

SOUTH AFRICA / JUDGMENT

Mabaso v Road Accident Fund (67889/2014) [2017] ZAGPPHC 1300 (7 September 2017)

[2017] ZAGPPHC 1300

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar

CASE / FILE NUMBER

67889/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA DIVISION)

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

DATE

7 September 2017

Case

No. 67889/2014

In

the matter between: MABASO,
 JULIA
 MATSELENG
 PLAINTIFF
 and
 THE
 ROAD ACCIDENT
 FUND
 DEFENDANT

JUDGMENT

MILLAR, AJ

1. This is an action brought by the Plaintiff for damages against the Defendant as the statutory insurer in terms of the Road Accident Fund Act 56 of 1996. The plaintiff was a passenger in a motor vehicle which was involved in a collision on 6 August 2011.
2. All issues between the parties have been settled save the claims for loss of income and the claim general damages. By agreement I am only called upon to decide the question of the loss of earnings and the quantum of the general damages[1] . The record of the settlement of the other issues is contained in a draft order which the parties requested I make an order of court.
3. It was agreed by the parties that none of the experts, who had furnished reports for the respective parties, would be called to testify and that I could have regard to the contents of those reports and the common minutes prepared by them as though the contents had been given in evidence before the court.[2]
4. The facts of the matter are common cause. The Plaintiff is a 47- year- old woman. She suffered severe orthopaedic injuries[3] as a result of the collision which have resulted in significant disability and disablement. These injuries alone have rendered her unfit to continue working. Besides these injuries she has also suffered "long term psychological effects"[4] and will require ongoing medical treatment and surgery for the remainder of her life.
5. The plaintiff completed grade 11 in 1988. After being unsuccessful with her attempt to pass grade 12 in 1989, she commenced work as a home helper in 1990. The plaintiff worked from then on in various capacities until 1997. From 1997 to 2002 she was stayed at home and was supported by her husband. During 2002 she struck out on her own and was working as a self- employed hawker at the time of the collision earning between R 2500,00 and R3 000,00. The experts for the parties fairly recorded that due to the nature of her endeavor the plaintiff was unable to furnish documentary proof of her earnings. They agreed that her earnings would have fluctuated in the circumstances but would have remained at this level apart from inflationary increases to her retirement at age 65.[5] The plaintiff continued to

improve her qualifications and attended various courses during the period 1990 to 2014.[6]

6. The parties were agreed that the actuarial calculation of Mr. Loots[7] which reflected the past loss of earnings in the sum of R 234 575,00 and future loss of earnings of R 780 593,00 are the gross figures reflective of these respective heads of damage. The parties argued that contingencies were to be deducted.
7. Mr. Anderson for the plaintiff argued for the deduction of a 5% contingency in respect of the past loss and 15% in respect of the future loss. Mr. Binasa for the defendant argued for 10% and 25% respectively.
8. The principle to be applied is that set out in *Southern Insurance Association Ltd v Bailey* NO [8] -

"Even where method of actuarial calculations is adopted the trial Judge still has a discretion to award what he considers right - Can make a discount for contingencies - Nature of contingencies that can be taken into account - Such contingencies not always adverse"

9. The plaintiff has had a steady work history. She is clearly someone who was motivated to work. When formal employment opportunities were unavailable she showed initiative, and worked for her own account. The plaintiff had been working in this capacity for 9 years at the time that she was injured. She had had sufficient time to encounter the challenges specific to her business and to overcome them. The fact that she was able to continue for 9-year is testament to this. Her age at the time of the collision is a factor which would have kept her on the same course until retirement.[9]
10. It is for these reasons that I have come to the conclusion that in respect of the past loss of earnings a contingency of 5% should be deducted. I do not agree with the submissions of either counsel in respect of the contingencies to be deducted from the future loss of earnings. Having regard to the modest level at which the plaintiff earned together with the fact that she was well able to and did successfully support herself, the probabilities are that she would have continued to do so. The 15% contended for by the plaintiff's counsel translates into just under 2 months of the year. The 25% contended for by the defendant's counsel translates into 3 months of the year. I regard both these contentions to be somewhat excessive in the circumstances of the matter and am of the view that a more appropriate deduction would be 10%.
11. The past loss of earnings after the deduction of the 5% contingency amounts to R 222 846,00 and the future loss of earnings after the deduction of the 10% contingency amounts to R 714 262,00.
12. It is trite that while awards made in previous cases provide guidance, each case must be decided on its own facts.[10] Counsel for the plaintiff argued that an award for general damages in the sum of R 600 000,00 was appropriate. The defendant argued that an award of R 550 000,00 was appropriate. I was referred to the cases cited in *The Quantum of Damages* Volume VI[11] The reference to the cases cited there was useful as a guide but none are on

all fours with the nature, extent and sequelae of the injuries suffered by the plaintiff in the present case.

