

SOUTH AFRICA / JUDGMENT

Ledwaba v Road Accident Fund (151012019) [2021] ZAGPPHC 749 (25 October 2021)

[2021] ZAGPPHC 749

COURT

North Gauteng High Court, Pretoria

BEFORE

Yende

CASE / FILE NUMBER

1510/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA.

CASE

NO: 1510/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

25 OCTOBER 2021

In

the matter between:

KAGISO

LEDWABA APPLICANT/

PLAINTIFF

and

ROAD

ACCIDENT

FUND RESPONDENT/DEFENDANT

JUDGMENT

JUSTICE YENDE AJ:

- [1] This matter was enrolled before court for default judgment in respect of Chapter 6 of the Judge President's Revised Supplementary Directive as issued on the 11 June 2021.

Factual

background.

- [2] The background facts were comprehensively set out by Applicant/Plaintiff in its Heads of Argument however for the purpose of this judgment the following I consider relevant. This is a claim for damages arising from a motor vehicle accident that occurred on the 24th December 2017 at /or near N1 North before Murray Hill Bridge wherein the Plaintiff was the driver of a Toyota Hiace Taxi with registration

letters and numbers 325 LMJGP. At approximately 11:55 a collision occurred between the Toyota Hiace taxi driven by the Plaintiff with other two motor vehicles namely a white ford Ranger bearing registration letters and numbers FT 21 NN GP driven by a certain Mr Tawanda Sithole and a Silver Tata Telcoline bearing registration letters and numbers VNG 569 GP driven by a certain Mr Zwanana Ngete.

- [3] As a result of the motor vehicle accident, the Plaintiff was hospitalized at Dr George Mukhari Hospital on the 24th December 2017 and later discharged on the 20th April 2018. According to the "RAF 1" FORM completed by one Dr BS Nkomo it is recorded that "referred from Jubile District Hospital with a history of MVA as a driver of a Taxi. Vehicle caught fire and rolled over after a collision. He sustained bilateral femur and right foot metatarsal fractures, Traumatic brain injury (cerebral edema and hemorrhage contusions) ".

- [4] The Plaintiff was referred to Dr M J TLADI an Orthopaedic Surgeon for assessment on the 23rd March 2020 .DR MJ TLADI in his assessment report stated under the heading INJURIES SUSTAINED "According to the claimant, hospital records kept at Dr George Mukhari hospital and RAF1, the claimant sustained the following injuries:

- 1) Head injury
- 2) Burns (back and right arm)
- 3) Multiple lacerations
- 4) Right knee deep laceration with patellar tendon injury and missed tibial plateau fracture
- 5) Open right femur fracture.
- 6) Open right tibial and fibular fractures.

7) Open right foot metatarsal fractures.

8) Left femur fracture."

[5] Dr MJ TLADI continues in his assessment report under the heading TREATMENT RECEIVED in paragraph 5.1 INITIAL TREATMENT where he records that "After the accident he was evacuated to Jubilee hospital that transferred him to Dr George Mukhari hospital, where he received the following treatment ;Clinical and radiologist examination; Pain management ;Skin traction; Back slap; Wound debridement and suturing ;Intramedullary nailing of the left and right femurs ;Antibiotics; Physiotherapy and walking frame. At 5.2 FURTHER TREATMENT, Dr TLADI records that "He later had skin graft".

[6] At paragraph 7 under the heading PRESENT MAIN COMPLAINT, Dr TLADI stated that "I recorded the following history:

7.1. Right knee pain:

This pain is intermittent in nature.

Exacerbated by prolonged walking, sleeping and standing.

Associated with clicking sounds.

He reports that he removed a suture that was visible from the knee. The suture was causing pus to come out.

7.2. Sequelae of head injury:

Short temper.

Insomnia.

Opinion is deferred to the neurologist/neurosurgeon.

7.3. No other symptoms reported."

It is further noted that at paragraph 12 under the heading PROGNOSIS AND FUTURE MORBIDITY Dr MJ Tladi further notes under section f- Head Injury "He has now developed sequelae of head injury that needs neurologist /neurosurgeon".

