

SOUTH AFRICA / JUDGMENT

L.R v Road Accident Fund (153/2017) [2020] ZAFSHC 64 (19 March 2020)

[2020] ZAFSHC 64

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, J

CASE / FILE NUMBER

153/2017

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THE

HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case

No.: 153/2017

In the matter

between:

LR Plaintiff
and
ROAD
ACCIDENT
FUND[1]
Defendant

Coram:

Opperman, J

Heard:

12 March 2020

Delivered:

19 March 2020

Summary:

Loss of income/earning capacity of the plaintiff -
purpose of the Road Accident Fund - section 17(4)(a)-certificate

JUDGMENT

I

INTRODUCTION

[1] On 10 July 2016 at approximately 4h15 and on the R30 road between Bloemfontein and Brandfort the motor vehicle driven by the plaintiff collided with the insured vehicle that just earlier overturned and was in the road without any warning lights or signals.

[2] On 12 January 2017 summons was issued. It was claimed in the summons that as result of the injuries sustained, the plaintiff suffered sequelae of pain and discomfort, loss of amenities of life, had to undergo medical treatment and “may have loss of earnings/earning capacity in future”. (Accentuation added)

[3] I pause to point out that there was not any specific loss of earnings at the time of the summons in January 2017 but it was claimed as a “maybe”. (See paragraph 6.4 of the Particulars of Claim)

[4] Notwithstanding the claim was for:

Past medical and hospital expenses

100 000.00

Estimated future medical treatment

600 000.00

Past loss of income

R7 920.00

Estimated future loss of income

2 752 596.00

General damages 800 000.00

TOTAL

R 4 300 516.00

[5] The reason why the loss of income was a “maybe” at the time of summons was because the plaintiff was properly employed in accordance with her pre and post – accident capacity and qualifications at PACOFS. She was in a “permanent light duty working environment” as prescribed by Dr Oelofse, the Orthopaedic Surgeon. He indicated that with successful treatment the plaintiff’s productivity will improve, however as the developing degeneration in the right hip and joints progresses, her productivity will decrease again. This may cause

her to retire earlier than the average 65 years of age.

[6] She earned a basic salary as an income accountant at PACOFS, where she started to work in 1995; of R15 197.00 per month and as on 10 July 2016. Added hereto was a thirteenth cheque. Furthermore, she received a housing allowance of R500.00 per month, an acting allowance of R613.00 per month, a total perk of R2508.00 per month and a non-taxable total contribution of R2656.00 per month; all on 10 July 2016 monetary terms. Thus, an annual income of R272 888.00. R25 643.00 per month in monetary terms on 5 February 2020 and with a projected inflation increase until retirement at 65.[2]

[7] She was in a secure and stable work environment.

[8] She resigned in 2017 and bought a pub and grill-business with her “pension money that payed out”.

[9] This court found in favour of the plaintiff on 25 April 2018[3] and that the defendant is liable for 100% of the plaintiff’s proven damages. The general damages had been settled between the parties during the course of the litigation in the amount of R800 000.00. Her future medical expenditures were also not an issue and was completely neutralised with a section 17(4) – certificate on 3 December 2019. The order on 3 December 2019 only dealt with future medical expenditures.[4] [5]

[10] At the end of the trial the dispute pivoted on loss of income.

1. The plaintiff maintains a claim of:

Loss of past earnings

R 47 920.00

Loss of future earnings

R 2 752 596.00

They do not want the section 17(4)-undertaking for an assistant offered by the RAF.

TOTAL CLAIM

R2 800 516.00[6]

2. The defendant, after conclusion of the trial and in their final address to court, offers:

No loss of past earnings

R 0.00

Loss of future earnings

R 1 597 672.00

An undertaking in terms of section 17(4) for the costs of an assistant at an estimated capitalised; but not restricted to, minimum amount of R7500.00 per month and to the total amount of

R948 234.00

TOTAL

R2 545 906.00[7]

3. The plaintiff wants for a 40% contingency and the defendant offers a 20% contingency. The difference in monetary value of the total claims is R254 610.00. If the salary of the assistant is raised the claim and intra curial offer might come on par and the payment by the RAF has the potential to be more than what is claimed by the plaintiff. The claim of the plaintiff for future loss of income is higher than the calculation of the Actuary at a 40% contingency: R2 188 702.00 and based on the postulation and recommendation of the Industrial Psychologist dated 5 February 2020 (See page 5 of Exhibit F).

