

SOUTH AFRICA / JUDGMENT

Kaduku v Road Accident Fund (83408/2014) [2017] ZAGPPHC 432 (22 March 2017)

[2017] ZAGPPHC 432

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi

CASE / FILE NUMBER

83408/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

22/3/2017

CASE

NO: 83408/2014

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

In

the matter between: KADUKU
PRINCE PLAINTIFF
vs
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

KUBUSHI J

INTRODUCTION

- [1] The plaintiff is claiming damages from the Road Accident Fund for bodily injuries sustained in a motor collision that occurred on 18 November 2012.
- [2] The evidence of the plaintiff was led in support of his claim. The defendant led no evidence.
- [3] No evidence was led in regard to quantum as well. The parties agreed to argue on the basis of the quantum reports handed in court by the plaintiff. The quantum reports forming part of the plaintiff's expert bundle are the following:

3.1 Medico-Legal Report by the Orthopaedic Surgeon Dr S K Mafeelane;

3.2 Medico-Legal Report by neurosurgeon Dr T P Moja;

3.3 Neuropsychological Report by the Clinical Psychologist Dr M Katjene;

3.4 Medico-Legal Report by the Occupational Therapist Ms A Phasha;

3.5 Medico-Legal Report by the Plastic and Reconstructive Surgeon Dr

J P M Pienaar; and

3.6 Psycho-Legal Report by the Industrial Psychologist Mr Sphiwe Katjene.

MERITS

Plaintiff's Evidence

- [4] According to the plaintiff he was a cyclist when he was knocked down by a motor vehicle insured by the Road Accident Fund. Plaintiff

testified that he was moving towards a T-junction. Before he reached the junction he went over a speed hump. At the T-junction, even though there was no stop sign for him, he stopped and looked to the right and to the left. He saw a motor vehicle approaching the junction from his left side. He had the right of way because there was no stop sign on his lane of travel and there was a stop sign on the left side for the motor vehicle. He also reached the T-junction before the approaching motor vehicle. When he saw the approaching motor vehicle it was about 20 to 25

meters away from the stop sign. He expected the motor vehicle to stop at the stop sign. As a result he cycled into the junction intending to cross over the road to be on the correct side. Whilst he was still negotiating the junction taking a right turn into the main road he was hit by the motor vehicle from behind. At the time the motor vehicle hit him he had already completed the right turn as he was about to go over the yellow line at the left edge of the road. He was about 10 meters away from the stop sign when the motor vehicle knocked him. According to him, from the looks of things the motor vehicle did not stop at the stop sign where it was supposed to and allow him to cross the intersection. He testified that there was nothing he could do to avoid the accident. He claims that he lost consciousness at the time of the collision. He was transported to the hospital and regained consciousness after five days. After being discharged he went back to the scene. He noticed break marks which started immediately after the stop sign and stopped at the left edge of the road.

Plaintiff's Argument

- [5] The submission by the plaintiff is that his claim should succeed by 100% because, firstly, the only evidence before court is his evidence. The defendant led no evidence to rebut his evidence.
- [6] Secondly, since the defendant in his plea denied the accident it cannot in its argument rely on the accident having occurred.
- [7] Lastly, the defendant should not be allowed apportionment of damages because it did not plead it in its papers and also because it denied that the accident took place.

Defendant's Argument

- [8] The contention by the defendant is that the liability should be apportioned 30 /70 in favour of the plaintiff. The submission in this regard is that the defendant conceded in the pre-trial conference held on 6 July 2015 that its version is as per the official SAPS records, which means that it admitted that the accident occurred. The defendant contended further that the defendant had in its defence pleaded apportionment of damages. Liability should be apportioned because the accident occurred whilst the plaintiff was still crossing the road which means that the plaintiff chose an inopportune time to cross the road. There is no evidence that proves that the motor vehicle did not stop at the stop sign because it hit the plaintiff from behind. The plaintiff could not have seen that the motor vehicle did not stop.

Analysis

- [9] It is common cause that the plaintiff was knocked down by the insured motor vehicle whilst negotiating a right turn at a T-junction. It is also not in dispute that the insured motor vehicle hit the plaintiff from behind. What is in issue is whether the liability should be apportioned between the parties and if so at what degree.

