

SOUTH AFRICA / JUDGMENT

M M v Road Accident Fund (5639/2017) [2019] ZAFSHC 262 (5 December 2019)

[2019] ZAFSHC 262**COURT**

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

5639/2017

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 5639/2017****In**

the matter between:

M
M PLAINTIFF
and
ROAD
ACCIDENT
FUND DEFENDANT

CORAM:

CHESIWE, J
HEARD

ON:

16 & 18 OCTOBER 2019
DELIVERED
ON: 05 DECEMBER
2019

JUDGEMENT

BY: CHESIWE, J

- [1] This is an action for damages against the defendant in terms of the Road Accident Fund Act 56 of 1996 as amended (the Act), pursuant to a motor vehicle accident that occurred on the 26 October 2016, in which the plaintiff was a passenger in a taxi with registration numbers FND [...] FS that was involved with another vehicle with registration number BNT [...] FS. The plaintiff sustained injuries arising out of the said accident; namely a minor head injury with hemiplegia on the left side of the body.
- [2] The matter was set down for trial on the 16 and 18 October 2019. In the opening address Counsel on behalf of the plaintiff informed court that the parties have settled the merits of her claim at 100% in favour of the plaintiff; that the Road Accident Fund (RAF) had agreed on past medical hospital expenses and that RAF would furnish the required undertaking in terms of s 17(4) of the Road Accident Fund Act 56 of 1996. The plaintiff's averment that she had suffered serious injuries has been rejected by the Health Professionals Council of South Africa (HPCSA) and that the plaintiff has not lodged an appeal against the decision.
- [3] Before the matter could proceed, Counsels for both parties confirmed that by agreement they accepted all the expert reports, including the joint minutes reports of the experts.
- [4] Therefore the court was called upon adjudicate the plaintiff's claim in respect of past and future loss of earnings. However, the plaintiff testified that she was remunerated her full salary during her absence from work. It was therefore evident that the claim for past loss of income was not in dispute.

PLAINTIFF'S EVIDENCE

- [5] The plaintiff testified that on the 26 October 2016, she was in a taxi on her way to Welkom when the accident occurred between

Bloemfontein and Brandfort. She was admitted at Mediclinic in Bloemfontein for three to four weeks, in that period of her hospital admission, she was in an Intensive Care Unit (ICU) for three days. She said she sustained injuries on her head and on the left side of her body including injuries on her left arm and leg. When she was discharged from Mediclinic she was unable to remember the date on which she was discharged. However, she recalled that she went back to work on the 12th December 2016. The plaintiff said after the accident she struggled with calculations as she works in the salaries department. She has become slower in doing her work, as a result thereof, some of the colleagues assisted her with her work. She gets sharp pains on the left elbow and left leg and has frequent headaches. She can no longer play netball, nor further her studies as she is unable to remember what she reads or studies.

- [6] Under cross-examination, the plaintiff confirmed that she received her full salary. She mentioned that since the accident happened the headaches have become worse and more severe. She could not continue with her studies as she also could not remember what she studied. She said before the accident she earned R10 000 per month and after the accident she earned R15 000, which after deduction she received R11 400 per month.

SUBMISSIONS

- [7] Adv. Bahlekazi, Counsel on behalf of the plaintiff submitted in the written Heads of Argument that the plaintiff has qualifications that could put her in a good position to be promoted at work, but due to her injuries the prospects of such opportunities have diminished. He said the plaintiff has submitted an Actuarial Report and the defendant did not submit such a report as a result of that the plaintiff's actuarial report stands unchallenged. Thus the plaintiff is to be awarded the amount as calculated by its Actuary in the amount of R1 035 874.
- [8] Adv. Grewar, Counsel on behalf of the defendant submitted that the injuries of the plaintiff are not severe as the majority of the injuries related to the general damages. He mentioned that the plaintiff's injuries were so minor that the plaintiff was back at work within months' time and that the plaintiff had headaches even before the accident. He submitted that the plaintiff is not likely to be dismissed at work and that she is not a vulnerable employee, nor is her life expectancy affected. He submitted that the plaintiff's claim in the amount of R934 374.00 is highly inflated. He submitted that an

amount of R100 000.00 would be an appropriate amount for loss of earning capacity.

