages.[5]
- [16] It is trite that the award of general damages must be fair to both the plaintiff and the defendant.[6]
- [17] The plaintiff submitted the following comparable cases.
- Mnguni v RAF*, plaintiff was awarded R700 000 on 1 June 2006, current value being R1 378 030.00. In this matter the Plaintiff sustained severe brain injury.

Zarrabi v RAF, the plaintiff was awarded R800 000 on 6 May 2006 with a current value R1 582 555. Plaintiff sustained permanent

disability following the brain injury.

Garroch v RAF the plaintiff was awarded R900 000 on 3 August 2005 with the current value R1 827 344. Plaintiff sustained severe brain injury with a below knee amputation.

Ngobeni v RAF awarded of R1 000 000 on 29 April 2011, with a current value R1 412 059. The plaintiff sustained closed head injury with a sequence of left hemiparesis and speech impairment.

[18] The defendant submitted the following cases as comparable cases:

Sebatjane and Another v Federated Insurance Co Ltd, IV H2 - 1 as discussed in Corbet and Honey, The Quantum of Damages in Bodily and Fatal Injury Cases Volume II at 175, the amount awarded was R6000 in 1989 current value R46000.00. The Plaintiff had a damage liver and spleen.

Ramcharan and Another v Southern Insurance Association Ltd, reported in Corbett and Honey, The Quantum of Damages in Bodily and Fatal Injury Cases Volume II at 175, the plaintiff was awarded R9000,00 in 1971 current value R592 000, the plaintiff had severe skull fracture.

[19] The basic principle underlying an award for general damages in

such actions is that the compensation must be assessed as to place the plaintiff as far as possible in the position he would have been had the wrongful act causing him injuries not been committed. "The assessment of compensation is done by comparing the

plaintiff's "properties" meaning a universitas or complex of general relations, including the plaintiff's rights and duties, as it is after the commission of the wrongful act with its projected state had the wrongful act not been committed.".[7]

[20] It is correct that notwithstanding the best available medical treatment that the plaintiffs have receive and will still receive in the future. The plaintiff's current condition will never be restored to its original position. The difficulties he now has following the motor vehicle accident, he will always have to depend on other people around. him to help him where necessary as he has restricted

movement. The plaintiff is unable to walk upright due to the plates inserted in his hips and this makes it difficult for him to walk upright. According to Dr Ziervogel the plaintiff, if he does find employment, he will need special orthopaedic equipment to accommodate his posture. I had to observe in court and take cognisance of the plaintiff's difficulty in walking as well as the scissor walk that was described by Dr Ziervogel. As already mentioned the plaintiff posture of walking and bending forward as demonstrated in court, will be difficult with all the medical intervention, to put him in his condition he was had the accident not occurred.

[21] In both Protea Assurance Co Ltd v Lamb[8] and Road Accident

Fund v Marunga[9] , it was stated that "in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent

disability and loss of amenities of life arises a trial Court in considering all the facts and circumstances of a case has a wide discretion to award what it

considers to be fair and adequate compensation to the injured party".[10]

[22] In Southern Insurance Association Limited v Baliey NO[11] the following was stated:

"The Appellate Division has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached..."The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case." To adopt a different approach... That is something which may be taken into account together with all the other circumstances."[12]

[23] When considering aspects like pain and suffering and loss of amenities of life in order to determine general damages, it is not possible to measure these losses in certain and precise measured financial terms or by reliance on other cases. In many of these cases the difficulty that was expressly mentioned in the matter of Khaya Sgatyia v Road Accident Fund (Eastern Cape Division dated 4 July 2001) [13] Jenet J stated as follows: "There are of course no scales upon which one can weigh things like pain and suffering and loss of amenities of life, nor is there a relationship between either of them and money which makes it possible to express that in terms of money with any approach

to certainty"[14].

[24] In the matter of Road Accident Fund v Marunga[15] is the authority for the approach that all assessments of general damages were historically too low and should be adjusted significantly upward. The upward tendency, it must be added, is but one of the factors to be considered in the exercise of the court's discretion in assessing the amount of general damages, and should only be applied, if the facts of the matter warrants such an approach.