- [11] Two major matters crystallised from the trial: The rationale for the existence and proclamation of the RAF system and the issue of the so-called section 17(4)-undertaking. The discretion of courts is trite.

II THE ROAD ACCIDENT FUND

- [12] The Road Accident Fund Act 56 of 1996 was promulgated, among others, to re-integrate victims of road accidents into society from a health and economic perspective; and to protect wrongdoers and their families from financial ruin. This is public knowledge.[8]

- [13] The RAF is funded by the people for the people. It is a precious constitutional commodity that must be managed with care. It is not a business venture that aims for profit and riches. It may not be applied or interpreted to address the possibility of a commercial

business making inadequate profits (or even losses) due to commercial uncertainties. More so; risks that plaintiffs take after the fact and that does not link with the road accident and its sequelae is not for the account of the RAF.

- [14] The RAF was decreed to protect social and economic welfare within a fair and democratic system. The courts are constantly revisiting the provisions of the RAF Act to maintain constitutional compliance.

- [15] The purpose of the RAF is to give the greatest possible protection to claimants. It is not an unqualified right.[9]

“[49] However, in determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government. These competing interests need to be carefully weighed.”[10]

- [16] Section 3 of the RAF Act simply and efficiently states: “The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of a motor vehicle”.
- [17] It is imperative to understand “loss or damage wrongfully caused”. In *Rudman v Road Accident Fund*
- [2002] 4 ALL SA 422 (SCA) at paragraph 11 it was correctly emphasized that a physical disability does not automatically bring about a reduction in earning capacity. It does not automatically reduce the estate or patrimony of the injured person.
- [18] I interpret it to mean that there must be proof of a reduction in earning capacity and that it gives rise to pecuniary loss. Of the same; there must be a causal link between the accident, injuries and the loss of income and earning capacity.
- [19] On the facts of this case the preceding rule depicts the damage that must be neutralised by the Road Accident Fund. The civil wrong is not of a different type because the RAF is involved. In *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) the principle was reiterated:

“In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:

"In later Roman law property came to mean the universitas of the plaintiff's rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage, and as it would have been if the act had not been committed (Greuber at 269)."

III THE SECTION 17(4)-CERTIFICATE

- [20] The issue of the section 17(4)-certificate has been ruled upon in the Supreme Court of Appeals. On appeal Leach JA (Tshiqi, Majiedt and Mathopo JJA and Ploos van Amstel AJA concurring) held in *Road Accident Fund v Mphirime* (1036/2016)
- [2017] ZASCA 140 (2 October 2017) that a section 17(4)-certificate will suffice for a domestic worker and that the plaintiff cannot refuse such an undertaking should the RAF exercise its right to do so.
- [21] The assistant as recommended by the Industrial Psychologist that testified on behalf of the plaintiff in this case will resort within the judgment of the Supreme Court of Appeals. It is permissible.

IV PAST LOSS OF INCOME

- [22] The plaintiff did not prove her past loss of income. The past loss of income at R47 920.00 was calculated on the “full loss of sick leave” of 2,5 months that the plaintiff was on sick leave as result of the accident and whilst in the employment of PACOFS. She still received her salary but; according to the Actuary that testified, lost the value of her sick leave. There was not any evidence forthcoming from the plaintiff whether there was an income/monetary-value as per her employment contract on sick leave. The only right is the benefit to take leave when sick.