EXPERT EVIDENCE

- [9] Several expert reports and joint minutes have been filed by both parties by agreement and accepted by the court. These include reports from Orthopaedic Surgeons, Occupational Therapists, Industrial Psychologists and an Actuarial Report for the plaintiff.
- [10] Dr. Watt, Orthopaedic Surgeon, stated in the report as follows:

"The hemiplegia is improving over time and she really has a normal function in the left arm and it appears the left leg is also improving over time but function in the left leg can also get back to normal again. It is possible that she is going to regain normal function in her legs and she will have to be reassessed again in 3 months' time to see whether she has recovered fully again." Paragraph 5 of the report stated that: "the injuries have not affected the patients' life expectancy."

Dr Watt concludes that:

"The patient is now recovering from the Hemiplegia. Her left arm has recovered and leg is partially recovered to the extent where she can now walk normally, squat down fully and has reasonable power and sensation in this leg."

- [11] Ms Juliet Shehab, Occupational Therapist, in her report on page 47 of the trial bundle, mentioned that the plaintiff had frequent headaches before the accident. In respect of residual capacity to work, Ms. Shehab stated that:

“Ms M returned to her same work and said the plaintiff informed her she is coping with all the work tasks. That the employer accommodated her and the colleagues are supportive. Ms M is employable in the open labour market to perform jobs which require sedentary to light physical demands. She will not be employable in the open labour market to perform jobs requiring medium to heavy physical demands.”

- [12] Ms Kheswa, Industrial Psychologist, in her report is of the view that:

“While the accident has curtailed the plaintiff’s functional capacity and therefore compromised her in terms of efficiency, effectiveness and productivity as compared to her uninjured counterparts, it did not render her unemployable. Should she adhere to the appointed experts recommendations, she will be able to continue working within her residual capacity.”

Joint Minutes of the Occupational Therapists

- [13] Ms. Juliet and Ms Moagi both agreed in their joint minute that the plaintiff will meet the physical demands of sedentary to low level light types of work, but would not meet the full range of light, medium, heavy to very heavy. They both agreed that the plaintiff need to continue with physiotherapy intervention to improve physical endurance.

Joint Minute of Dr P Miller and Dr MD Ngqandu

- [14] Dr Ngqandu said he found no neurophysical or cranial nerve abnormalities, nor found any problems in relation to the head or neck specifically. Dr Miller made the same findings as Dr Ngqandu, except for the significant weakness in relation to the lower limb. Both Doctors noted the headaches that the plaintiff experiences. Dr Ngqandu suggested that the headaches be controlled with anti-inflammatories, and ordinary analgesics, where Dr miller noted that the headaches occur mostly when the plaintiff is trying to calculate or concentrate, which he thinks might be due related stress and tension phenomena.

Joint Minutes of Mrs SJ Van Jaarsveld and Mrs Kheswa

- [15] They agree that post-accident the plaintiff was able to return to work and received her full salary. They further agreed that the plaintiff was left with a sequelae of physical injuries and as a result of the injuries the plaintiff’s career options are narrowed down, as she will be restricted to work of a light physical nature. They both agreed that the plaintiff is employable in the open labour market, but she will not be a fair competitor in the open labour market due to the injuries sustained in the accident.

[16] Mr Johan Sauer, an Actuarial on behalf of the plaintiff indicated that the post-morbid was calculated according to the report of Mrs Van Jaarsveld, that no income was projected till 1 January 2016 to allow for full loss of sick leave. He mentioned that a higher future post-morbid contingency deduction be allowed for the increase, taking the following into consideration:

“Employment vulnerability, labour incapacity, uncertainty, possible long periods of unemployment and early retirement.”

[17] As already indicate above that the plaintiff cannot claim for past loss of income as she testified that she was paid her full salary while in hospital and on sick leave. The plaintiff furthermore testified that the accident occurred on 26 October 2016 and she was back on duty on 1 December 2016. The actuarial calculation indicated the amount claimed for past loss of income was R15 957, 00. However, the plaintiff informed the two Occupational Therapists that at the time of the accident she earned R10 000 and after deduction she received R8 000 and received a bonus of R3500. This indicates that the plaintiff did not suffer any loss of income as she received her full remuneration from the employer.

[18] Counsel on behalf of the plaintiff submitted that the plaintiff's qualifications would have placed her in a good position for promotion, but because of her injuries the prospects of such promotion have diminishedRepeated. He submitted that based on the first scenario of Ms Jaarsveld, it is the appropriated scenario as the plaintiff would have been appointed to a senior position had she not sustained the mentioned injuries in the accident. Counsel mentioned that the contingencies to be applied in this instance for future loss of income should be between 10 % and 30 %.

