

SOUTH AFRICA / JUDGMENT

M v Road Accident Fund (49890/2014) [2017] ZAGPPHC 315 (7 July 2017)

[2017] ZAGPPHC 315**COURT**

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

49890/2014

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE NO:49890/2014****7/7/17****Not****reportable****Not****of interest to other judges****Revised.****In**

the matter between:

N

M PLAINTIFF

and

THE

ROAD ACCIDENT

FUND DEFENDANT

JUDGMENT

RANCHOD J:

- [1] This matter relates to the quantum of damages only as the merits were previously settled between the parties on the basis of a 90% apportionment of blame against the defendant.
- [2] I was also informed at the commencement of the trial that an undertaking in terms of s17(4) (a) of the Road Accident Fund Act 56 of 1996 has already been accepted by the plaintiff in relation to future medical expenses.
- [3] Only the quantum of damages in relation to both past and future loss of earnings and general damages remain in issue.
- [4] Plaintiff's counsel submitted that the expert reports of the plaintiff were admitted by the defendant including the contents

thereof. The basis of the actuarial calculations were also admitted by counsel for the defendant. In the result no oral expert evidence was led.

- [5] Counsel for the defendant then informed me in court that he cannot dispute the claim for past loss of income nor the amount but he did not have formal instruction from the defendant to admit this head of damages. I will revert to this aspect presently.
- [6] Insofar as future loss of income is concerned defence counsel said the amount claimed is not in dispute but that it is the contingencies

deductions that must be applied that is in issue.

Accident and injuries sustained

- [7] According to the trial documentation the plaintiff was a driver of a motor vehicle when he was involved in a collision with another motor vehicle on 14 August 2011. He sustained a neck injury which is stated to be a 'C2 odontoid fracture of the neck'.
- [8] Plaintiff was admitted at Kalafong Hospital where he remained until 31 August 2011. On 26 August 2011, 'a posterior C1/2 fusion was performed as well as instrumentation (a cable)'. (As stated in the medico-legal report of orthopaedic surgeon Dr P Engelbrecht which he gleaned from the hospital records).
- [9] Post-operatively, he was nursed in High Care. After discharge, he had to use a brace for several months and he also received

physiotherapy in hospital. He was followed up for about 5 months until January 2012 which then completed his formal treatment. The plaintiff's Glasgow Coma Scale on admission was 15/15 which indicates he was fully conscious at the time. He was also neurologically intact on admission.

[10] The plaintiff was on sick leave for about 3 months.

Work capacity since accident

[11] Prior to the accident the plaintiff commenced work as a graphic designer for a company in 2011.

[12] When he returned to work after the accident, he did freelance work for his previous company as well as other design companies. He has since then being employed at several different companies. His several changes of employment were not accident related, according to the report of the occupational therapist, Ms Anneke Greeff.

[13] The plaintiff can complete his daily tasks, although neck stiffness compels him to take a break about every 75 minutes. This apparently causes him to take longer than was the case prior to the accident to complete a specific task.

[14] At the time when Dr Engelbrecht interviewed him in June 2013, the plaintiff did not experience any pain of note and there was no referral pain into his arms. On occasion at night, he would experience discomfort in his neck. He can walk far distances. However, if he were to run his neck becomes stiff. He was not using any medication.

[15] On clinical examination by Dr Engelbrecht it was noted that the plaintiff had muscle spasm as well as some tenderness posteriorly in his neck. Neck movements were impaired as follows:

- a) With flexion : The chin reaches to 3cm from the sternum.
- b) Extension : 30°
- c) Rotation to the right : 30°
- d) Rotation to the left : 30°
- e) Letaro-flexion to the right : 35°
- f) Letaro-flexion to the left : 35°

An addendum to Dr Engelbrecht's report was obtained dated 18 November

2016. Two aspects are noted. First, that x-rays taken on the same day indicated early changes of spondylosis in mid- to lower cervical spine. Second, that the plaintiff's neck movement as far as latero-flexion to the right and to the left were impaired by 30° on each side whereas previously they were 35°.

[16] The plaintiff also had an 11x2cm rear posteriorly of his neck which has healed.

[17] There is no loss of life expectancy due to the accident and its sequelae.

- [18] According to Dr Engelbrecht, plaintiff would have experienced acute pain of 5-7 days; moderate pain for up to 6 weeks after injury and thereafter chronic pain for up to 3-4 months after injury.
- [19] As far as loss of amenities it was noted that the plaintiff did skateboarding prior to the accident but was advised not to do it any longer and will have to refrain from contact type of sports.
- [20] Dr Engelbrecht was of the view that plaintiff would qualify for up to 15% loss of work capacity due to the accident and sequelae thereof. But he would still be able to perform his work as a graphic designer with a work station appropriate to his spinal condition. If the work station is well planned ergonomically, he should be able to work until normal retirement age.
- [21] Dr Engelbrecht puts repeat surgery to plaintiffs spine at no higher than a 25% possibility which Ms van Zyl, the Industrial Psychologist says could lead to a limitation on choice of positions, environment and employer.
- [22] Ms Greeff, the occupational therapist says the plaintiff retains 'suitability for occupation performed in a sedentary environment'. The plaintiff's work as a graphic designer is sedentary in nature. Ms Greeff says:

'It is accepted that the presence of symptomatic pathology noted in his spine however will still constitute periods of increased awareness of pain and discomfort which will constitute loss of efficacy, thus resulting in him being vulnerable and compromised compared to a full bodied individual.'