V THE PLAINTIFF AND HER PROVEN CIRCUMSTANCES

- [23] The Occupational Therapists reported on 17 July 2018 that the plaintiff resigned in September 2017 due to non-accident related reasons. (Accentuation added) The reports show that she never mentioned any accident-related difficulties that caused her to want to resign. This is in conflict with her testimony that she had physical and emotional challenges that prompted her to resign. If the situation at her place of employment was so adverse and challenging, she would have reported it to the experts in 2018 as the reason for her resignation in 2017.
- [24] Based on the information supplied in the plaintiff’s case her work was categorised by the Occupational Therapists as sedentary to occasional light work. Added hereto; the plaintiff reported that she was supported by her colleagues after she returned to work. Colleagues assisted her with tasks such as copying, printing and filing. Upon returning she was reasonably accommodated to working three days a week. In June 2017 she felt more comfortable to perform her role. She was assisted with frequent and hourly rest breaks by her employer.
- [25] The therapists reported that her role as income accountant which was of sedentary to occasional light work was suitable as accommodations and support was offered. She would have been unable to perform her tasks of filing and crouching and kneeling and would have continued to experience pain in her hips during prolonged sitting. However, with a supportive employer and with adaptations to her role she may have been able to be productive in her role. She would thus not be suitable for the full spectrum of her work in her pre-accident trade but her income was not affected.
- [26] The plaintiff testified that she resigned because she physically and emotionally could not deal with her job. She is a smoker and due to her injuries could not negotiate the stairs, could not do the filing and to walk to the other offices was too difficult. She struggled to do the filing that was not at eye level. Emotionally she was not coping. She let the salary dispute go in
2015. She did not mention this to either the Industrial Psychologist or the Occupational Therapists during their interviews in 2018.

- [27] The Occupational Therapist stated unequivocally that she is not suitable for her current role as self-employed owner and manager. She will need assistance. This is also the view of the Industrial Psychologist.
- [28] She had a salary dispute with her employer; PACOFS since 2014. She was already unhappy about her salary package before the accident in 2016. She, for instance, wanted her medical benefit in cash. A dispute arose due to a misunderstanding with the HR officer. It now became a labour dispute in 2015.
- [29] The plaintiff's employer reported to the Industrial Psychologist that the plaintiff was an excellent employee and despite certain difficulties after the incident she was still a good employee. Post-accident she still scored an 8/10 (from 9/10 previously) for her overall performance.
- [30] The court questioned her as to the attitude of the employer and if she took the issues of stairs and the lifts not working up with them. She did take the physical and emotional challenges up with the employer; they only said they will look into it and get back to her. She did not take it further and decided it will be better for her to resign. She was not emotionally strong enough to withstand her work environment.
- [31] As said, in 2017 she resigned and bought a pub with her pension money. Just over two year into the business she earns R10 000-00 per month. The business does not perform to such an extent that she can have a salary increase.
- [32] She only entered her personal bank statements into evidence and not any of the business. She introduced a very informal and general depiction of the expenditures of the business. There are not any financial statements of the business available. She could not tell the court why not. There are not even any SARS returns available.
- [33] During cross examination there was some instability and contradictions in her income pointed out. The business apparently ran on cash without formal bookkeeping.
- [34] The risks of the business are not for the account, nor the responsibility of the RAF.
- [35] The oral evidence of the plaintiff during trial is of severe significance. She did not provide any evidence about the business to the court or to the Industrial Psychologist. It is unknown to everybody; the court and the experts employed on behalf of the plaintiff, what the business potential was before it was acquired by the plaintiff and her husband, if it is profitable currently and whether her income is sufficient. She did prove that she is in need of an assistant for the physical duties.

- [36] It is not disputed that if the business fails, she will have to return to the open market. The Industrial Psychologist on 22 January 2020 predicted that she will “in all probability also be able to return to earn a salary on par with that of what she was earning at PACOFS” and would have been allowed to retire at 65. But the Orthopaedic Surgeon predicted retirement at age 55 to 60 and as her condition deteriorates it will make her less capable to compete for promotional positions.
- [37] The undisputed evidence of the Industrial Psychologist that testified for the plaintiff is that she resigned due to a salary dispute and started a business because she could not cope with the dispute at work. She can continue with the business and has a 70% chance of making a success of it if an assistant is provided. I quote from his evidence:

“JUDGE: Sir, just from my side what is the premise that the actuary must work from. You base your evidence on the facts supplied by the plaintiff and of course your information that you gained from the supervisor of the plaintiff. You gave your evidence to the actuary. What is the basis that the actuary must work from? What are the facts that we must accept today?”

