

SOUTH AFRICA / JUDGMENT

Lubisi v Road Accident Fund (2015/84674) [2019] ZAGPPHC 562 (22 October 2019) [2019] ZAGPPHC 562

COURT

North Gauteng High Court, Pretoria

BEFORE

FMM Snyman

CASE / FILE NUMBER

2015/84674

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IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE:

YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.
CASE
NUMBER: 2015/84674
23/10/2019
In
the matter between:-
LUBISI,
ALBERTINA
MASINGITA
Plaintiff
and
ROAD
ACCIDENT FUND
Defendant

JUDGMENT

FMM SNYMAN (AJ):

- [1] The plaintiff sustained serious injuries in a vehicle collision on 10 September 2013. Only one vehicle was involved in the collision, being the vehicle driven by the plaintiff. The plaintiff alleged that another vehicle caused the collision. The identity of the driver of the other vehicle (being the insured driver) as well as the vehicle which purportedly caused the collision, is not known.
- [2] This matter has been set down before me for determination of both merits and, should merits be found in favour of the plaintiff, quantum for compensation against the Road Accident Fund.

Merits of the claim:

- [3] The plaintiff was the only witness who testified. After the plaintiff has closed her case, the defendant asked for absolution from the instance.
- [4] Judgment was given ex tempore in favour of the plaintiff dismissing the request for absolution from the instance. The defendant closed its case without calling any witnesses. The defendant was ordered to pay 100% of the proven or agreed damages suffered by the plaintiff as a result of the aforesaid collision. The reasons for the judgment in favour of the plaintiff were also given ex tempore on 23 August 2019. In essence, a summary of the reasons provide as follows:
 - [4.1] The cases of the plaintiff was that damages was caused by an unknown vehicle, which vehicle was in the lane of oncoming traffic.
 - [4.2] The defendant claimed that the plaintiffs negligence and inexperience caused the damage suffered by the plaintiff.
 - [4.3] The collision occurred on the unnamed tarmac road next to Strooifarm, Zamdela. The road consists of single lanes in which traffic is in opposite directions.
 - [4.4] The plaintiff's uncontested evidence was that the vehicle of the insured driver had its bright headlights shining in the plaintiff's view. The time of the collision was approximately 05:30 at dawn, with clear visibility.
 - [4.5] The plaintiff flashed her vehicles' bright lights to prompt the driver of the oncoming vehicle to reduce the bright lights to normal.
 - [4.6] The driver of the oncoming vehicle did not respond and the insured drivers' vehicles bright headlights blinded the plaintiff.
 - [4.7] The plaintiff witnessed that the insured vehicle crossed over the lane of oncoming traffic and entered the lane that the plaintiff was driving in.

[4.8] The plaintiff steered the vehicle she was driving, to the left side off the road (on the left shoulder of the road) in order to avoid a head- on collision with the oncoming vehicle.

[4.9] The insured driver in the unknown vehicle passed the plaintiff in the lane where the plaintiff was supposed to travel.

[4.10] The plaintiff steered the vehicle to the right, in order to re-enter the tarred road from the left shoulder of the road.

[4.11] The plaintiff lost control of the vehicle and the vehicle overturned. The defendant's case is that the plaintiff was negligent in not slowing down to such a speed when it would be safe to re-enter the tarmac.

[4.12] The defendant's case was that the plaintiff caused the damage to the vehicle being driven by her, due to her inexperience as a driver and negligent driving.

[4.13] It was not disputed that there was another vehicle which were in the oncoming direction. It was also not disputed that the insured driver of the unknown vehicle drove with its bright headlights and blinded the plaintiff. It was furthermore not disputed that the insured driver veered in the lane of the plaintiff and the plaintiff left the road to drive on the left side of the shoulder of the road in order to avoid the collision.

[4.14] The defendant's case was further that the plaintiff was driving at a high speed when steering back to the tarred road. The speed according to the plaintiff was approximately 80km per hour.

[4.15] As mentioned, the defendant asked for absolution for the instance after the plaintiff closed her case.

[4.16] The test for absolution from the instance has been set out in *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403(A) by Miller AJA

"The test to be applied is not whether evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff."

[4.17] The test was repeated in *Gordon Lloyd Page and Associates v Rivera* and another 2001 (1) SA 88 (SCA) by Harms JA:

"This - The passage quoted above (sic)- implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence not court could find for the plaintiff."

