

SOUTH AFRICA / JUDGMENT

Kampi v Road Accident Fund (5216/2021) [2024] ZAGPPHC 790 (12 August 2024)

[2024] ZAGPPHC 790

COURT

North Gauteng High Court, Pretoria

BEFORE

JA Kok

CASE / FILE NUMBER

5216/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 5216/2021

(1)

REPORTABLE: YES/NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 12 August

2024

JA Kok

In

the matter between: Kampi,
 Nozuko
 PLAINTIFF
 and
 The
 Road Accident
 Fund
 DEFENDANT

JUDGMENT

Kok AJ

Introduction

- [1] This is a claim for damages (general damages, loss of earnings, past and present medical expenses) flowing from a motor vehicle accident on 29 August 2019 in which the plaintiff was injured.
- [2] The merits were settled on the basis of 100% in favour of the plaintiff. I heard argument on quantum only. No witnesses testified.
- [3] I admitted into evidence the hospital records and collateral information obtained by the plaintiff's experts as admissible hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 and section 34 of the Civil Proceedings Act 25 of 1965. There was no objection from the defendant.
- [4] I allowed the plaintiff's affidavit and the plaintiff's experts' affidavits as evidence in terms of Rule 38(2) of the Uniform Rules of Court. There was no objection from the defendant.
- [5] The plaintiff explained why a curatrix ad litem must be appointed and a trust created for the protection of funds (the award made in favour the plaintiff). The court order will contain a paragraph in this regard.

Facts

- [6] Various expert reports formed part of the relevant evidence. It is not necessary to traverse these reports in detail in this judgment. The defendant did not file its own set of expert reports and limited its case to an argument on the quantum and based its argument on the experts' findings.
- [7] The plaintiff suffered the following injuries: A mild head injury; a neck injury; right shoulder injury; injury to her ribcage; upper leg injury; and serious and permanent scarring on her left shoulder (1.5 cm) and forehead (1.5 cm).

- [8] The Plaintiff still experiences the following sequelae and complaints as a result of the injuries she sustained in the accident: Headaches in the right frontal area of her head up to two times a week; during periods of cold weather her headaches worsen; right shoulder pain and stiffness which makes it difficult to perform overhead tasks and she cannot lift or carry heavy objects; pain in her thoracic lumbar spine and stiffness of her lower lumbar spine (this pain is intermittent in nature and also experienced at night, the pain is throbbing in nature localised in the area of her thoracic lumbar spine); intermittent pain in her right knee; locking of this joint experienced up to three times a week; pseudo locking of her right knee; impaired walking and standing ability due to the accident-related pain experienced in her right hip and her right knee; swelling in her legs; and serious and permanent scarring making her self-conscious and withdrawn.
- [9] The future medical treatment which the plaintiff will require, as set out in the experts' reports, may be covered by a section 17(4)(a) undertaking and the court order will contain a relevant paragraph in this regard.
- [10] The Plaintiff incurred undisputed medical expenses which were related to the motor vehicle accident of R359.35.
- [11] As to the claim for loss or earnings, the following facts are relevant. Prior to the collision, the plaintiff was in employment as a canteen cook. After the accident she continues to work in the same position, but in an accommodated capacity. After the accident, the plaintiff's work pace is slower and she complains of pain and discomfort when standing for long periods. The plaintiff is not required to engage in very heavy lifting as a cook as the other cooks mostly assist her during her work day when lifting heavy pots and pans and she uses a machine to cut and peel potatoes and can sit whilst working at times during periods of pain. The plaintiff is currently allowed to continue to work out of sympathy for her as her employer is aware that the plaintiff has children to take care of as a single mother. Her employer has managed to secure two year contracts with Sasol since 2014. The current contract is expected to come to an end by end-November 2024. Sasol usually renews the contract every year or second year if it is satisfied with the contractor's services. If the contract is not renewed, the plaintiff will be at risk of losing her current position as a contracted cook along with the other similar employees. In such a scenario her limitations on needing

accommodation in her workplace will make it more difficult for her to compete for employment.

Plaintiff's

submissions

- [12] The plaintiff made the following

submissions.

[13] As to general damages, the plaintiff referenced various comparable judgments from which the court was invited to take some guidance: *Sauerman v Road Accident Fund* 2004 (5B4) QOD 190, *Vukeya v RAF* 2014 (7B4) QOD 1 (GNP), *Scheepers v Road Accident Fund* ZAGPPHC 376, *Oosthuizen v Road Accident Fund* 2016 (7C4) QOD 5 (GNP), *Ramolobeng v Lowveld Bus Services (Pty) Ltd and Another* 2015 (7C5) QOD 29 (GNP), *Swartz v Road Accident Fund* 2011 (CC2) QOD 74 (ECP), *Radebe v Road Accident Fund* (14645/17; North Gauteng High Court judgment of 8 August 2019), *JM v Road Accident Fund* [2019] ZAMPMHC 6, *Parsons v Auto Protection Insurance Company Ltd* 1963 (1C4) QOD 373C, and *Mallela V Road Accident Fund* 2013 (6C3) QOD 17 (GNP). The plaintiff submitted that an award of R700 000 for general damages would be fair and reasonable under the circumstances.