Moodie: My Lady, I think that on my scenario which I initially anticipated is that she initially made a career move to something else and if she have done it when she was healthy and strong she could have done it without additional support and I think it is fair to award her with somebody to assist her with that salary as I anticipated. As I said in my report a salary of R12 000/ R14 000 which is the average salary of bar managers. I do think it is necessary because she will be still involved she can still make managerial decision she can still do make more managerial decisions and I don't think it is necessary because she will still be involved but she need somebody so that she can go out and to try to build the business. So, if she is able to employ a lady and remunerate or pay her R5000 per month the business is not going to grow, it is going to stay there and I am just concern that in the long run if the business will be able to sustain itself.

Court: What is the link between the accident, injuries and the potential successes of the business?

Moodie: If she was uninjured, she could have focussed on a lot more and try to make a success of the business. The fact is that they are in this business for the last two to three years, so they have got a good feeling of the business. If they know that their personalities do not really fit and if it will never work out, they will not consider now to open up another pub or moving the pub to another premises. So, I think they are confident that it will basically work. But so there is always as well also the possibility that the business will not continue and the longer they wait to make that actual transition and she becomes over the age of 50 and then it will then be too difficult for her to move to the same going back to the same work as that she did at the time of the accident. So, they if they make the move it will be actually much quicker. So, I personally feel that there will be a 70/30 chance. 70% percent chance of her helping saving the business with an assistant and 30% without an assistant.

JUDGE: On page 170 you referred to your interview with her supervisor and you stated that the reason she resigned was due to her being unhappy with her salary package and not due to her working conditions. Not the fact that she is not assisted due to her physical challenges at that stage.

Moodie: Yes, she said to me that she was much more focussed on this crises and that she got this fight with her employer which actually started in 2014 so the focus was more on her issue of her salary and that she said she wanted to go in any event as a result of that. But when I approach her and said what about her condition she said at that stage another doctor said she will get better and she did not think that her condition will get worse and to a stage that she will need additional operations and what the work actually involves when she actually got there.”

VI

CONCLUSION

[38] In *Southern Insurance Association v Baily* NO 1984 (1) SA 98 (A) that was supported in *Adv Johan Malherbe Kilian N.O Plaintiff in his capacity as Curator Ad Litem to Jansen Van Rensburg: Andre Abraham Petrus Le Grange v Road Accident Fund*, The High Court of South Africa (Gauteng Division, Pretoria) Case No. 34116/2016 Judgement 15/9/2016 Gauteng Division, Pretoria it was held that:

“[1] Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make estimates, which is often a very rough estimate, of the present value of loss. It has open to it, two possible approaches: One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try 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, and these may vary from the strongly probable to the speculative.

[2] It is manifest that either approach involves guesswork to a greater or lesser extent. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can, on the material available even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss.

[6] I must however emphasise that because of the speculative nature of the enquiry, when parties elect to approach the court on a stated case and lump sum of money is claimed, as in the present case, R6 653 636.00 from the public coffers, it is incumbent on the parties to place before the court sufficient evidence in the form of admissions and other admitted format.”

[39] On the evidence adduced by the plaintiff and her experts the calculations by the Actuary on 5 February 2020 with a 20% contingency

and an assistant to neutralise the physical and emotional sequelae of the road accident on the plaintiff; will be the best outcome for all.

VII ORDER

IT IS ORDERED that:

1. The defendant is to pay the plaintiff an amount of R800 000-00 in respect of general damages (As agreed).
2. The defendant is to pay the plaintiff an amount of R 1 597 672.00 in respect of loss of income/ loss of earning capacity.
3. The defendant is ordered to provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for costs associated with the hiring of an assistant as contemplated by the Industrial Psychologist.
4. The defendant is to pay the aforementioned amounts into the plaintiff's Attorney's trust account with the following details:

ACCOUNT HOLDER: VZLR INC

BRANCH: ABSA BUSINESS BANK HILLCREST

BRANCH CODE: 632005

TYPE OF ACCOUNT: TRUST ACCOUNT

ACCOUNT NUMBER: 3014-7774

5. In the event of default on the above payment, interest shall accrue on such outstanding amount at 9.75% (at the mora rate of 3.5% above the repo rate on the date of this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment.
6. The aspect of past medical expenses is separated in terms of Rule 33(4) and is postponed to the pre-trial roll of 20 April 2020 (As agreed).
7. The defendant to pay the Plaintiff's taxed or agreed party and party costs, into the above-mentioned account, for the instructing- and correspondent attorneys, which costs shall include, but not be limited to the following:
 - 7.1 All reserved cost to be unreserved, if any;
 - 7.2 The fees of senior junior counsel;
 - 7.3 The cost of obtaining all expert medico legal-, actuarial, and any other reports of an expert nature which were furnished to the defendant and/or it's experts;