[7] It appeared to the court at the prima facie perusal of the bundle of Experts Reports uploaded on caselines under section 007: EXPERTS NOTICES that the Plaintiff was also referred for assessment to Industrial psychologist Mrs B Nkambule who conducted her assessment on the 25 January 2021, with the Plaintiff who according to her, "was alone and not accompanied by anyone". It warrants referring to the relevant part of her assessment report. At paragraph 2 under the heading DOCUMENTATION RECEIVED, Mrs. Nkambule stated that "The following documents were received during the time of compiling this report:

- Instruction letter from Tl Mothoa Attorneys dated 25 January 2021.

- Copy of Mr Ledwaba's proof of earnings (Affidavit)
- Copy of RAF 1 form;
- Copy of clinical records from Dr George Mukhari Hospital
- Medical legal report from Mr TP Sekati- Occupational Therapist dated 25 January 2021;
- Copy of the RAF4 form from Dr M J Tladi - Orthopaedic Surgeon dated 23 March 2020 ;
- Medical legal report from Dr MJ Tladi Orthopaedic surgeon dated 23 March 2020;
- Copy of Radiologist report from Drs Mkhabele & Induna Diagnostic Radiologists Inc (Dr .N Adroos);"

[8] Plaintiff was also referred for assessment to Occupational Therapist, Mr Thabo Paul Sekati who conducted her assessment on the 25 January 2021. It warrants referring to the relevant part of his occupational therapy assessment report in this regard. At paragraph 2 under the heading DOCUMENTATION RECEIVED, Mr. Sekati records that he received the following documents:

- MMF1
- HOSPITAL RECORDS –GEORGE MUKHARI (CLINICAL NOTES)
- RAF4 form from Dr M J Tladi –Orthopaedic Surgeon
- Medical legal report from Dr MJ Tladi Orthopaedic surgeon.

[9] At paragraph 4.2 under the heading HISTORY OF THE ACCIDENT, Mr Sekati records the following "

: Head injury.

: Burns (Back and right arm) and multiple lacerations.

: Right knee deep laceration with patella tendon injury and missed tibial plateau fracture.

: Open right femur fracture; open right tibial and fibular fractures; open right foot metatarsals fracture and left femur fractures."

[10] At paragraph 4.3 under the heading PROBLEMS EXPERIENCED AFTER THE ACCIDENT, Mr Sekati records that "injuries sustained, according to the claimant and the documents at hand

: Pain in the right knee.

: Sequelae of head injury.

: Difficulty performing activities of daily living".

[11] In his conclusion remarks Mr Sekati further records that the "Plaintiff sustained head injury...."It is apparent from the above mentioned experts assessment reports that reference is made to a head injury that the Plaintiff sustained amongst other injuries during the motor vehicle accident however what is concerning to the court is that the Plaintiff was never referred to a neurologist and/or neurosurgeon as opined by Dr MJ Tladi in his Orthopaedic assessment medical report.

Plaintiffs Heads of Argument /Legal submissions.

[12] As mentioned in paragraph 1 above this was an application for default judgment for the purposes of this judgment I deem it fit to refer to the notice of motion that was served on the Defendant on the 5th October 2021 and same uploaded on caselines platform. The application for default judgment was set down for the 13th October 2021 in terms of which the Plaintiff claims against the defendant for interalia;

"1.1 Payment of the sum of R1965 000.00, being the total amount for the claim for:

Emergency medical treatment: R 50 000.00

Non-emergency medical treatment: R 150 000.00

Future loss of income: R 280 000.00

Past loss of income: R 85 000.00

General damages: R 500 000.00."

[13] The Plaintiff's Counsel submitted and presented the Plaintiff's Settlement Proposal to RAF REF: 560/12589814/1101/3 LINK NUMBER: 442038 during the hearing of this default judgment. The document was duly signed by Plaintiff's attorneys dated the 11th October 2021 and uploaded on caselines platform. This document the court would prefer to refer to same as the "Plaintiff's heads of Argument". For the purpose of my judgment I deem it fit not to regurgitate the whole document but to only to refer to the most relevant and salient sections thereon.

[14] Counsel for the Plaintiff read the "Heads of Argument" on record and at paragraph 1.6.1 same referred to the injuries as per hospital records kept at the Dr George Mukhari Hospital see paragraph 4 above. At paragraph 6.2.1 Counsel for the Plaintiff referred to the Report by DOCTOR M J TLADI what is concerning to the court is what is contained in paragraph 6.2.1.4.6.5 where it is recorded that "The Plaintiff as a result of the injuries requires neurologist or neurosurgeon evaluation for his sequelae of head injury". At this juncture I pointed out to Plaintiff's counsel that according to the hospital records kept at the Dr George Mukhari

Hospital it is recorded amongst other that the Plaintiff sustained a head injury.