[4.18] In applying the test to the evidence before me, I found that any perceived or actual negligence of the plaintiff did not cause the collision. The actions of the insured driver caused the collision.

[4.19] The plaintiff admitted that she is an inexperienced driver. In application of the reasonable man test, I find that the plaintiff acted as any reasonable man (being experienced driver or not) would have acted in avoiding a heads-on collision with an oncoming vehicle.

[4.20] The common cause facts support the inference that the plaintiff was not the cause of the collision, but the insured driver.

[4.21] As mentioned above, on these reasons I gave judgment 100% in favour of the plaintiff on the merits of the matter.

[5] The parties proceeded to deal with the quantum claimed by the plaintiff.

Quantum

[6] By agreement between the parties a draft order was handed up dealing with all the other aspects save for loss of earnings. A surmised content of the draft order is:

[6.1] the past loss of medical expenses are postponed sine dies by agreement between the parties;

[6.2] the general damages are settled on an amount of R700,000.00 (Seven Hundred Thousand Rand);

[6.3] the defendant shall furnish Plaintiff with an unlimited Undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act, 56 of 1996, of the costs of the future medical expenses.

[7] No evidence was led in relation to the quantum in relation to the loss of earnings. Both parties agreed to argue on the actuarial report filed by the plaintiff. This report was done by Munro Forensic Actuaries and dated 12 August 2019. No actuarial report was filed by the defendant.

[8] Mr Grobbelaar conceded in argument that the plaintiff is not seeking compensation for past loss of income.

[9] The actuarial report placed the monetary amount of R1,988,817.00 (One Million Nine Hundred Eighty Eight Thousand Eight Hundred and Seventeen Rand). To this amount the percentage of contingencies are to be applied.

[10] The plaintiff worked as an underground worker at the Sasol Coal mine prior to the collision, and she has been doing these physical duties for the past 5 years. The mine has retained her as an employee, but provided duties in the light room with the minimal physical capacity.

[11] Mr Grobbelaar argued on behalf of the plaintiff in favour of a contingency differential of 20% to be applied, on the basis of the injuries sustained by the plaintiff and the probability that she would not be employed in the open market, given the injuries. The most essential injuries are 5 fractures of the vertebrae, chest injuries that leads to shortness of breath and a right shoulder injury.

- [12] Mr Phahlamohlaka argued on behalf of the defendant in favour of a contingency differential of 10% to be applied. The basis of the defendant's argument is that the collision occurred at the age of 39 and the plaintiff's age is currently 45 which is accepted as the career ceiling of the individual. The plaintiff is currently employed by the mine (her employer prior to the collision) but in a different capacity.
- [13] The report from the neuropsychologist indicated that the plaintiff suffered from a pre-existing epilepsy which was not accident related.
- [14] As mentioned above, the actuarial report of Munro Forensic placed the capital value of the plaintiffs future loss of earnings at R1,988,817.00.
- [15] Application of 20% contingency differential as requested by the plaintiff, places the plaintiffs future loss of earnings at R397,763.40. This is derived at the capital value of the loss of earnings (uninjured at R1,988,817.00) minus a contingency differential of 20% (being an amount of R397,763) resulting in the injured loss of earnings of R1,591,053.60. The difference between the uninjured loss of earnings and the injured loss of earnings amount to R397,763.00.
- [16] Application of 10% contingency differential as requested by the plaintiff, places the plaintiffs future loss of earnings at R198,881.00. This is derived at the capital value of the loss of earnings (uninjured at R1,988,817.00) minus a contingency differential of 10% (being an amount of R198,881) resulting in the injured loss of earnings of R1,789,936.00. The difference between the uninjured loss of earnings and the injured loss of earnings amount to R198,881.00.
- [17] In arriving at the most apt, reasonable and fair percentage of contingency differential to be applied, I will have regard to all the factors argued before me and raised in the different expert reports. I specifically have regard to the fact that the plaintiff remains employed by the same employer both before and after the collision, even though the plaintiff is now performing different duties. Furthermore the epilepsy of the plaintiff was not accident related, but the frequency and intensity of the epilepsy increased after the collision. The plaintiff worked underground at the time of the collision and considering the physicality of the work, the probabilities are in favour of the argument raised by the defendant that the plaintiff would in any event (collision not taken into account) not be working underground until the plaintiff has reached retirement age.
- [18] Considering the abovementioned facts, I deem the application of a contingency differential in the amount of 15% to be fair and reasonable.