7.4 The cost of obtaining documentation / evidence, scans, considered by the expert(s) to finalise their reports;

7.5 The reasonable taxable qualifying, preparation, reservation and attendance fees of the following experts: (including the cost of consultation fees with the legal teams):

7.5.1 Dr L F Oelofse (Orthopaedic Surgeon)

7.5.2 Ben Moodie (Industrial Psychologist)

7.5.3 Johan Sauer (Actuary)

7.6 The reasonable taxable qualifying, preparation and reservation fees, if any, of the following experts:

7.6.1 Lizeli Olivier (Occupational Therapist from Rita van Biljon Occupational Therapists)

7.6.2 Danie Hoffmann (Plastic, reconstructive and cosmetic surgeon)

7.6.3 Claire Hearne (Clinical Psychologist)

7.6.4 Dr Marinda Joubert (Psychiatrist)

7.7 The reasonable traveling- and accommodation cost, if any, incurred in transporting the Plaintiff to all medico-legal appointments;

7.8 The reasonable cost for an interpreter's attendance at court and at the medico legal appointments for translation of information,
if any;

7.8.1 The above-mentioned payment with regard to costs shall be subject to the following conditions:

7.8.1.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and

7.8.1.2 The plaintiff shall allow the defendant 14 (fourteen) calendar days to make payment of the taxed costs;

7.8.1.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

M OPPERMAN, J

Appearances:

For plaintiff: Adv. M.D.J STEENKAMP

Instructed by:

Du Plooy Attorneys

Bloemfontein

Ref: DU PLOOY/V59

For defendant: Adv. I SANDER

Maduba Attorneys

Ref: MA/RAF/1766

[1] RAF.

[2] Exhibit F page 2 paragraph 2.

[3] “1. Defendant is liable for all and any damages that the plaintiff may proof and 2. Defendant pay the costs of the trial

pertaining to the merits.”

[4] “1. The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods (of a medical and non-medical nature) to the Plaintiff arising out of injuries sustained by the Plaintiff in a motor vehicle collision on 10 JULY 2016, in terms of which undertaking the Defendant will be obliged to compensate the Plaintiff in respect of the said costs and expenses after the costs and expenses have been incurred by the Plaintiff or by any party on behalf of the Plaintiff, and upon proof thereof. The Defendant is ordered to pay the reasonable traveling costs and accommodation for the Plaintiff and her caretaker to and from the location where she is to receive treatment covered under the undertaking. 2. The matter is postponed to 4,5 and 7 February 2020 for adjudication of the remaining aspect of quantum; 3. Costs to stand over for later adjudication.”

[4] “1. The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods (of a medical and non-medical nature) to the Plaintiff arising out of injuries sustained by the Plaintiff in a motor vehicle collision on 10 JULY 2016, in terms of which undertaking the Defendant will be obliged to compensate the Plaintiff in respect of the said costs and expenses after the costs and expenses have been incurred by the Plaintiff or by any party on behalf of the Plaintiff, and upon proof thereof. The Defendant is ordered to pay the reasonable traveling costs and accommodation for the Plaintiff and her caretaker to and from the location where she is to receive treatment covered under the undertaking.

2. The matter is postponed to 4,5 and 7 February 2020 for adjudication of the remaining aspect of quantum;
3. Costs to stand over for later adjudication.”
- [5] Past medical expenditures will be adjudicated later and the matter will serve on the Pre-trial roll in April 2020.
- [6] Heads of Arguments: Plaintiff at paragraph 12 and Exhibit E (Actuary report) at page 152.
- [7] Heads of Arguments: Defendant at paragraphs 47 and 48 with reference to footnote 26 and Exhibit F (Actuary report), page 5 with a 20% differential.
- [8] www.raf.gov.za on 10 March 2020.
- [9] See *Mvumvu v Minister for Transport*
- [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paragraph 20 and *Engelbrecht v RAF*
- [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at paragraph 23.
- [10] *Mvumvu v Minister for Transport*
- [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC).

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