

SOUTH AFRICA / JUDGMENT

Manabe v Road Accident Fund (41737/2019) [2021] ZAGPPHC 639 (6 October 2021)

[2021] ZAGPPHC 639**COURT**

North Gauteng High Court, Pretoria

BEFORE

Khwinana

CASE / FILE NUMBER

41737/2019

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE NO:**

41737/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

6 October 2021

In

the matter between: ALIE
ALBERT
MANABE
Plaintiff
And
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT

KHWINANA AJ

Introduction

- [1] This is a third party claim for damages against the Road Accident Fund (referred to as the “RAF”) as a result of an accident which occurred on 7 April 2018. The plaintiff, an adult male, with identity number [...], was 31 years old at the time of the accident. He is currently 33 years old.
- [2] The plaintiff lodged a claim with RAF on the 07th of January 2019. On the 14th of June 2019 the plaintiff proceeded to issue summons which were served on the defendant on the 18th of June 2019. The defendant pleaded to the plaintiff’s particulars of claim on the 11th of July 2019. The matter was certified trial ready on the 25th of June 2020. The notice of set-down was served on the defendant’s attorneys on the 20th of August 2020 and to the defendant on the 19th of August 2020 for the 18th of May 2021. The merits and quantum are in dispute.
- [3] The Plaintiff’s version is contained in her section 19(f) affidavit as well as in the pleadings. The plaintiff was unable to open a criminal case due to failure to secure a J88 from the hospital. Neither the defendant nor its attorney showed up on the day of the trial. Numerous attempts were made to engage the defendant but they did not respond.
- [4] I am therefore forced to proceed with this matter on an unopposed basis. It is concerning that our courts are inundated with defendant’s matters wherein they simply do not show up despite that public funds are at stake. The plaintiff has prepared for hearing of this matter and it would be unfair to have this matter postponed as the costs for litigation will skyrocket which is double jeopardy against the defendant.
- [5] I am therefore proceeding to hear this matter. The plaintiff has filed expert affidavits and has requested that the matter proceed in terms of the affidavits and it is so ordered.

Summary of Facts

- [6] On the 7th of April 2018 at approximately 04h00 on Soshanguve Road between Block P and Y, an accident took place. The Plaintiff was walking next to the road when a Polo Vivo stopped a few meters in front of him. Someone in the vehicle called the Plaintiff and offered him a lift. The Plaintiff got into the said vehicle. The front seated passenger took out a gun and robbed the Plaintiff of his money and cell phone. The back seated passenger pushed the Plaintiff out of the door while the vehicle was moving.
- [7] The plaintiff was injured as a result of the accident and had to be transported to hospital. The plaintiff went to Tshwane District Hospital & Dr George Mukhari Hospital on the date in question. The hospital records depict that the plaintiff was involved in a Motor vehicle accident wherein he was pushed out of a moving vehicle.
- [8] The RAF has neither submitted a version nor a statement from any insured driver. It is submitted that the Plaintiff was a passenger in a vehicle when he was deliberately pushed out of a moving vehicle. A passenger, such as the Plaintiff in casu is entitled to claim from the Defendant for the sequelae of the injuries he sustained. The defendant has not denied the plaintiff's that the Plaintiff's version of events.

Injuries and Sequelae

- [9] According to the medico-legal report by Dr. Oelofse, an orthopaedic surgeon, the following is recorded:

9.1 The patient was transported to Steve Biko Academic Hospital. The patient transferred to Dr George Mukhari Hospital on the same day. According to the transfer notes, the patient's right shoulder was swollen.

9.2 On examination crepitus of his right shoulder was noted. The range of movement of his right shoulder was restricted.

9.3 Abrasions on his hand (side not specified) was also recorded. The patient was given a prescription of analgesics.

9.4 Hospital records from George Mukhari hospital note that the patient sustained abrasions to his right forearm and hand and that his right shoulder was deformed. X-rays of the right shoulder were conducted.

9.5 A fracture of the proximal humerus was diagnosed. On 16 April 2018, the patient was taken to the operating theatre for an open reduction and internal fixation of his right humerus. He was discharged on 17 April 2018.

9.6 According to the RAF 1, the patient received post-operative physiotherapy. His arm was immobilised with an arm sling for 2 (two) months. The patient continued to experience pain and discomfort in his upper arm and shoulder. According to the patient, once his cast was removed and he attempted to use his arm his pain intensified.

