

SOUTH AFRICA / JUDGMENT

Mahachi v Road Accident Fund (20784/2013) [2018] ZAGPPHC 405 (25 May 2018) [2018] ZAGPPHC 405

COURT

North Gauteng High Court, Pretoria

BEFORE

MIA

CASE / FILE NUMBER

20784/2013

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

CASE NO: 20784/2013

25/5/2018

In

the matter between:

PRECIOUS
MAHACHI
PLAINTIFF
And
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

MIA, AJ

[1] The plaintiff, Precious Mahachi, was a 31 year old female when the collision occurred on 5 June at approximately 18h30 at OF Malan Road (now Eskia Mphahlele), Pretoria Central. The plaintiff was a pedestrian when an unknown motor vehicle (insured motor vehicle)

driven by an unknown driver collided with the plaintiff. She instituted an action for damages against the defendant in terms of

the provisions of the Road Accident Fund Act, Act 56 of 1996 ("the Road Accident Fund Act") arising from bodily injuries that she sustained as a pedestrian as a result of the collision.

[2] The issue of liability and quantum were previously separated by an order of court dated 13 August 2015. The issue of liability (merits) was conceded 90% in favour of the plaintiffs proven or agreed damages. The defendant also undertook to furnish an undertaking given in terms of section 17(4) (a) of the Road Accident Fund Act in respect of future hospital and medical costs limited to 90%. The issue which remained unresolved between the parties and which I am required to determine are that of the quantum of the plaintiffs general damages and the plaintiffs past and future loss of earnings/income.

[3] The plaintiff sought an amendment of the Particulars of Claim to read that the general damages claimed by the plaintiff amounts to the sum of R1 500 000 wherever it may appear on the summons and the Particulars of Claim. There was no opposition from the defendant. The amendment was accordingly granted.

[4] The matter came before me on the basis that neither of the parties would lead oral evidence. The parties agreed that the contents of the various medico-legal reports obtained on behalf of the parties and joint minutes compiled by the overlapping experts obtained would serve as proof of the injuries and their sequelae. The injuries are common cause and the impact on the plaintiff and the sequelae are reflected in the reports of the experts. I am required to adjudicate the outstanding issues in dispute based on the agreed facts and the submissions made during arguments based on the agreed facts and the reports of the experts. The reports and injuries are categorised as follows:

4.1. Severe head injury in respect of which the report of Dr Russouw, the neurologist is uncontested;

4.2 Orthopaedic injuries in respect of which a joint minute of Dr Blignaut and Dr Enslin orthopaedic surgeons are filed;

4.3 Joint minute of occupational therapists Mr T Ncwane and Ms D Rocha;

4.4. Facial scarring in respect of which the plastic surgeon report is applicable Dr Saul Braun, the Maxillofacial and Oral surgeon Dr Ashraf Mohamed and the dental surgeon, Dr H.B. Horak;

4.5. Psychological trauma, the report of Dr Nirvana Moodley is applicable

4.6. Impact of the injury on her future employment. Joint minutes of the Industrial psychologists Dr M Malaka and Cecil Nel are also referred to;

4.7. Special damages per Actuarial report of Munro Forensic Actuaries.

[5] According to Dr Russouw the head injury was moderate but deteriorated in hospital to a severe head injury and the plaintiff had to be intubated. A CT scan of the brain showed multiple contusions, a base of skull fracture and pneumocephalus. Whilst she recovered, as a result of the accident she suffers from headaches. She is also emotionally unstable and depressed due to the after effects of the accident.

[6] The occupational therapists note extensive injuries and agree that the plaintiff requires occupational therapy, namely thirty hours of physical and cognitive rehabilitation and ten hours of group occupational therapy. They also recommend four hours of occupational therapy should she undergo further surgery. They note that she presents with a mood disorder and refer to a psychologist in this

regard. They also recommend the referral to a neurosurgeon for future management of epilepsy. They note that no cognitive impairment is usually expected after a head injury such as the one the plaintiff sustained and suggest the referral to a neuropsychologist for in-depth evaluation.