[19] Application of 15% contingency differential as requested by the plaintiff, places the plaintiff's future loss of earnings at R298,412.00. this is derived at the capital value of the loss of earnings (uninjured at R1,988,817.00) minus a contingency differential of 15% (being an amount of R298,413.00) resulting in the injured loss of earnings of R1,690,404.00. The difference between the uninjured loss of earnings and the injured loss of earnings amount to R298,413.00.

I proceed to make the following order:

1. The Defendant is liable to compensate the Plaintiff for 100% (One Hundred Percent) of the Plaintiffs proven or agreed delictual damages suffered as a result of the motor vehicle collision on 10 September 2013.
2. The issue of the Plaintiffs Past Hospital and Medical Expenses is separated from all the other heads of damages in terms of Rule 33(4) of the Uniform Rules of Court, and is postponed sine die.
3. The Defendant shall pay the capital amount of R 998,413.00 (Nine Hundred and Ninety Eight Thousand Four Hundred and Thirteen Rand) in full and final settlement of the following delictual damages, which is calculated as follows:
4. The capital amount is payable by means of direct fund transfer on or before 31 October 2019 into the trust bank account of the Plaintiff's attorneys; Mills & Groenewald Trust Cheque Account, Absa Bank, Vereeniging, Account nr. 4042179809, Branch code: 630 137, reference: A VANZYL/ DK/ L26319.
5. No interest will be payable except in the event of default of payment before or on 31 October 2019 in which case interest will be payable at the rate of 10.00% calculated on the capital amount from 1 November 2019.
6. The Defendant shall furnish Plaintiff with an unlimited Undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act, 56 of 1996, of the costs of the future accommodation of the Plaintiff in a hospital and nursing home and treatment of and rendering of a service

to the Plaintiff and supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle

collision on 10 September 2013 after such costs have been incurred and upon proof thereof;

7. The Defendant shall pay the Plaintiffs taxed or agreed party and party costs up to date on the High Court scale, which party and party costs shall include, but not be limited to:

7.1 The reasonable costs in respect of the preparation of the medico legal reports, RAF 4 serious injury assessment as well as the actuarial calculations, of experts as per paragraph 7.6 below;

7.2 Consultations when detailed instructions were given due to the complexities of the matter;

7.3 Costs of counsel, including the preparation for- and trial attendances to date hereof, the preparation and drafting of the Settlement Proposal, Heads of Argument and Joint Memorandum of Settlement;

7.4 The travelling costs of the Plaintiff to and from all medico-legal appointments and consultations;

7.5 The cost of the preparation and making 5 copies of all bundles for purpose of trial;

7.6 Qualifying and I or reservation and / or preparation fees, if any for the trial on 23 August 2019 to be proven to the taxing master of the following

experts:

7.6.1 Dr G A Versfeld (Orthopaedic Surgeon) report and RAF4 claimform;

7.6.2 Sunninghill Radiology;

7.6.3 Dr L Berkowitz (Plastic and Reconstructive Surgeon) report and RAF4 claim form;

7.6.4 Mr S Ferreira-Teixeira (Clinical Psychologist);

7.6.5 Ms C Rice (Occupational Therapist);

7.6.6 Dr DK Mutyaba (Neurosurgeon);

7.6.7 Dr W Pretorius (Industrial Psychologist);

7.6.8 Munro Actuaries (Actuary) reports;

7.7 As well as the reasonable preparation fees of Dr G A Versfeld (Orthopaedic Surgeon) In respect of the joint meeting discussions, preparation and drawing of the joint expert minute with Dr MG Masemola;

7.8 Any costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 3 supra, as well as any costs attended upon the obtaining of payment of the taxed costs.

8. Subject to the following conditions:

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

8.2 The Plaintiff shall allow the Defendant 14 (Fourteen) court days to make payment of the taxed costs. No interest will be payable, except in the event of default of payment of such costs, in which case interest will be payable at the rate of 10% from date of taxation.

FMM SNYMAN, AJ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 23 AUGUST 2019

DATE OF JUDGMENT: 22 OCTOBER 2019

Appearance for the plaintiff: Mr D Grobbellaar (076 278 3727)

Instructed by Mills Groenewald Attorneys

VZLRlnc

Tel: 012 435 9444

Appearance for the defendant: Adv K Phahlamohlaka (072 122 0454)

Instructed by Mathipane Tsebane Attorneys

Tel: 011 265 9959/60/61

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