9.7 He states that the pain was aggravated by lifting heavy objects and doing physical labour. This prevented him from resuming his occupation as a Manual Labourer. The movement of his shoulder became restricted.

9.8 According to the patient, his shoulder would ache when working above shoulder height. Cold aggravated the pain in his shoulder and upper arm. The patient states that sleeping on his arm disturbed his sleep due to pain. Current Symptoms - The patient continues to experience pain in his upper arm and shoulder. He describes the pain as sharp and aching in nature. Cold continues to intensify the pain.

9.9 There is an intramedullary pin in the right-sided humerus with proximal and 2 distal locking screws. ~ Bony union is seen of the fracture through the surgical humeral neck. ... Diagnosis United proximal humerus fracture with:

9.9.1 Painful instrumentation

9.9.2 Moderate restriction in range of movement

9.9.3 Rotator cuff tendonitis/tear

9.10 However, carpentry work involves repetitive shoulder, elbow and wrist movements. These movements are bound to exacerbate the pain in his shoulder, especially in light of his diagnosed rotator cuff tear/tendonitis.

Loss of Earnings

[10] Johan Sauer Consulting Actuaries has provided the calculation on loss of earnings. Their report is not in dispute. The plaintiff was a Manual Labourer at the time of the accident. According to the assessor the plaintiff has been temporarily incapacitated at his job as a carpenter, however he currently suited to light and low range medium work that does not include use of power tools or working with his hands above shoulder level.

[11] The plaintiff was self-employed prior to the accident; his chances of securing employment suited to his educational and vocational background are low at the moment.

[12] The experts opined that, with successful treatment as well as vocational rehabilitation, his vocational capacity should improve. This therefore spells out that the plaintiff has not suffered total loss of earnings.

[13] The plaintiff reported that the doctor gave him a letter to apply for a SASSA temporary grant, however he explained that the office staff were on strike. He then returned later when they informed him that his letter had expired and need to obtain a new letter, whereafter he did not return to his doctor or SASSA.

[14] The plaintiff did not earn an income post his injury since he was not able to continue working. His loss of income is expected to continue at least until he receives successful treatment. · He will require a substantial number of sick leave days as he recuperates from the prescribed surgical interventions and as he undergoes physiotherapy. Counsel for the plaintiff opines that a higher than

normal post-accident contingency to be applied to account for the fact that he is no longer an equal competitor in the open labour market when compared to his uninjured peers.

[15] The plaintiff's pre-morbid loss of earnings has been calculated at R 169 045.00. Counsel for the plaintiff has proposed contingency at 10 % should be applied to this calculation which puts plaintiff pre-morbid loss at R 152 140.50 and post-morbid being R 32 812.00 less 5 % R 1 640.60. The total past loss of earnings is R120 969.10.

[16] The plaintiff was able to secure his first employment in 2011 as a general worker at SABS (contract ended the same year). He was unemployed for 2012 where after he started working as a self-employed carpenter. The plaintiff's self-reported earnings of R 4800 per month (2018 terms) is comparable to Koch semi-skilled lower median scale (R 49,250, 2018 terms) counsel submits that the Koch semi-skilled median scale (R 82,000 per annum, 2019 terms) falls in line with earnings research for a carpenter (R 6971 per month, 2019 terms) plaintiff was 31 years of age at the time of the reported accident and had scope for career progression.

[17] As the post-morbid contingencies: Advocate Van der Merwe submits calculations as R2 531 203.00 less 20 % is R 2 024 962.40 and R772 659.00 less 35 % R 502 228.35 which totals to R1 522 734.05.

Application of the law

[18] In the matter of Prins v Road Accident Fund[1], Mojapelo DJP as he then was stated as follows:

"It is common cause that a passenger needs only to prove the proverbial 1 % negligence on the part of an insured driver in order to get 100% of damages that he is entitled to recover from the Fund."

The plaintiff was a passenger as at the time of the accident and therefore is entitled to 100 % of liability.

[19] In the matter of MS v Road Accident Fund[2] paragraph 8 thereof, Fisher J states as follows:

"The statutory nature of the liability is such that the RAF insures the third party for any loss or damage which the third party has suffered as a result of any bodily injury to himself ... if the injury ... is due to the negligence or other wrongful act of ... the insured driver."