[25] Taking into consideration the injuries the plaintiff sustained and the sequelae thereof the expert reports filed, the comparable cases and arguments submitted. I am satisfied that a fair and just amount for general damages suffered by the plaintiff is R1 000 000.00.

PAST LOSS OF EARNINGS/FUTURE LOSS OF EARNING CAPACITY

[26] It is common cause that at the time of the accident the plaintiff was earning R100.00 per day. The employer certificate exhibit F confirms that the plaintiff was a temporary employee at the rate of R100.00 per day. The actuary accepted the income for purposes of calculation and gradual increase to R150, 00 per day. With the assumption that semi-skilled labourers in terms of Kock Quantum Yearbook of 2017, the plaintiff falls in the income level of R20 600

- R59 00 - R151 000 per annum, thus placing the plaintiff in the median/upper quartile. Mr Immerman concludes that,

having taken into consideration the opinion of Dr Ziervogel, the plaintiff is unable to complete in the open labour market and is therefore unemployable. Having said that he calculates the plaintiff's past loss of income according to the median/upper quartile as R 248 623 with 5% contingency deduction total loss is R 236 192.

[27] In respect of future loss of income the actuary took into consideration the difference between the value of the plaintiff's income but for the accident and the value of the plaintiff's income having regard to the accident. Further that the calculations are also based on the report of the industrial psychologist of the plaintiff. In the joint minutes meeting between Mrs Van Jaarsveld and Mrs Kheswa, they agreed that the plaintiff would have remained self-employed as a scrap metal dealer or in a similar position until retirement at age 65 years. The actuarial calculations based on the report of the psychologist places the plaintiff loss of future income at the median upper quartile calculated as R1 502 825 with a 15% contingency applicable the total loss is R1 513 593.

[28] They further agreed that the plaintiff would have been equivalent to his income at the time of the accident, with annual inflationary adjustments and taking cognisance of the suggested income of a semi-skilled worker in the non-corporate sector of the labour market. They further agree that post-accident the plaintiff was unable to return to work due to his injuries and he received a three months' salary from the company just out of goodwill.

Mrs Susan Van Jaarsveld concluded that the plaintiff will be a compromised competitor in the open

labour market and has limited chance to secure employment in the open labour market.

[29] Mrs Kheswa concluded that it will be immature to provide details on post-accident income earning capacity and the impact of the physical injuries without the neurosurgeon, orthopaedic surgeon neuropsychologists and occupational therapists opinions. Nor did the plaintiff submit a proof of income to her. However, the plaintiff submitted the proof of income from the employer at the time of the accident. The plaintiff further under oath during his oral evidence confirmed the different incomes he had at the different employers. The actuary, for purposes of the calculation, he made use of the proof of income of R100 that the plaintiff provided.

[30] In approaching claims of this nature, the courts have always had open to it two possible approaches; namely:

30.1 Either the judge makes a round estimation of an amount which seems to be fair and reasonable. That process is entirely a matter of guesswork, a blind plunge into the unknown;

Or,

30.2 That the judge tries to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions.

[31] It is manifested that either approach involves guesswork to a greater or lesser extent. The inherent difficulties and uncertainties, it has generally been accepted that it is preferable to make an assessment based on the actuarial calculations rather than to take a blind plunge into the unknown. In my view, there is no coherent reason to depart from the conventional, tried and tested actuarial approach that this and other courts have accepted.

CONTINGENCY

[32] Counsel for the plaintiff submitted that the plaintiff at one stage earned more than the upper quartile and a possibility existed

that the plaintiff could have earned more than the upper quartile. Counsel was of the view that a higher contingency deduction will not be necessary as the plaintiff income was not challenged by the defendant. He stated that the 15% deduction as calculated in the actuarial report would be a fair deduction the by the court.

Counsel for the defendant submitted that it is in the court's discretion as to what percentage of contingency should be applied.

[33] 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 the parties. There is no hard and fast rule regarding contingency allowances.