- [15] That even Dr MJ Tladi opined that for the sequelae of head injury a neurologist or neurosurgeon evaluation was required and no such expert report was secured to which Counsel for the Plaintiff responded that same has been catered for. The court was left speechless as there was no such neurologist or neurosurgeon report on the documents filed of papers at the time of the hearing of the application.
- [16] In spite of the concern raised by the court, Counsel for the Plaintiff proceeded to address the court on its selected case law and /or precedence in support of its application as regards to the claim for general damages. For the purpose of this judgment I deem it fit to refer to the said case law and/or precedence; Anthony v Road Accident Fund, unreported, case 27454/2013, judgment delivered by Msimeki J on 15 February 2017 and cited by Davies J in Mashigo v Road Accident Fund (2120/2014) [2018] ZAGPPHC 539 at paragraph 8 thereof, the Learned Judge remarked as follows: "In Anthony's case general damages of R1.6m were awarded. Tobi's case was relied on because the plaintiff there sustained some scarring to his leg which were unsightly..... In Anthony's case which was only presented as a possible example for how high an award for general damages can go, the plaintiff had suffered numerous of other injuries for which he also needed to be compensated, such as a bilateral medical orbital fracture ,multiple facial lacerations and open wounds. broken and lost teeth and a moderately severe head injury together with his scarring and disfigurement".
- [17] At paragraph 10.3 of the "Heads of Argument", Counsel for the Plaintiff submitted that "With regards to quantum and guided by the expert reports which were substantially procured by Defendant", here I pause to mention that this submission is incorrect if not a falsehood as there are no Defendant's experts report secured and filed in the entire documents filed and uploaded on record by the Plaintiff attorney of record. In spite of this the counsel for the Plaintiff continued to proposed that the Plaintiff be awarded the following amounts:

10.3.1 Emergency Medical Treatment: R

10.3.2 Future Medical Expenses : See 10.2 above

10.3.3 Past loss of income : R 276 693.00

10.3.4 Future Loss of income : R 2 562 131 .00

10.3.5 General Damages : R 1 600 000.00

10.4. The total amount payable is R4 439 824.00, (Four Million four hundred and thirty-nine thousand, eight hundred and twenty-four Rands only).

- [18] Counsel for the Plaintiff continued to make submissions at paragraph 11. RATIONALE FOR THE AMOUNTS CLAIMED. Plaintiff's Counsel submitted at paragraph 11.1.1 that " With regards to the amounts for the future medical expenses; it is relied on the Orthopaedic Surgeon's report at page 6 paragraph 8 of the report of Dr Sibanyoni together with the assumption on retirement containing in the actuary report at page 6, paragraph 4.4 thereof " . Here I pause to mention that this submission is incorrect if not a falsehood since there is

no report by Dr SIBANYONI of the entire documents filed on record and the page(s) and paragraph(s) in the actuary report referred to are non-existence.