[19] Counsel on behalf of the defendant in the written heads of argument submitted that the plaintiff's claim is highly inflated as the plaintiff's injuries were minor. He mentioned that within a month of the motor vehicle accident, the plaintiff was back at work. Counsel mentioned that the headaches the plaintiff complained about were already there before the accident. He submitted that the contingency in this instance is grossly exaggerated and that the court should apply an appropriate contingency, as all the factors put together in respect of the plaintiff's loss of earning capacity should be calculated at a contingency 10% - 12 %.

[20] An enquiry into damages for earning capacity is of its nature speculative, because it involves a prediction as to the future.

All that the court can do very often is to make a rough estimate of the present value of loss[1].

[21] It is now accepted that in the assessment of these kinds of damages, which cannot be assessed with any amount of mathematical accuracy the court has a wide discretion[2].

[22] In Bailey supra Nicolas JA said:

“In a case where the court has before it material on which an actuarial calculations can usefully be made, the first approach offer any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an “informed guess”, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s ‘gut feeling’ as to what is fair and reasonable is nothing more than a blind guess”.[3]

- [23] Both Neuro-surgeons agreed that the plaintiff’s post-accident complaints of on-going headaches can be manage by consulting a general practitioner as well as consultations by way of neuropsychological and occupational therapy. However, Dr Miller

mentioned that the headaches mostly relate to the stress and tension phenomena, especially when the plaintiff is busy with calculations or concentrate on any matter. Bearing in mind that the plaintiff informed the Industrial Psychologist that the headaches were there before the accident. The plaintiff testified that the headaches were pre-existing, though after the accident she said the headaches are more severe. The doctors in respect of the forgetfulness and concentration difficulties recommended that the plaintiff must go for a neuropsychological evaluation. They do not anticipate any future neuro-surgical intervention with regard to the head injury the plaintiff sustained, and that the plaintiff’s life expectancy will not be affected as a result of the accident.

- [25] The plaintiff is currently employed as an Accounting Clerk in the Department of Education. She has been in this job since she started as an intern from 2010. The employer has not indicted to her that she will be dismissed or placed in another position due to lack of her coping with the work. Indeed she may be slow as she told this court during her testimony, but the work gets completed. The nature of her work is sedentary. She mentioned that since the accident, she was moved closer to the copy machine and the registry office. The colleagues assisted her with the calculations as she was a bit slower. She said she can make phone calls; she can lift a file; work on the computer and do the usual jobs she did before the accident. The employer has shown to be sympathetic and accommodative towards the plaintiff.

- [26] The plaintiff during her evidence in court appeared well conversant, clear and logical. She was honest and even informed this court that she was paid her full salary after the accident, including when she was on sick leave. The plaintiff coped well post the accident, to the extent that she had a notch increase in her salary. In respect of the headaches, Dr Ngqanda recommended that it be manage by a general practitioner, as well as consultation with an Occupational Therapists.

- [27] Dr Bogatsu in his report concluded that the plaintiff’s sequelae of her orthopaedic injuries have not resulted in significant

losses of earning capacity, employment capacity, amenities, independence and enjoyment of life.

- [28] Ms Kheswa is of the view that with the treatment of the headache and proper management, the plaintiff should be able to continue to work as an Accounting Clerk.

