

SOUTH AFRICA / JUDGMENT

Makaudi v Road Accident Fund (68341/2014) [2017] ZAGPPHC 406 (9 May 2017) [2017] ZAGPPHC 406

COURT

North Gauteng High Court, Pretoria

BEFORE

S. A. M. Baqwa

CASE / FILE NUMBER

68341/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 68341/2014

DATE:

9/5/2017

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

In

the matter between: GLORIA
 MAKGALALELO
 MAKAUDI
 Plaintiff
 and
 THE
 ROAD ACCIDENT
 FUND
 Defendant

JUDGMENT

Baqwa J

- [1] This is an action under the provisions of the Road Accident Fund Act No. 56 of 1996 ("the Act") in which the plaintiff sues the defendant for damages arising out of injuries she sustained in a motor vehicle collision which occurred on 31 January 2010 at approximately 18h20 at or near the N12 Wolmarans - Klerksdorp Road when the motor vehicle with registration letters and numbers [W....] wherein the plaintiff was a passenger, there and then driven by one Ditiro Joeph Motimela lost control and overturned.
- [2] The parties agree that the merits of this claim have been conceded at 100% in favour of the plaintiff and that the matter proceeds on quantum only.
- [3] The plaintiff is Gloria Makgaleleo Makaudi an adult female who was approximately 29 year of age at the time of the accident. She

turned 36 in March of this year.

- [4] The plaintiff sustained injuries as follows:

4.1 a severe head injury with a subarachnoid haemorrhage and a transient loss of consciousness; and

4.2 multiple lacerations and contusions to the head, face, arms, abdomen, knees and feet.

- [5] Consequently the plaintiff claims:

5.1 Future medical expenses: R46 000.00

5.2 Past loss of earnings: R121 366.00

5.3 Future loss of earnings: R511 577.00

5.4 General damages: R800 000.00

- [6] The defendant has tendered the statutory undertaking in regard to the claim for future medical expenses and that head does not require a determination.

[7] The parties have already agreed the award to be made in respect of general damages in the sum of R650 000.00.

[8] In determining the issue of future and past loss of earnings this Court is assisted by expert reports filed by the parties herein

including, inter alia, a report by Ms P. Ngoako, an industrial psychologist (for the plaintiff), and a report by Ms M. Hough, an industrial psychologist (for the defendant).

[9] The plaintiff resides in Turffontein with her boyfriend and three minor children aged 15, 10 and one. Her highest level of education is grade 11. At the time of the collision she enjoyed good health and was gainfully employed as a domestic worker.

[10] After the accident the plaintiff attempted to resume her pre-accident employment on 1 June 2010. She was however unable to perform all the tasks required of her but had an understanding and sympathetic employer. Unfortunately for her, the employer relocated and the plaintiff was rendered unemployable. Thereafter the plaintiff managed to secure work in a community work program in Rossetenville

as a general worker where she barely coped and was assisted by co-workers in fulfilling her duties. Due to memory difficulties,

the plaintiff is unable to recollect the exact dates of such employment but estimates that the employment lasted no longer than a few months. The plaintiff was however forced to cease with this work due to the sequelae of her injuries and has been unemployed now for a period of about seven years.

[11] The sequelae comprise inter alia, low back pain, pain and swelling in the left knee, headaches, pain in the left arm and right rib cage, cervical spinal pain, depression, acute temper, anger, insomnia, concentration and memory difficulties as well as diminished libido. The plaintiff also finds it difficult to walk for long distances and to carry heavy items. She experiences difficulty in standing for long periods, negotiating stairs and is unable to squat.

[12] The defendant has admitted the opinions expressed by the unopposed experts, namely Dr M. J. Laric (an orthopaedic surgeon), Dr L. Berkowitz (a plastic surgeon) and Dr D. A. Shevel (a psychiatrist).

[13] The experts who have counterparts have met and prepared joint minutes and the points of agreement constitute the common cause evidence of the parties whilst the points of disagreement constitute the issues for determination. There is no disagreement between the neurologists and it is quite evident from their reports that the plaintiff suffered a severe head injury.

[14] Similarly, there is no disagreement between the neuropsychologists who are ad idem that the plaintiff is unlikely to be employable.

[15] Two witnesses were called to the witness stand by both parties namely Mesdames Ngoako and Hough for the plaintiff and defendant

respectively.

[16] These experts differ in two respects. In the injured scenario they differ as to the plaintiff's earnings ceiling. Ms Ngoako projects a ceiling at the upper quartile of scales for domestic workers namely, R42 000.00 per annum whilst Mr Hough projects a ceiling at the least on par with the minimum wage for domestic workers in the sum of R26 768.40 per annum. This apparent divergence of opinion does not, however, make much difference in the greater scheme of things as the plaintiff has utilised the figures of the defendant's expert in the assessment of the loss.