[14] As to future loss of earnings, the following submissions were made.

[15] Pre-collision, the plaintiff would probably have continued to work as a canteen cook or a similar job with the same or similar employer for the remainder of her career with expected short periods of unemployment between contracts. Pre- and post-collision, her

current employment may come to an end when the contract with Sasol terminates, and she will have to seek and secure similar contracted

employment again with a similar employer in the open labour market. Thus, for calculation purposes it is assumed that uninjured as well as injured she would have probably been unemployed for periods due to the nature of the contract work that she is performing.

[16] Post-collision, the plaintiff is at risk of losing her current employment at some point in the future due to her physical, neurological and psychological limitations; her expected degeneration; future surgeries and her pain and discomfort when she is working. If she should lose her current employment, she is at risk of remaining unemployed for extended periods of time between contracts. She is at risk of loss of earnings while away from work for treatment or recuperation. She is also at risk of not experiencing some growth and earnings in future due to her negatively impacted competitiveness in the open labour market, coupled with her expected degeneration, future surgeries and experiencing discomfort.

[17] The plaintiff submitted actuarial calculations, taking a range of contingency deductions into account. Depending on the contingency deduction percentages for pre-collision income and post-collision income, these estimates ranged from R616 890 to R449 130. The plaintiff submitted that R574 890 would be a fair and reasonable award.

Defendant's

submissions

[18] The defendant made the following

submissions.

[19] The amount claimed for general damages as per the plaintiff's heads of argument is more than the amount claimed in the summons.

During the trial the plaintiff applied for an amendment in terms of Rule 28(10). The defendant is prejudiced on the basis that when the defendant makes an offer to a plaintiff, it considers the injuries that the plaintiff suffered compared to the amount claimed in the particulars of claim.

[20] The defendant referred to *Schutte v Road Accident Fund* (2159/2022) [2023] ZAFSHC 391 and the caselaw cited in this judgment and submitted that R400 000 for the plaintiff's general damages would be an appropriate award.

[21] As to loss of earnings, the defendant provided the court with its own calculations, not as part of an actuarial expert report, ranging from R253 715 to R304 230 and invited the court to make its own award, based on *Bailey v Southern Insurance Association* 1984 (1) SA 98 (A).

Analysis

[22] I deal first with the plaintiff's application in terms of Rule 28(10) to have the particulars of claim and prayer amended. An amendment may be granted at any time before judgment. An amendment will be refused where prejudice to the other party cannot be cured by an appropriate costs order - *Myers v Abramson* 1951

(3) SA 438 (C).

[23] No witnesses testified during the trial. Both parties relied on the same set of expert reports. The issues in dispute between the parties remained exactly the same. It is not clear to me which prejudice were or would be suffered by the defendant if the amendment is granted, as the defendant did not explicitly argue the

point. I may speculate. The defendant for example did not ask for a postponement of the trial to reconsider a possible offer to be made to the plaintiff, in light of the plaintiff's case for a higher award of general damages than stated in the summons. Would the trial not have proceeded if the defendant knew that the plaintiff would be making a case for a higher award of general damages? Would the defendant have increased its offer and avoided a trial if the plaintiff accepted the higher offer? Extensive argument on this point were not led by either party and the court lost very little time, so wasted costs are also not in issue. These considerations lead me to the conclusion that the application to amend the particulars of claim and prayer be granted.

[24] The calculation of the award to be made for future loss of earnings lies in the court's discretion. It is a calculation that navigates some logical basis and informed guesswork. *Goldie v City Council Of Johannesburg* 1948

(2) SA 913 (W) 920; *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) 114A; *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) paras 40-43.

- [25] When a court considers the actuarial calculations that are relied on as a basis for the calculation, a court should also identify the assumptions on which the calculations were made. Compare Bailey NO 113H.
- [26] Where a court is satisfied that the evidence establishes that the plaintiff suffered a patrimonial loss, the court must then come to a conclusion on the award to be made, relying on the evidence before it as best it can. Bailey NO 114A-E and the authorities cited there.
- [27] Payments made to the plaintiff out of the benevolence of her employer are not to be deducted from her claim - *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ).
- [28] The evidence established that the plaintiff suffered a patrimonial loss. She no longer has the same earning capacity that she had pre-collision. She will require accommodation by her current or a future employer and there is no guarantee that her current or any future employer will continue to accommodate her in this way.
- [29] I had regard to the various actuarial calculations and agree with the plaintiff that the award that this court should make, should be towards the higher end of the permutations in the report. Fair and reasonable allowance should be made for the significant risk that the plaintiff will not continue in her current position and will suffer from long periods of unemployment.
- [30] The determination of non-patrimonial damages ("general damages" in the present matter) is within the discretion of the
- court. When exercising this discretion, a helpful guide is the awards by previous courts in comparable cases. Previous awards provide broad parameters or a pattern in which the court should aim to place its own award. Previous awards however remain a guideline. They do not replace the court's discretion with a strict mathematical calculation of adjusting previous awards with the value of inflation - *De Jong v Dupisanie* [2004] 2 All SA 565 (SCA) para 64.
- [31] The remark in *Pitt v Economic Insurance Co Ltd* 1957
- (3) SA 284 (D) 287E-F also remains relevant: "[T]he court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense".
- [32] To give some consistency and predictability to awards for general damages, the preferable approach to me seems to be to carefully consider the awards in previous, comparable cases. I considered the judgments that the plaintiff and defendant referred me to, and I aimed to compare the plaintiff's injuries as best as I could to the injuries of plaintiffs in previous judgments. In my view, R400 000 would amount to adequate compensation for the plaintiff.