- [29] DR Watt is of the view that the plaintiff has recovered, to the extent that she can walk normally with her left leg, she can squat and has reasonable power and sensation in the left leg.
- [30] The plaintiff's circumstances are not one of those severe cases, where she is totally unemployable. There are worst cases where a person is totally disabled and unemployable. The majority of injuries listed by the plaintiff relate to the general damages which was declined by the HPCSA. The plaintiff mentioned the headache and numbness as the damages that affected her in her working environment. The Industrial Psychologists agreed that the plaintiff is a government employee working for the Department of Education with the application of the Occupational Specific Dispensation[4] (OSD) which is the earning scale used for government employees. The plaintiff with the recommended therapy by the different expert will be able to perform her duties, taking into consideration that the defendant has already made an undertaking with regard to future medical expenses for the plaintiff. Post-accident the plaintiff has been in her current work for the past two years. A job she has performed well thus far though she testified that she was slower. The plaintiff is best suited to safely perform sedentary duties in respect of less mobility demands as she is currently performing in her current employment.
- [31] It is trite that no two cases are always the same, since it is difficult to find a comparable case that will focus in respect of all the facts. Past decided comparable cases although useful, merely serve as a guideline. The need to adjudicate each case on its particular merits is always present.
- [32] Based on the experts' opinions as well as the views expressed by them which is largely common cause, the pertinent question is what award would be fair and adequate compensation for the plaintiff in respect of loss of earning capacity.
- [33] It is now settled that contingencies whether negative or positive are an important control mechanism to adjust loss suffered to the circumstances of an individual case in order to achieve equity and fairness to both parties. There is no hard and fast rule regarding contingency allowance. Kock in the Quantum Yearbook 2011 at 104 said:
- "Generally contingencies cover wide range considerations which may vary from case to case and may include taxation, early death, travel costs, loss of employment promotion prospects, divorce etc. These are no listed rules as regarding general contingencies."*
- [34] The plaintiff is entitled to be awarded damages for future loss. But the parties could not agree on the percentages. Counsel for the plaintiff was of the view that the applicable percentage should be 10% - 30% for future loss of income. Counsel for defendant submitted that a 10% - 12 % contingency be applied, as the 30% is grossly inflated. The defendant submitted that the plaintiff's injuries were not major, that the general damages were not applicable, furthermore the plaintiff returned to work within a month's time after the accident.

[35] The actuarial report of Mr Sauer indicated that the calculations are based on a higher future post-morbid contingency of 30% to allow for employment vulnerability, labour incapacity, uncertainty, possible long periods of unemployment and early retirement. The amounts are calculated on two scenarios; scenario one, if the plaintiff will be promoted to senior accounting clerk the loss will be R1 035 874. And if she remains in the position of accounting clerk the loss will be R934 374. The defendant disputed these amounts as highly inflated. The defendant submitted that if the plaintiff received R934 374 and remains in the labour market for the next twenty eight years, she will be receiving R2781, 00 more per month. The defendant is of the view that an amount of R100 000 will be an appropriate amount in this matter. Taking into account both amounts the parties are extremely far apart.

[36] The plaintiff is only 33 years old. She has a better chance of recovery as a young person. The plaintiff was able to return to work within a month after the accident. As correctly stated by Counsel on behalf of the defendant that the plaintiff's

injuries were not severe; the headaches the plaintiff complaint about, were pre-existing; the plaintiff has no apparent risk of

epilepsy attacks and the accident has not affected her life expectancy.

[37] The inherent difficulty and uncertainty in these calculations is generally accepted that it is preferred that an assessment be made based on actuarial calculations rather than take a blind plunge into the unknown mathematical calculations. Having considered the different expert reports and the actuarial report submitted and also having regard to what was expressed in the matter of *Pitt v Economic Insurance Co (Ltd)*[5] 1957(3) SA 284 (N) at 287 E-F:

"...the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not to pour largesse from the horn of plenty at the defendant's expense."

[38] As already mentioned above the plaintiff is not one of the worst cases. She has a sympathetic accommodative employer and the unlikelihood is that the plaintiff will not retire earlier than at the age of 60 years. Therefore there is need to 'pour largesse from the horn of plenty'. The injuries are indeed of a minor nature and it will be grossly unfair towards the defendant to award such a huge amount for the mentioned minor injuries. The amount offered by the defendant is reasonable and fair. For all of the above mentioned reasons and having concluded that the plaintiff still has some residual working capacity, a fair and just award would be an amount of R200 000.

[40] In the circumstances I make the following order:

1. The plaintiff is awarded an amount of R200 000 in respect of loss of earning capacity.
2. The defendant to pay the costs, which costs shall include costs of the experts and Counsel of the plaintiff.

S. CHESIWE, J

Appearances

For Plaintiff: Adv. NM Bahlekazi

Instructed by: Booysen & Fourie

BLOEMFONTEIN

For Defendant: Adv DM Grewar

Instructed by: Maduba Attorneys

[1] Southern Insurance Association Ltd v Bailey 1984(1) SA 98 AD at 116H

[2] AA Mutual Insurance Association Ltd v Maqula 1978(1) SA 805 (A)

[3] See footnote 1 at 99C-D

[4] Public Services And Administration (DPSA) – the purpose of OSD was to improve government’s ability to attract and retain skilled employees through increased remuneration.

[5] Pitt v Economic Insurance Co (Ltd) 1957 (3) SA 284 (N) at 287 E-F:

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