[7] The occupational therapists agree further that the accident has resulted in significant changes in the plaintiff's life. They note she did not return to her pre-accident occupation due to the sequelae of her injuries. They agree that she would have difficulties sustaining her optimal participation required for work. They express the view that her injuries and perceptual functioning would impede her ability to return to her pre-accident occupation. Her assessment demonstrated tolerance to meet requirements for work falling within light industrial speed parameters and she is only suited to work of a sedentary nature. Consequently she would be an unfair competitor in the open labour market in any sector should she not receive rehabilitation.

[8] The orthopaedic surgeons agree she qualifies for the narrative test due to her musculoskeletal injuries and has been left with serious

long-term impairment and permanent serious disfigurement. She has significant functional impairment, severe scarring, progressive

degenerative changes in her left knee and severe limitation of movement in the left knee joint. She has a restriction of work capacity of 10 -15% which will increase as time goes by and will eventually require a knee replacement.

[9] The psychologist, Dr Moodley, found severe fluctuations in attention and concentration. She notes Ms Mahachi lost consciousness at the scene of the accident and was unable to recall events following the accident. She opines that Ms Mahachi presents with attention deficits and reduced mental and motor speed resulting from concussion. Ms Mahachi appears to be regressing as a result of the trauma

experienced and has low concentration and energy levels. She is of the view that Ms Mahachi requires intense psychotherapy to resolve

trauma and depression and address issues in terms of body image and to develop coping skills to deal with the body scarring she has.

[10] The maxillofacial surgeon expresses the view that the scars on the face and scalp of the plaintiff are unaesthetic and virtually impossible to camouflage. This affects her self-confidence and self-esteem. The skull defect can be reconstructed using a custom made prosthesis, the scarring however will remain and a disability of 30 % can be expected. Dr Braun, the plastic and reconstructive surgeon indicates the plaintiff will remain permanently disfigured and will be unable to wear certain types of clothing. She will attract negative stigma socially and in the workplace. She will have to keep the affected area out of sunlight and the scarring will ultimately affect her choice of occupation. The experts are of the view that the injury constitutes a permanent serious disfigurement.

LOSS OF INCOME

[11] On the basis of the joint minute of the industrial psychologists, the average income of the plaintiff prior to the accident was R1600 per month. It is projected that she would have worked until her retirement age of 60-65 years depending on working conditions. The possibility exists that she may have opted to apply for an old age grant from the age of 60 years according to the experts.

[12] The foregoing translated into an actuarial calculation by the defendant's actuary NBC in terms of which the net loss of earnings

(past and future) of the plaintiff was calculated on the basis of two possible scenarios. The first scenario postulates the plaintiff's

post - morbid earning an income similar to her pre-accident earnings. The second scenario postulates a case where the plaintiff is completely unemployable having regard to the accident. In the first scenario, which in my view is the more realistic one and one which accords with the probabilities in this matter, the calculations were on the assumption that the plaintiff at the time of the accident earned R1600 per month, resulting in a loss of R94 726. There is no past loss of earnings. A 5% contingency was applied in respect of both pre - and post - morbid income, hence no past loss of earnings as the supposition is that the plaintiff's income remained the same.

- [13] The plaintiffs future pre - morbid income, as well as her post - morbid income, were calculated at R38 903, before the application of contingencies. The contingencies applied were as follows: the normal / standard 15% contingencies in respect of the pre - morbid future income, and a 10 % higher contingency of 25% was applied to the post
- morbid projected income, resulting in nett future loss of income of R38 903. This loss is based on the first scenario, the so - called 'contingency differential, which I have already indicated to be, in my judgment, the more reasonable approach.. The second scenario has not been considered as it provides for the plaintiff being unemployable and receiving no income. This is not the factual position as the plaintiff does derive an income as a hawker at present which is similar to her income as a car wash assistant.

- [14] In Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001(3) SA 1188(SCA) at para [36] and [37] the court stated the following regarding expert evidence and the opinions of expert witnesses:

"[36]...what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho V City and Hackney Health Authority [1997] UKHL 46; [1998] AC 232 (HLE)). With relevant dicta in the speech of Lord Browne- Wilkinson we respectfully agree.....

- [37] The Court is not bound to absolve the defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has logical basis. in other words that the expert has considered comparative risks and benefits and has reached 'defensible conclusion!."

- [15] In considering the experts views regarding the plaintiffs future prospects of work and her ability to work in the open labour market

and in applying the above principle to the present matter, I have considered the undisputed fact that the plaintiff is presently

receiving an income similar to her pre-accident income as a car wash assistant. Consequently the first scenario finds application

regarding the plaintiffs loss of income which I intend awarding in the amount of R38 903.