- [19] At paragraph 11.1.4 Counsel for the Plaintiff continued to make submission to the effect that "With regards to the general damages, the Plaintiff relies on the legion of comparable below:
- i In Nobel v Road Accident Fund 2011 (6) QOD J2-56 (GSJ) the plaintiff was a 36 year old male contracted to a firm of attorneys. He had multiple injuries consisting of, inter alia, the following : head and brain injury resulting in the plaintiff suffering from a reduced cognitive ability , altered personality and resultant mood disorders; fracture of the right femur complicated by shortening of the right leg and rotational deformity; fractured right foot with scarring including a mal-union of some of the metatarsal bones; scarring of the right thigh as a result of skin craft taken from that area to the right lower leg; and chronic neck pain, headaches and shortening of the right leg. An award for general damages in the amount of R 600 000.00 was made during 2011, which now translate to R 839 000.00 (The Quantum Year book by Robert Koch, 2017, p 56).
 - ii In Seme v Road Accident Fund 2008 (5) QOD A4-33 (DJ the plaintiff ,a 36 old male ,sustained a severe head and brain injury together with multiple fractures ,multiple Joss of teeth, facial lacerations and a dislocated right elbow. He was awarded general damages of R1 million during 2008 which is currently worth R 1 642 000.00 (The Quantum Year book, supra, p 55).
 - iii In Zarrabi v Road Accident Fund 2006 (5) QOD B4-231 (T) a 30-year old trainee medical specialists sustained a severe diffuse axonal brain injury with severe physical neurocognitive and neuropsychiatric consequences. She was left totally unemployable as a medical doctor and was awarded R 800.000 for general damages in 2006, which is currently worth R 1,569,000.00(The Quantum Yearbook, supra, 44)".
- [20] At paragraph 12 of the said Plaintiff's Settlement Proposal to RAF REF: 560/12589814/1101/3 LINK NUMBER: 442038 herein referred by the court as the "Heads of Argument" Counsel for the Plaintiff continued to make her submissions to the effect that " In all these matters, the injuries that were under consideration are substantially similar to the injuries sustained by the Plaintiff .The amounts of money claimed and which awarded are not of line with the amounts that have claimed by the Plaintiff".
- [21] At that moment the court was more concerned about the so-called legion of comparable case law and /precedent referred to by the Plaintiff's Counsel .It became abundantly clear to the court that all these cases were clearly unique and quite distinguishable from the present matter in that in the Seme matter the Plaintiff accordingly sustained inter alia severe head and brain injury together with multiple fractures, multiple loss of teeth, facial lacerations and a dislocated right elbow. Whereas in Zarrabi matter the Plaintiff sustained a severe diffuse axonal brain injury with severe physical neurocognitive and neuropsychiatric consequences and in Noble matter the Plaintiff sustained amongst other head and brain injury resulting in the plaintiff suffering from a reduced cognitive ability , altered personality and resultant mood disorders.

- [22] The court pertinently enquired from the Plaintiff's Counsel if the reference to these case law was not misplaced in light of the fact that although incasu it is recorded from the hospital records that the Plaintiff sustained a head injury there was no referral of the Plaintiff to an appropriate neurologist /neurosurgeon to properly assess the Plaintiff for such injury and the related sequalee .I wish to point out that no satisfactory response was proffered by the Plaintiff's Counsel save to submit from the bar that the Plaintiff's head injury has been catered for.
- [23] At this juncture the court informed the Plaintiff's Counsel that from the court's point of view her papers were overall not in order and owing to the lateness of the hour rolled the matter to the 14th October 2021 with the directive that the Plaintiff's Counsel must reconsider the case law she referred the court to in support of the Plaintiff's claim for general damages.
- [24] Postea, on the 14th October 2021 the proceedings resumed and the Plaintiff's Counsel made submissions to the effect that she has prepared and uploaded her Supplementary Heads of Argument with regards to the contingencies which the court had concerned thereon since it was not clear from the Report of the Actuary how she arrived at her calculations. She also submitted that she looked at her comparable authorities on damages. The court perused the Supplementary Heads of Argument and indeed found that the case law referred therein can be considered as being in the similar category with the present matter.
- [25] It is worth to mention that other than the issue of contingencies applied by the Actuarial and the case law, no cogent explanation was proffered as to why the Plaintiff was never referred to the neurologist /neurosurgeon to assess the his Head injury. The Plaintiff's Counsel moved for the draft order to be granted. The court did not grant the draft order and reserved its judgment.

Legal position

- [26] The Road Accident Fund (RAF) is a juristic person established by the Road Accident Act, Act no 56 of 1996("The Act") as amended. It is a critical organ of state which provides compulsory social insurance cover to all road users within the borders of South Africa. In terms of the Road Accident Fund Act ,56 of 1996 ("the Act") at all material times the Defendant is obliged to deal with this claim and to make proper financial compensation to the Plaintiff being a victim of motor vehicle accident in terms of the Act and the Regulations promulgated thereunder.
- [27] Generally the Plaintiff can lodge his/her claim in person but incasu the Plaintiff gave instructions to his attorney of record to lodge the claim on his behalf. That being said it is expected of the

Plaintiff's attorney of record to properly assess the Plaintiff's claim and use the plethora of medical experts to assist the Plaintiff

in ensuring that his motor vehicle injuries are properly assessed including the Sequelae thereof in order that the Plaintiff is

properly compensated for his injuries sustained during the motor vehicle accident.