[10] The defendant's contention is that the liability should be apportioned because the plaintiff was knocked down whilst still

crossing the intersection. I do not agree with this contention.

[11] The only evidence, as the plaintiff submits, is that of the plaintiff. The plaintiff testified that he had the right of way

because there was no stop sign in his lane of travel and that he expected the motor vehicle to stop and allow him to cross the road to the correct side (that is the left side of the road) of his path of travel. If the evidence of the plaintiff is accepted, the insured motor vehicle should not have knocked the plaintiff. Firstly, as testified by the plaintiff he reached the junction before the insured motor vehicle. Secondly, the motor vehicle was supposed to have stopped first before moving into the intersection. From the look of things if the plaintiff went first into the intersection and if the motor vehicle had stopped at the stop sign it would not have hit the plaintiff. What is worse, the plaintiff was hit from behind. The insured motor vehicle ought to have seen the plaintiff and avoided colliding with him. The plaintiff's testimony is that the accident happened in the month of November at around 19h00. In November at around 19h00 it is not yet dark outside. If the driver of the insured motor vehicle was keeping a proper look out, he should have seen the plaintiff and avoided hitting him. The further evidence by the plaintiff is that there was nothing he could do to avoid the accident. He was hit from behind which means he did not see the insured motor vehicle immediately before it hit him. In the premises the plaintiff's claim must succeed in full.

[12] I find the evidence of the plaintiff to be satisfactory in all material aspects. He was a good witness, spoke eloquently and did not contradict himself. I am, as such, satisfied that he has been able, on a balance of probabilities, to establish his claim against the defendant.

QUANTUM

[13] As regards quantum the plaintiff's claim is for two heads of damages, namely, the loss of earnings and general damages. The parties are agreed that the plaintiff is entitled to an amount of R1 062 069, 50 for loss of earnings. What remains to be determined is the amount for general damages.

Injuries Sustained

[14] As a result of the collision the plaintiff suffered the following injuries: a left tibia and fibula fracture and head injury with a laceration of the scalp. An open reduction and internal fixation with tibial nails was done for the left tibia fracture. He was treated medically for the head injury and the scalp laceration was sutured. He was kept in hospital for a month.

[15] The neurosurgeon reports that the plaintiff sustained blunt head trauma, evidenced by the

multiple scars on his scalp. He lost consciousness at the accident scene. On arrival at the hospital, he was semiconscious with a Glasgow coma scale of 12/15 to 13/15. CT brain showed mild brain oedema. He was treated medically for the head

injury. His Glasgow coma scale improved to 15/15 the following day. Based on the available evidence, the plaintiff is said to have sustained a moderately severe diffuse brain Injury.

[16] The neurosurgeon is of the opinion that the plaintiff has made a good recovery post the head injury, with no obvious residual neurocognitive problems and has no residual neurophysical deficits.

Pain and Suffering

[17] It is recorded that before the collision the plaintiff was physically fit and healthy. He had no chronic medical problems or previous head injuries or limb fracture. The neurosurgeon reports that post injury, the plaintiff complains of recurrent left lower leg pain, exacerbated by prolonged standing, walking long distances, cold weather and prolonged weight bearing and strenuous exercise. He cannot run due to his leg pain. He struggles to perform his tiling work due to the pain.

[18] The neurosurgeon confirms that the plaintiff suffered acute pain from the left tibia structure and head injury with multiple scalp lacerations and an abrasion on the forehead. He was managed conservatively for the head injury. He had an open reduction and internal fixation of the left tibia. He would have experienced pain for several weeks from the healing fracture.

[19] According to the medico-legal report of the orthopaedic surgeon the plaintiff suffered acute pain that was present for almost 10 to 14 days as a result of the fracture as well as surgery involved to stabilise the fracture. He was given analgesics to ease the pain. He continues to suffer the inconvenience and discomfort of chronic pain from the injured areas. He has never been pain free since the collision. He will need to remove the tibial nail in the future and will, as a result, suffer more pain when the implants are removed.