GENERAL DAMAGES

- [16] I turn now to the general damages which is claimed in the amount of R1 500 000.00.

- [17] Mr Pather appearing for the plaintiff, submitted that similar injuries attracted an award of R600 000.00 which translates to R1 177 000.00 in current monetary terms in relation to the orthopaedic injuries.[1] In respect of the head injury an award in similar circumstances translated into current monetary terms amounted to R1689 000.00.[2] By way of comparison

he referred to a further case which awarded R 1 002 000.00.[3] He submitted that an amount of R614 230.00 be allocated to past loss and R1500 000.00 for future loss and general damages, further that a normal party and party costs order be granted. The total amount being R2 114 230.00.

- [18] Mr Malatje submitted on behalf of the defence that the plaintiff had to prove there was a loss of income as a result of the sequelae and that the plaintiff had to justify the amount of general damages taking into account the sequelae of injuries having regard to the experts' reports. He submitted that the report on the loss of earning capacity reflected that the plaintiff was earning more than she had been earning as a car wash assistant. In this regard there was no loss of earnings. Prior to the accident she earned R1600 whilst post the accident she earned R2500. There was also the possibility that the plaintiff could be re-employed to wash cars once she was rehabilitated and received adequate support therapeutically from the occupational therapist, psychologist and reconstructive surgery.
- [19] He submitted that the nature of the injuries were common cause having regard to the expert medical reports and there was no doubt that the plaintiff was severely injured and her life has been changed permanently. He submitted further however that in its discretion in awarding an appropriate amount the Court should be fair to both parties. The plaintiff should be properly but not overly compensated

with an inordinately high award which would burden the defendant.[4]

- [20] He referred to the amounts mentioned by Mr Pather and submitted that the Court should decide on general considerations. In this regard he referred to *Bay Passenger Transport Ltd v Franzen* 1975

- (1) SA 269 (A) at p274 where the Court summarised the proper approach to be followed as follows:

"Comparable cases, when available, should rather be used to afford some guidance in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous and broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. All the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and the sequelae may have been either more serious or less than those in the case under consideration."(see also *Protea v Lamb* 1971 (1) SA 530 at 536 A-0).

- [21] Mr Malatje submitted further that whilst awards must to reflect the current value of money it was not necessary to slavishly follow the consumer price index. See *Norton v Ginsberg* 1953(4) SA 537 (A) at 551; *AA Onderlinge Assuransie Assosiasie Bpk v Sodom* 1980 (3) SA 134 (A) at 141.

[22] In referring to a number of matters where there were similar injuries the damages were awarded in the amount of R380 000.00 in *Solomon and Another NNO v De Waal* (1972] 2 All SA 112 (A) in current value. This injury was only cosmetic and did not entail the extent of the plaintiff's injury in the present matter. Mr. Malatje referred to an unreported case of *Morne van Eeden v Road Accident Fund* Case No. 2069/2011, Eastern Cape, Port Elizabeth where a 36 year old male was awarded R380 000.00 for an injury which involved gross disfigurement and psychological injury. The amount was equivalent to R480 000.00 in January 2018. In view of the Van Eeden matter, he submitted that this was the closest case comparable to the present matter bearing in mind that the plaintiff did have further injuries whilst Mr Van Eeden sustained only an injury to his left leg.

[23] I have had regard to the comments by the Court in the matter of *De Jongh v Du Pisanie* NO [2004] 2 All SA 565 SCA, where the Court reduced the award of the Court a quo from R400 000 to an amount of R 250 000 for a head injury. At para [65] the Court noted the tendency to award high amounts and cautioned against same as it was not mathematically accurate. I am mindful that merely following the trend to grant high awards slavishly does not take cognisance of the view of Holmes J in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287E-F that:

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

Nor does it take cognisance of the view expressed in *Hulley v Cox* 1923 AD 234 at 246:

"we cannot allow our sympathy for the claimants in this very distressing case to influence our judgment".