[34] Robert Koch in the Quantum Yearbook 2017 at 104 said:

" ... General contingencies cover a wide range of considerations which vary from case to case and may include: taxation, early death, save travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies. The following guidelines can be helpful: Sliding scale: ½% per year to retirement age, i.e. 25% for a child, 20% for a young and 10% in middle age."

[35] In aligning myself with the finding of the court in the matter of Road Accident Fund v Reynolds 18/2/2005, (unreported case)[16] the learned judge said:

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

[36] In Southern Insurance Association LTD v Bailey NO[17] 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.[18]

[37] Consequently, after listening to the submissions from counsel on both sides and considering the report of the actuarial, it is my view and finding that an appropriate contingency deduction to be applied would be as calculated in the report of the actuary in respect of Basis B which is the median/upper quartile level. Therefore the plaintiff's loss of past earning is R 236 192 and loss of future earning is R1 513 593.

[38] 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 nothing contentious in it.

[40] T is Draft Order is accepted, marked "X" and authenticated with my signature and date, and it will fully depict the capital amount payable.

ORDER

[41] Order is granted in terms of the Draft Order marked 11X" which is made order of court and the draft order is annexed to this judgement to form an integral part hereof.

S CHESIWE, AJ

On behalf of plaintiff: Adv.J.J Maree

Instructed by:

Schoeman Maree Incorporated

Bloemfontein

On behalf of defendant: Adv.C.J Hendriks

Instructed by: Maduba Attorneys

[1] Pitt v Economic Insurance Co ltd 1957

(3) SA 284 (N)

[2] Ibid at 287E-F

[3] AA Mutual Insurance Association Ltd v Maqula 1978

(1) SA 805 (A) at 806H. See also Road Accident Fund v Guedes 2006 (S) SA 583 (SCA) para [81 and Southern Insurance Association ltd v Bailey No 1984 (1) SA 98 (A)

- [4] Van Dyk v Road Accident Fund 2003 (SES) QOD 1 (AF) para [22] and also Protea Insurance Company v Lamb 1971(1) SA 530 (A) at 535H-536A
- [4] Van Dyk v Road Accident Fund 2003 (SES) QOD 1 (AF) para [22] and also Protea Insurance Company v Lamb
1971(1) SA 530 (A) at 535H-536A
- [5] Road Accident Fund v Marungo 2003
- (5) SA 164 (SCA) at 169G· H and also Protea Insurance Company v Lomb above and Sigournay v. Gillbanks 1960 (2) SA 552 (AD)
- [5] Road Accident Fund v Marungo 2003
- (5) SA 164 (SCA) at 169G· H and also Protea Insurance Company v Lomb
above and Sigournay v. Gillbanks 1960 (2) SA 552 (AD)
- [6] Pitt v Economic Insurance Company limited 1975
- (3) SA 284 (N) at 287E
- [7] Webb v Road Accident Fund (2203/14)
- (2016) ZAGPPHC 15 (14 January
- 2016) and see also Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665
- [8] Protea Assurance Co Ltd v Lamb 1971(1) SA 530 (A)
- [9] Road Accident Fund v Marungo 2003
- (5) SA 164 (SCA) at 23
- [10] Protea Assurance Co Ltd v Lamb above at 534H and also Road Accident Fund v Marungo above para [23]
- [11] Southern Insurance Association Ltd v Bailey No 1984 (1) SA 98 (A)
- [12] Ibid at 99H
- [13] Khaya Sgatya v Road Accident Fund, unreported judgment, Eastern Cape Division case no 682/2000, delivered on 4 July 2001 and The Quantum of Damages vol 1, 4ed, at pages 4-5.
- [14] Ibid and also Sandler v Wholesale Cool Suppliers Ltd 1941 AD 194 at 199
- [15] Road Accident Fund v Marungo above para [27] and also Wright v Multilateral Motor Vehicle 1997 (4) reported in Corbett and Honey The Quantum of Damages in Bodily and Fatal Injury Cases Vol. IV at E3-31.
- [16] Road Accident Fund v Reynolds (Unreported WLD Case No A5023/0418 February 200

[17] Southern Insurance Association LTD v Bailey NO above

[18] Ibid at 116H and also Minister of Defence and Another v Jackson (1964) 81 SAU at 34F- H

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