Concerns by the Court.

- [28] It is trite that the rule of natural justice dictates that justice must not only be done but must manifestly be seen to be done. It is further trite that justice must not only be done to the Plaintiff but it must also be done to the defendant. The Plaintiff entrust his attorney of record to lodge his claim on his behalf and to ensure that he is properly assessed for his injuries he sustained in the motor vehicle accident . It is then obligatory for the Plaintiffs attorney of record to ensure that the Plaintiff through a proper financial compensation is placed in the position he would have been but for the accident.
- [29] According to Dr MJ Tladi a Specialist Orthopaedic Surgeon after assessing the Plaintiff of his Orthopaedic injuries he record that from the hospital medical records of the Plaintiff a head injury is recorded . He records in his assessment report that at paragraph 7.2 under the heading Sequelae of head injury; short temper. Insomnia, Opinion is deferred to the neurologist /neurosurgeon. It boggles the court as to why the Plaintiff was never referred to same specialist for assessment. No cogent explanation in laws was proffered by the Plaintiff's counsel other than to submit from the bar that same has been catered for.
- [30] In my view the Plaintiffs claim against the defendant has not been properly assessed in that one of the injuries he sustained being a head injury has not been assessed by the relevant and competent neurologist and/or neurosurgeon. The court is completely in the dark about the nature of the head injury that the Plaintiff sustained as well as the extend and the gravity of the sequelae thereof. The Plaintiff's Counsel further referred the court to an actuary's calculation which did not indicate what the appropriate contingency has been applied to the plaintiffs uninjured earnings as well as to his injured earnings. When quizzed about this with specific reference to the paragraph 5 which is the last heading of the Actuarial report the plaintiff's Counsel was constraint to proffer any appropriate contingency.
- [31] The Plaintiff was hospitalized at Dr George Mukhari Hospital on the 24th December 2017 and later discharged on the 20th April 2018 for approximately (4) four months. His head injury needs to be properly assessed especially when it was recorded on his hospital medical records that he sustain amongst other a "Traumatic brain injury (cerebral edemia and hemorrhage contusions)' Failure to investigate properly this injury will result in the plaintiff not being properly compensated for his injuries. There is

no other manner in which the Plaintiff's Legal Representative could have investigated whether the Plaintiff sustained a head injury as well as the resultant sequelae except to employ the service of the relevant surgeon as suggested by Dr MJ Tladi.

[32] I am of the respectful view that a diligent legal practitioner would have easily referred the Plaintiff to the neurologist and/or neurosurgeon. The ineluctable conclusion is that the failure by the Plaintiff's attorney of record to refer the Plaintiff to the neurologist and/or neurosurgeon as part of assessing the Plaintiff's head injury was unreasonable and unnecessary in the circumstances of this case. I therefore hold the firm view that the submission by the Plaintiff's Counsel that this has been catered for without any cogent proof is unfortunate, illogical and flawed.

[33] As a consequent, I make the following order(s);

[33.1] The draft order is not made the order of the court;

[33.2] The Plaintiff's Attorney of record is ordered to refer the Plaintiff to the Neurologist and/or Neurosurgeon as opined by Dr MJ Tladi in his Orthopaedic Assessment Report within 30 days of receipt of this order;

[33.3] That having obtained the Neurologist and/or Neurosurgeon assessment report, the Plaintiff is granted leave to amend and/or update its papers and approach the court;

[33.4] That the registrar of the court refer to the Legal Practice Council to investigate whether the conduct of the Plaintiff's Attorney of record in failing to refer the Plaintiff for assessment as opined by Dr MJ Tladi constitute a misconduct in terms of the Code of Conduct of its members.

[33.5] That the costs of the 13th and 14th October 2021 be cost de bonis propriis.

J YENDE

Acting Judge of the High Court Gauteng Division.

DATE OF APPLICATION: 13 and 14 October 2021 (by video conferencing)

JUDGMENT

DELIVERED: 25 October 2021 (electronically)

FOR APPLICANT/PLAINTIFF: ADVOCATE MM SONO

INSTRUCTED BY: T

I MOTHOA ATTORNEYS

ATTORNEYS FOR THE APPLICANT/PLAINTIFF, PRETORIA

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