Loss of Amenities of life

[20] There is loss of amenities of life due to the chronic left knee and leg pain. As a result of the injuries, the plaintiff has difficulty standing for a long time. He has difficulty walking long distances and can no longer run. He can no longer do any prolonged weight bearing and strenuous exercise. Pre-injury he worked as a tiller and he now struggles to perform his tiling work due to the pain.

Disfigurement

- [21] The plaintiff has a 5cm scar on the right parietal region of the head; a 6cm scar on the right occipital region of the head; multiple surgical scars on the left leg (knee, lower leg and ankle) and abrasion scar on the left lumbar region. He also has a bony deformity of the lower tibia.
- [22] The plaintiff's submission is that the report of the neurosurgeon shows that the plaintiff suffered serious brain injury and he should be compensated for that. According to the plaintiff he lost consciousness after the accident and remained oblivious of his surrounding for five days. This, the plaintiff argues, is confirmed by the Glasgow coma reading of 12/15 to 13/15. Plaintiff contends further that when considering the amount to be awarded for general damages the court must take into account that the plaintiff might in future have to remove the screws inserted in the tibia.
- [23] In support of his submission the plaintiff referred to the judgment in *Dlamini v RAF* 2015 (59188/2013) ZAGP 646 (3 September 2015) wherein the plaintiff who sustained a dislocated toe and brain injury was awarded an amount of R1 350 000 for general damages. According to the plaintiff that case is much closer to the present case where the plaintiff had a tibia fracture and brain injury.

Plaintiff, thus, submits that a fair and reasonable compensation for the general damages should be R1 500 000.

Defendant's Argument

- [24] In argument before me, the defendant concedes that the plaintiff sustained a moderately severe diffuse brain injury but denies that such brain injury was severe as argued by the plaintiff. The defendant also submits that the plaintiff's evidence that he was conscious for a period of five days is not congruent with the report of the neurosurgeon which state that the plaintiff's Glasgow coma scale was 15/15 the following day and that he was semiconscious. According to the defendant the plaintiff was not seriously injured as the neurosurgeon states in the report that he made good recovery. The defendant admits that the fracture tibia will require the removal of the screws in future.
- [25] The defendant denies that the judgment in *Dlamini* to which the plaintiff refers is a close mirror of the present case. According to the defendant the plaintiff in the

Dlamini-judgment suffered more serious injuries than the plaintiff in this instance. The defendant refers to other judgments which are accordingly similar with the present case. The judgments are: *Malope v RAF* 2009 where the plaintiff sustained a fracture of the tibia and fibula and was awarded R90 000; *Pinane v RAF* where the plaintiff sustained brain injury and was awarded R450 000 and *Mgomezulu v RAF* case number 04643/2010 where the plaintiff suffered a compound fracture and was awarded R600 000. The submission by the defendant is that a fair and equitable amount in the circumstances of the present case should be R500 000.

[26] I am in agreement with the defendant that the Dlamini-judgment is not a mirror image of the current case. In the Dlamini -judgment the plaintiff suffered very serious injuries like: severe right foot injury with dislocation of his second metatarsophalangeal joint and damage to the navicular cuneiform joint and inter-cunieform joint; severe injuries to the head and face

with intracranial bleeding and a mandible fracture and irreversible brain damage. 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

[27] In this instance, it is evident from the experts' reports that the plaintiff, due to the injuries sustained in the accident, is entitled to be compensated for general damages:

27.1 He suffered pain when the accident occurred. He suffered further pain occasioned by the treatment he received for the injuries and he continues to suffer the pain even long after the accident. The neurosurgeon refers to this pain as chronic. The experts say he will suffer more pain when the implants are removed.

27.2 He has also suffered loss of amenities of life. The experts are agreed that because of the injuries, the plaintiff has difficulty standing for a long time, walking long distances and can no longer run. He can no longer do any prolonged weight bearing and strenuous exercise and struggles to perform his tiling work due to the pain.

27.3 He is disfigured because of scarring to his head, knee, lower leg and ankle. He has abrasion scar on the left lumbar region and a bony deformity of the lower tibia.

[28] It is, thus, my view that in the circumstances of this case the plaintiff should be awarded an amount of R650 000 as just and

equitable compensation for general damages.