[24] Having regard to the case law, the estimate method and comparable case law has been used to determine the award applicable in the present matter. The plaintiff's injuries are serious. Her skull has a permanent deformity. Whilst she will benefit from psychotherapy and occupational therapy as well as reconstructive surgery, these will only afford limited relief and assistance. It will help her cope with what cannot be changed. Her scars will remain and some will only be changed marginally. She is depressed and at risk in the future.. Similar awards updated are in the region of R1100 000, with the conservative estimate of R480 000. In the *De Jongh v Du Pisanie* matter above, the award was R250 000. As no matter matches the plaintiffs case exactly the award is merely an estimate. Based on *De Jongh v Du Pisanie* the award for general damages translates to R1100 000. The sum awarded is thus an amount of R1138 903.00 minus 10% which leaves a total of R1127 513.70. The amended order attached marked X, is duly incorporated into the judgment, with the insertion of the amount of R 1127 513.70 which takes into account the 10% deduction in view of the defendant only being accountable for 90% on the merits.

S C MIA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the plaintiff

: Mr Tl Pather.

Instructed by

: Pather Inc

On behalf of the Defendants

: Adv SM Malatje

Instructed by

: Diale Mogashoa Attorneys

Date of hearing

: 14 March 2018

Date of judgment

: 25 May 2018

IN THE HIGH COURT OF SOUTH AFRICA

Case no: 20784/2013

On this the 14th day of March 2018, before His Lordship, Mr Justice Ledwaba DJP

MAHACHI PRECIOUS

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

AFTER HAVING HEARD COUNSEL AND BY AGREEMENT BETWEEN THE PARTIES THE COURT
MAKES AN ORDER in the following terms:

1. The Defendant shall pay to the Plaintiff the sum of R1127513.70 (One million one hundred and twenty seven thousand five hundred and thirteen rands and seventy cents) in respect of her General Damages and loss of Earning and/or Earning capacity.

2. In the event of the aforesaid amount not being paid within 30 days from the date of this Court Order, the Defendant shall be liable for interest on the amount at the rate of 10.5% per annum, calculated from the date of this Order to date of payment.
3. There is a contingency fee agreement;
4. The Defendant shall pay the Plaintiff's taxed or agreed party and party cost's on the High Court scale, subject to the discretion the Taxing Master and that:
 - 4.1. In the event that the costs are not agreed:
 - 4.1.1. the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;
 - 4.1.2. the Plaintiff shall allow the Defendant 14 (fourteen) Court days from date of allocatur to make payment of the taxed costs.
 - 4.1.3. should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.5% per annum on the taxed or agreed costs from date of allocatur to date of final payment.
 - 4.2. such costs shall include:
 - 4.2.1. the costs incurred in obtaining payment of the amounts mentioned in paragraph 1 above;
 - 4.2.2. the costs of Attorney Tyron I Pather with the right of appearance in the High Court for reasonable preparation fee as well as day fee;
 - 4.2.3. the costs of all medico-legal, actuarial and addendum reports, if any, obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles;
 - 4.2.4. the reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the experts;
 - 4.2.5. the reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties.
 - 4.2.6. the cost of holding all pre-trial conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;
 - 4.2.7. the cost of and consequent to compiling all minutes in respect of pre-trial conferences;
 - 4.2.8. the cost of and consequent to the holding of all expert meetings between the medico-legal experts appointed by the Plaintiff as well as the costs pertaining to the procurement of joint minutes;
 - 4.2.9. The cost of preparing 6 trial bundles;

4.2.10. The reasonable travelling expenses of the Plaintiff to attend the proceedings, as he is declared a necessary witness;

5. The amounts referred to above will be paid to the Plaintiff's Attorneys, TYRON I. PATHER INC, by direct transfer into their trust account, details of which are the following:

Name:

TYRON I.PATHER INC

Bank:

NEDBANK

Account number: [...]

Branch code: 160445

Ref:

TM4913/ MAHACHI PRECIOUS

BY ORDER OF THE COURT

REGISTRAR OF THE HIGH COURT

For Plaintiff: T Pather Attorney

Tel: 012 343 3043

For the Defendant: Advocate Stephen Malatji

Tel:

[1] Bernell Schmidt v RAF QOD Vol 5 P2-168

[2] Richter v Capita Assurance Co Ltd 1963(4) SA 910

[3] Ndokweni v RAF QOD Vol 7 P4-9

[4] De Jongh v Du Pisanie N.O. [2004] All SA 565 (SCA)

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