13. In my view, it is neither appropriate nor practical to attempt to break down the individual heads of damage and to make an award piecemeal. The plaintiff suffered the damages that she did in an indivisible fashion, firstly by sustaining the injuries she did in the collision, being hospitalized and undergoing treatment and thereafter having her enjoyment of life affected. She will have to undergo surgery in the future, in her twilight years. She has in addition suffered the loss of the dignity of being able to support herself and her family.
14. Having regard to the injuries suffered by the plaintiff and their sequelae, I regard the sum of R435 000.00 as an appropriate award in respect of pain and suffering, loss of amenities of life, disfigurement and disablement.
15. The parties furnished me with a draft order in respect of costs and subject to the exercise of my discretion I have incorporated this into the order I intend making save in regard to the Contingency Fee agreement which Counsel for the plaintiff has assured me complies with the provisions of the Contingency Fees Act 66 of 1997.
16. In the circumstances, I make the following order:
 - 16.1 The defendant is ordered to pay to the plaintiff the sum of R 1 149 262,00 made up as follows:
 - 16.1.1 The sum of R 222 846,00 in respect of past loss of income.
 - 16.1.2 The sum of R 491 416,00 in respect of future loss of income.
 - 16.1.3 The sum of 435 000,00 in respect of general damages.
 - 16.1.4 Payment shall be made into the trust account of the Plaintiff's attorneys,
details as follows: Mokoduo Erasmus Davidson Incorporated Trust Account
First National Bank, Rosebank Branch
Account Number: [6...]
Branch Code: 253305
 - 16.2 The Defendant is ordered to furnish the Plaintiff with a 100% 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 treatment of or rendering of a service or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision of 6 August 2011 after such costs have been incurred and upon proof thereof.

16.3 The Defendant is ordered to pay the agreed or taxed party and party High Court costs of the action, such costs to include the preparation expenses of the reports and preparation expenses for trial of the Plaintiffs experts: Dr. Scher, Dr. Shapiro, Ms. Eunson, Dr. Townsend, Mr. Sampson, Ms. Ledwaba, Ms. Leibowitz and Mr. Loots together with the costs of counsel.

A MILLAR

ACTING JUDGE OF THE HIGH COURT HEARD ON: 5 SEPTEMBER 2017

JUDGMENT

DELIVERED ON: 7 SEPTEMBER 2017

COUNSEL FOR THE APPELLANT: ADV B ANDERSON

INSTRUCTEDBY:

MOKODUO ERASMUS DAVIDSON INC.

COUNSEL FOR THE RESPONDENT: ADV W BINASA

INSTRUCTEDBY:

TAU PHALANE ATTORNEYS

- [1] The statutory requirements having been met for the plaintiff to qualify for payment of this head of damages.

The experts agreed that her whole person impairment was measured at 52% - in excess of the minimum

30% required - see Exhibit A page 3

- [2] Besides the pleadings and notices bundle, each party submitted a bundle of its expert reports as well as a bundle of the minutes of the experts who had met. The parties referred primarily to the bundle of expert minutes which was marked Exhibit A and to the bundle of plaintiff's expert reports which was marked Exhibit 8.

- [3] Exhibit A pages 1-3

- [4] Exhibit A paragraph 8 page 5

- [5] see Exhibit A paragraphs 2.5 - 2.13 page 10

- [6] see The Defendants Expert Bundle page 47 on which her full educational and work history is set out.

- [7] Exhibit B page 116ff

- [8] 1984 (1) SA 98 (A) at 98 E-F

- [9] Exhibit A paragraph 2.9 on page 10

[10] See Minister of Safety & Security v Seymour 2006 (6) SA 320 (SCA) at paragraphs 16 to 18

[11] Corbett and Honey, Juta 2010 and in particular to the cases referred to in E4 and E7.

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