ORDER

In the result, the following order is granted:

1. The plaintiff's application in terms of Rule 28(10) is granted.
2. Judgment in favour of the plaintiff in the amount of R975 249.35, made up as follows:
 - 2.1 General damages of R400 000.
 - 2.2 Loss of earnings of R574 890.00.
 - 2.3 Past medical expenses of R359.35.
3. Party and party costs, which includes the reasonable costs of the duly appointed curatrix ad litem.
4. The defendant will within four months from date of this order furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs stipulated in terms of the said section arising out of the injuries sustained by the plaintiff in the motor vehicle collision that is the subject of the claim instituted under the abovementioned case number. It is ordered that any expenses as envisaged in section 17(4)(a) that are incurred after this order is made will resort and be claimable under the undertaking.
 - 5.1 Attorney Tammy-Jean van Jaarsveld of Tammy van Jaarsveld Attorneys is hereby appointed as trustee to a trust to be established for the benefit of the plaintiff with the powers and duties as set out in the draft trust deed attached hereto as Annexure "XX" ("the trust instrument");
 - 5.2 The net proceeds from the award to the plaintiff payable in terms of the action under the abovementioned case number are upon accounting to the trustee to be deposited in the trust's bank account to be opened by the trustee, such nett proceeds to be administered by the trustee in accordance with the powers and obligations stipulated in the trust instrument;
 - 5.3 The trustee shall provide security to the satisfaction of the Master of the High Court and shall perform her powers and execute her duties in regard to the damages awarded as required by the Trust Property Control Act 57 of 1988;
 - 5.4 The trust will terminate on the date of the plaintiff's death, unless it is terminated beforehand by order of the High Court;
 - 5.5 The trust instrument may only be amended by order of the High Court;
 - 5.6 The trustee shall administer the section 17(4) undertaking ordered in paragraph 4 above which undertaking shall cover 100% of the costs, fees and disbursements incurred in the formation, registration, administration and annual audits of the trust, incurred in providing security from time to time and in respect of the trustee's administration of the undertaking in terms of section 17(4)(a) itself.

5.7 The plaintiff's attorney shall, upon receipt of the capital in terms of this order, and pending accounting to the trustee, invest the capital amount in a savings account or other interest bearing account in terms of section 86(4) of the Legal Practice Act 28 of 2014 for the benefit of the plaintiff, the interest thereon likewise accruing for the benefit of the plaintiff which investment shall be utilised as may be directed by the trustee of the trust when created;

5.8 The trustee shall invest the proceeds from the claim upon accounting to her only with a registered financial institution(s); and

5.9 The plaintiff's attorney may, in her discretion, until such time as accounting takes place make payments to the plaintiff from the capital awarded for the following expenses:

5.9.1 For payment of debt and/or expenses of the plaintiff;

5.9.2 For the preservation or safe custody of any property of the plaintiff; and

5.9.3 For the maintenance of the plaintiff to meet any current expenditure in any business/undertaking carried on by the plaintiff.

6. All payments of the plaintiff's capital and legal costs are to be made by paying the amount(s) and taxed or agreed costs to the credit of the trust account of Salomé Le Roux Attorneys, the details of which are as follows:

SALOMÈ LE ROUX ATTORNEYS

BANK: THE STANDARD BANK OF SOUTH AFRICA

BRANCH: PRETORIA, CHURCH SQUARE

BRANCH CODE: 0[...]

ACCOUNT NUMBER: 0[...]

ACCOUNT HOLDER: SALOMÈ LE ROUX TRUST ACCOUNT

TYPE OF ACCOUNT: TRUST CHEQUE ACCOUNT

REF: K[...]

VENDOR NR: 5[...]

7. It is recorded that the plaintiff's claims are not subject to a contingency fee agreement.

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the plaintiff: J van der Merwe Instructed by: Salomé Le Roux Attorneys For the defendant: KA Phokwane Instructed by: State Attorney Date of the hearing: 29 February 2024 Date of judgment: 12 August 2024

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