COSTS

[29] The plaintiff submits that the trial was allocated two days. The defendant accepted loss of earnings calculations only on the morning of the trial thus shortening the hearing to one day. The plaintiff's contention is that the scale of costs should be granted for the two days. The defendant on the other hand left the award of costs in the discretion of the court.

[30] I am of the view that the plaintiff as the successful party is entitled to the costs on the scale of two days. The matter had been set down for two days and counsel had as a result been booked for both days. The plaintiff should as such not be punished by the failure of the defendant to provide instructions to its counsel in advance before the matter was allocated the two days.

ORDER

[31] In the circumstances the draft order marked "XY" and initialled is made an order of court.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Counsel for Applicant:

Adv. M. M. Matsimela

Instructed by:

Mphela & Associates

Counsel for Respondent: Adv. K. Mongwe

Instructed by:

Aucamps c/o Herman Esterhuizen Smalman Attorneys

Date heard:

08 MARCH 2017

Date of judgment:

22 MARCH 2017

(GAUTENG DIVISION, GAUTENG)

BEFORE THE HONOURABLE JUDGE MOTHLE ON 22 MARCH 2017

CASE NO. 83408/14

PRINCE KADUKU

PLAINTIFF

-and-

ROAD ACCIDENT FUND

DEFENDANT

AFTER HAVING HEARD COUNSEL FOR THE PARTIES, the following order is made:

1. The Defendant to pay Plaintiff the amount of R 1 712 069.50 which amount shall be paid on or before 14 days from date of this order to the Plaintiff's Attorneys, Mphela & Associates, in settlement of the Plaintiff's claim, by direct transfer into their trust account, the details of which are as follows:

MPHELA & ASSOCIATES TRUST ACCOUNT

BANK

: STANDARD BANK

BRANCH CODE : 05-26-47-41

ACCOUNT NO : [...]

TYPE

: CURRENT ACCOUNT

2. Defendant is not liable for interest on the aforesaid payment if timeously made;
3. Defendant is ordered to furnish Plaintiff with an undertaking in terms of Section 17(4) (a) of Act 1996 for payment of the costs of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her resulting from a motor vehicle accident on 18th November 2012 after such costs have been incurred and upon proof thereof;
4. Defendant is ordered to pay Plaintiff's taxed or agreed costs on the High Court scale as between party and party UNTIL 9 March 2017, which costs shall include, but not limited to:
 - 4.1. The cost occurred in obtaining payment of the amount mentioned in 1 paragraph 1 above.
 - 4.2. The costs of one consultation with Plaintiff to consider the tender.
 - 4.3. The reasonable travelling and accommodation expenses of the Plaintiff to attend the medico legal appointments of the parties.
 - 4.4. The reasonable taxable fees of inter alia the below mentioned experts for compiling medico legal reports, including joint minutes, actuarial calculations, RAF reports and addendum reports, as well as the reservation, preparation and day fees, if any, of the following experts:
 - 4.4.1. DR. MOJA;(NUROSURGEON
 - 4.4.2. DR MAFEELANE;(ORTHOPAEDIC SURGEON
 - 4.4.3. DR. KATJENI (CLINICAL PSYCH
 - 4.4.4. M KATJENI(INDUSTIRIAL PSYCH
 - 4.4.5. ADELAIDE PHASHA(OCCUPATIONAL THERAPIST
 - 4.4.6. DR PIENAAR(PLASTIC SURGEON
 - 4.4.7. MUNRO CONSULTING(ACTUARY
 - 4.5 The costs incurred in transporting the Plaintiff to and from the abovementioned medico legal appointments as well as those arranged by the Defendant (if any);
 - 4.6 The costs of making bundle for trial (if any);

4.7 The costs of counsel;

4.8 In the event that the costs are not agreed, the Plaintiff shall serve a Notice of Taxation on the Defendant's Attorneys of record:-

4.8.1 The Plaintiff shall allow the Defendant 7 (seven) Court days from date of allocation to make payment of the taxed costs;

4.8.2 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest on the taxed or agreed costs from the date of the allocation to date of final payment.

BY THE COURT

REGISTRAR

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