[17] In the injured scenario Ms Ngoako is of the view that the plaintiff has been rendered unemployable on the open labour market. Her testimony was to this effect. She testified that according to available expert opinion the plaintiff is not ideally suited to domestic work or any jobs with high physical demands. She is ideally suited to sedentary and light physical work as most unskilled jobs are manual in nature and have high physical demands.

[18] Ms Ngoako further opined that there are very few jobs in the unskilled category that have light physical demands and that the

plaintiff would find it extremely difficult to compete for such jobs with other job seekers who are younger, more educated and physically and mentally stronger than her. She further testified that prospective employers would always be prejudiced against her due to her physical and neuropsychological limitations. The plaintiff would also not be able to secure sedentary employment as most sedentary jobs have a clerical component and she does not have the required skills and training for such jobs. She concluded by stating that even though available expert opinion suggests that she has some residual capacity in that she can perform sedentary to light work, on a practical level she will not be able to compete for such work for reasons already stated.

[19] Ms Ngoako was cross-examined at some length regarding her conclusion but was adamant and did not alter her views. I found her to be a credible and convincing witness. The defendant sought to counter her views through the testimony of Ms Hough who was one of the experts holding the view that the plaintiff has some residual work capacity.

[20] It became quite apparent during the cross-examination of Ms Hough that her conclusion was based on a totally factually erroneous basis. This was glaringly apparent from her report where she states as follows: "Writer did not administer any psychometric tests as Ms Makaudi did not sustain a head injury as per available documentation and as such it is accepted that her cognitive ability remained intact." She conceded that her view was totally erroneous in view of the views expressed in the joint expert minutes report referred to above. No weight could, therefore, be attached to the opinion she had initially expressed regarding the plaintiff's alleged residual capacity for employment.

Actuarial Assessment

- [21] The actuarial assessment was based partly on both the opinions expressed by the industrial psychologists. In the uninjured state the projection of Ms Hough is utilised and in the injured state the projection of Ms Ngoako is utilised.
- [22] The amounts assessed and claimed yield losses of R121 366.00 and R511 577.00 for past and future loss of earnings respectively but the calculation does not take into consideration contingency deductions.
- [23] The plaintiff contends for a 5% contingency in respect of past loss of earnings. This is the norm and contrary to the submissions by counsel for the defendant, I am not persuaded that this contention is unreasonable. The resultant figure is R115 298.00.
- [24] In regard to future loss of earnings, the defendant's counsel has argued for the application of a 20% contingency whilst the plaintiff's counsel contends for a nil contingency deduction in respect of the uninjured earnings. I have considered the circumstances of this case and concluded that there ought to be a nil contingency deduction.

[25] In the result the following order is made:

25.1 Future medical expenses - as per statutory undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996.

25.2 Past loss of earnings - R115 298.00. 25.3 Future loss of earning - R511 577.00. 25.4 General damages - Total - R650 000.00. R1 276 875.00

[26] The Draft Order handed in (as amended) is marked 'X' and made an order of Court.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:

08 May 2017

Delivered on: 09 May 2017

For the Plaintiff: Advocate M. Patel

Instructed by: Noko Attorneys

For the Defendant: Mr B. Bahlmann

Instructed by: Fourie Fismer Incorporated

GAUTENG DIVISION

PRETORIA

CASE NO: 14/68341

DATE: 08/08/17

MAKAUDI MAKGALALELO GLORIA

Plaintiff

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

ON 5 MAY 2017

BEFORE THE HONOURABLE BAQWA J

By consent between the parties it is ordered that:-

1. The defendant shall pay the nett capital amount of R1 276 875.00 ONE MILLION, TWO HUNDRED AND SEVENTY SIX THOUSAND, EIGHT HUNDRED AND SEVENTY FIVE RAND in full and final settlement of the plaintiff's claim directly to the trustee of a trust to be formed for the benefit of Gloria Makgalalelo Mkaudi ("Gloria") an adult female born on [...]1981, within 14 days of this order.

2. In the event that the trust, referred to below, is not formed

timeously the defendant shall pay all the amounts referred to in this order directly to the plaintiff's attorneys. The plaintiff's attorney shall invest the capital amounts so received in terms of section 78(2) of the Attorneys Act, No 53 of 1979, the interest thereof accruing for the benefit of Gloria.

3. The plaintiff's attorney shall be entitled to make payment of all disbursements from the capital amount and shall account to the

trustee in respect of any payments made in respect of disbursements.