- [23] The industrial psychologist, Ms Renee Van Zyl, says the following with regard to the plaintiff's pre-morbid career scenario (inclusive of employability and career prospects):

'Mr M. would probably have remained functioning in a skilled capacity (Graphic Designer) within the general sector of the labour market while growing in terms of skills and knowledge until his retirement at the age of sixty five

(65) years.'

- [24] As far as post-morbid career scenario (inclusive of employability and career prospects) is concerned Ms van Zyl says:

'Mr M. will probably remain functioning as a Graphic Designer within the general sector of the labour market while growing in terms of skills and knowledge until his retirement at the age of sixty five (65) years.'

- [25] It is to be noted that the plaintiff earned R6000.00 per month at the time of the accident in 2011. However, by March 2015 he was earning R9040 per month and in July 2016 he was earning R9500 per month which is more than 50% of the income he earned at the time of the accident.

- [26] Ms Van Zyl says it is unclear if the plaintiff suffered a loss of earnings from the date of the accident until his return to work at Bumba Signs and Graphic Design. I was neither referred to any proof nor could I find any payslips or other documentary proof in this regard. If he was compensated for sick leave then his claim for past loss falls to be disregarded. The onus is on the plaintiff to prove his claim. I find none regarding his past loss of income.
- [27] Insofar as future loss of income is concerned Ms Van Zyl says loss of earnings as a result of the plaintiff's compromised performance and diminished access to work opportunities should be addressed through the application of a higher post-morbid contingency deduction as compared to the pre-morbid deduction. In other words, as I understand it, actual income will not be less than post-morbid.
- [28] Counsel for the plaintiff submitted that a contingency deduction of 10% pre-morbid and 30% post-morbid would be appropriate. Defendant's counsel argued that it should be less for post-morbid income.
- [29] The plaintiff's actuary, Mr Heymans of ARGEN Actuarial Solutions, says that no other direct loss of income was indicated apart from a three month recuperation period when the plaintiff was totally off-work. Hence, he postulated the post-morbid future income to be the same as the pre-morbid future income.
- [30] It is trite that contingency deduction is a prerogative of the court and is largely a value judgment. It seems to me from a consideration of all the above factors that a contingency deduction in respect of future pre-morbid income should be 5% and 15% for future post-morbid income. I see no reasons, given all the experts' reports why a contingency deduction for future loss of income should be on the basis submitted by plaintiff's counsel.
- [31] An amended actuarial report was obtained which takes into account my view. It provides for future loss of income after allowing for contingencies in the amount of R413 674.
- [32] I turn then to general damages.

General Damages

- [33] I was referred to a number so-called comparable cases regarding general damages. No two cases are exactly alike therefore past cases can only serve as a rough guide and ultimately each case must be determined on its own facts.
- [34] In coming to a decision on the award for general damages I have taken into account, inter alia, the following cases.
- [35] *Klein v Mutual & Federal Insurance Co Ltd* 1983 (3C3) QOD 422 (C)

In this case the injuries and sequelae were more severe than in *casu*. An award for general damages was reduced on appeal by agreement from R40 000 to R20 000. According to Koch: The Quantum Yearbook 2017 the present (2017) value of R20 000 equals to R328 000.00.

[36] Van Der Spuy v Randalia Versekeringskorporasie van SA Bpk 1964 (1C2) QOD 324 (C)

A 29 year old housewife suffered fractures of the two top vertebrae, healing was out of alignment, headaches and dizziness were likely to grow more in the future. There would be serious bone-grafting operation necessary to bind vertebrae to skull. An award of R3 500 was made for general damages for the neck injury which translates to R288 000 in 2017 per Koch.

[37] In Jones v AA Mutual Insurance Association Ltd 1976 (2C2) QOD 793 (W)

A violinist aged 30 at the time suffered neck and lower back injuries necessitating a posterior fusion of the 4th and 5th cervical

vertebrae. A further fusion was recommended in the near future due to further injury extending beyond these two vertebrae. There was a possibility of a future operation in the lower back also becoming necessary. An award of R9 000 (current value per Koch R349

000) was made for general damages for pain and suffering, disability and loss of amenities.

[38] In my view, in casu, an award of R325 000.00 would be appropriate taking all factors into account.

[39] I make the following order:

1. The defendant is to pay the plaintiff R664 806.60 (Six Hundred and Sixty Four Thousand Eight Hundred and Six Rand and Sixty Cents) (which includes future loss of income of R413 674.00 and general damages of R325 000.00 minus a 10% apportionment).
2. Defendant is to pay interest at the rate of 10.25% as from the date 14 days after the date of this order.
3. The defendant shall furnish the plaintiff with an undertaking in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 for future medical and hospital expenses.
4. The defendant is to pay the agreed or taxed costs of the action including all relevant qualifying fees of the experts.

RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff: Adv C Spangenberg

Instructed by: Spruyt Incorporated

Counsel on behalf of Defendant: Adv R.B Mphela

Instructed by: Tsebane Molaba Inc.

Date heard: 16 February 2017

Date delivered: 7 July 2017

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