4. Should the defendant fail to make payment of the nett capital amount or part thereof within 14 days of the granting of this

order the nett capital amount or balance due shall attract interest at the prescribed rate of interest from that date to date of payment in full.

5. The defendant shall furnish to the plaintiff an 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 Gloria in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to Gloria, arising out of the injuries sustained in a motor vehicle collision on 31 January 2010, and the sequelae thereof, after such costs have been incurred and upon proof thereof.

6. The defendant is ordered to pay:-

6.1 the costs of the creation of the Trust referred to below and the appointment of the trustee;

6.2 the costs of the Trustee in administering the Trust as determined by section 84(1)(b) of the Administration of Estates. Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators; and

6.3 the cost of furnishing annual security for so long as the trust remains in existence.

7. The defendant is to pay to the trustee the plaintiffs agreed or taxed party and party High Court costs of the action, such costs

to include:

7.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 supra;

7.2 the reasonable costs of the reports, the RAF4 forms, the joint minutes, the preparation and reservation fees, if any of all of the

plaintiff's experts namely Dr.S.M.Sara, Dr.MJ.Laric, Ms.M.A.Gibson, Dr.K.D.Rosman, Dr.D.A.Shevel, Dr.L.Berkowitz,

Ms.I.H.Shibambo, Ms.P.Ngoako and

Mr.RKoch.

7.2 The reasonable attendance fees of Ms P Ngoako

7.3 The notice of taxation shall be served on the defendant's attorney of record.

8. The defendant is to make payment of the taxed costs within 14 days of taxation.

9. As soon as the bill of costs has been taxed by the plaintiffs attorney or agreed upon between the defendant's attorneys and the plaintiff, the trustee and/or the plaintiffs attorney is to receive and collect payment thereof from the defendant directly for the benefit of Gloria.

10. The trustee is to pay the plaintiff's attorney's costs in terms of the contingency fee agreement entered into between the plaintiff and the plaintiffs attorneys.

11. The trustee of the trust to be formed shall be entitled to call for an appropriate taxation of the attorney and own client fees and disbursements to be recovered by the plaintiffs attorneys, should this be deemed to be necessary.

12. The plaintiffs attorney is ordered and authorised to form a trust, to inter alia, administer and/or manage the financial affairs

of Gloria, with Absa Trust and to sign all documents necessary for the formation of the trust which is to be formed for sole benefit of Gloria.

13. The trustee, if appointed, is to furnish security to the satisfaction of the Master in terms of Section 77 of the Administration of Estates Act, No 66 of 1965, the annual costs of such security to be paid by the defendant.
 14. Should the trustee fail to furnish security within a reasonable time or vacate his office, the Master is authorised to appoint an alternate nominee of his choice.
 15. The trust instrument shall make provision for inter alia the following:-
 - 15.1 Gloria to be the sole income and capital beneficiary;
 - 15.2 the Trustee of the Trust to be formed shall take all the requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfilment of his/her obligations and to ensure that the bond . of security is submitted to the Master of the High Court at the appropriate time as well as to all other interested parties if so required by the Master of the High Court;
 - 15.3 the duty of the Trustee to disclose any personal interest in any transaction involving the Trust property to the Master;
 - 15.4 the termination and or amendment of the Trust with the leave of the High Court alternatively termination of the Trust upon the death of Gloria whereafter the trust estate shall devolve on her estate;
 - 15.5 the Trustee shall be entitled, if he deems it necessary, to utilise the income and the capital of the Trust for the reasonable maintenance of Gloria or for any other purpose which the trustee may decide to be in the interest of Gloria;
 - 15.6 the trust property is excluded from any community of property and/or accrual in the event of the marriage of Gloria;
 - 15.7 the trustee is authorised to recover the remuneration of and costs incurred by the trustee in administering the trust and undertaking;
 - 15.8 the procedure to resolve any potential disputes are subject to the review of any decision made in accordance therewith by this Court;
 - 15.9 the suspension of Gloria's contingent rights in the event of cession, attachment or insolvency prior to the distribution or payment thereof by the trustee to Gloria; and
 - 15.10 the trust property and administration of the trust be subject to an annual audit.
- The provisions referred to in paragraphs 15.1 to 15.10 above shall, in accordance with the provisions of the Trust Property Control Act No 57 of 1988, be subject to the approval of
16. This order is to be served by the plaintiff's attorney on the Master of the High Court, Pretoria and the nominated trustee

within 15 days of the granting of this order.

BYTHECOURT

REGISTRAR

FOR PLAINTIFF ADV.M.PATEL 082 412 7338

FOR DEFENDANT MR B. BAHLMANN

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