[20] The plaintiff's counsel referred to a plethora of cases and I would like to refer to the following judgment of Nicholas JA at 116-117 of Southern Insurance Association v Bailey NO[3]:

“Where the method of actuarial calculation is adopted, it does not mean that the trial Judge is ‘tied down by inexorable actuarial

calculations’. He has a large discretion to award what he considers right’ (per Holmes JA in Legal Assurance Company

Limited v Boles, 1963 (1) SA 608 (A) at 61 4F). One of the elements in exercising that discretion is the making of a discount for ‘contingencies’ or the ‘vicissitudes of life’. These include such matters as the possibility that the plaintiff may in the result have less than a ‘normal’ expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.”

[21] In the Gwaxula[4]-matter the claimant was much younger and unemployed at the time of the accident and should thus be somewhat distinguished. Counsel submits that it must also be considered that the plaintiff is currently 32 and will retire at age 65.

He further said using the sliding scale, referred to above, this would equate to a deduction of 16.5 % and for the above reasons he submitted that, as in the Gwaxula-matter, a higher contingency deduction is justified as a result of uncertainty of plaintiff’s exact income and the nature of his self-employed venture as a carpenter in the informal sector.

Conclusion

[22] It is clear that the plaintiff is experiencing difficulties as a result of the sequelae of the accident and thus he has not been able to go back to work. It is evident that due to being unable to walk long distance, lift heavy things and do physical work he will always be at risk. I also take cognizance of the fact that the optimal interventions and pain management, the plaintiff’s quality of life may very well

improve. However, the fact that the income is not documented is worrisome thus considering all these factors a high contingency must be applied. I agree with the plaintiff’s counsel that the fair and reasonable contingency is 15 % pre-morbid and 35 % contingency should be applied.

Order

[23] The following order is made:

1. The defendant shall pay to the plaintiff the amount of R 1 643 703 .15.
2. 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, in respect of the payment of cost of future accommodation of the plaintiff in a hospital or nursing home, or the treatment of, or the rendering of a service or the supplying of goods to him as a result of the injuries sustained by him in the motor collision which occurred on the 7th of April 2018, and the sequelae thereof, after such cost has been incurred and upon proof thereof.

3. The total amount referred to in paragraph 1 supra will not bear interest unless the defendant fails to effect payment thereof within 180 calendar days of the date of this order, in which event the capital amount will bear interest at 7% per annum calculated from and including the date of judgment to and including the date of payment.

4. Costs of Suit.

The plaintiff's counsel has filed a draft order on CaseLines. I have completed it and I make it an order which is marked "X".

E.N.B. KHWINANA

ACTING JUDGE OF GAUTENG DIVISION, PRETORIA

HIGH COURT, PRETORIA

HEARD ON: 20 May 2021

FOR THE PLAINTIFF: ADV. J. VAN DER MERWE

INSTRUCTED BY: Nel Van der Merwe & Smalman Inc.

FOR THE DEFENDANT: NO APPEARANCE

DATE OF JUDGMENT: 6 October 2021

IN THE HIGH COURT SOUTH AFRICA

Before the Honourable KHWINANA, AJ

On this the 6th day of October 2021

CASE NO: 41737/19

ORDER GRANTED ELECTRONICALLY IN TERMS OF THE DIRECTIVES REGARDING SPECIAL ARRANGEMENTS TO ADDRESS COVID-19 IMPLICATIONS FOR ALL LITIGATION AND MANAGEMENT OF COURTS DURING THE NATIONAL STATE OF DISASTER

ALIE ALBERT MANABE Plaintiff

and

ROAD ACCIDENT FUND

Defendant

RAF Claim Nr: 560/12785349/309/0 – Link Nr.: 4614799

DRAFT ORDER

Having read the papers filed and having heard Counsel on behalf of the Plaintiff -

IT IS HEREWITH ORDERED THAT:

1. The Defendant concedes the question of liability and agrees to pay 100% of the Plaintiff's proven/agreed damages arising from a motor vehicle collision on 7 April 2018.
2. The Defendant is ordered to pay the Plaintiff the amount of R 1'643'703.15 (ONE MILLION SIX HUNDRED AND FOURTY THREE THOUSAND SEVEN HUNDRED AND THREE RAND FIFTEEN CENTS) in delictual damages (Loss of Income), which amount is payable by the defendant to the plaintiff's Attorneys NEL VAN DER MERWE & SMALMAN INC. by depositing same into plaintiffs' attorneys of record's trust account, the details of which are as follows:

Account holder: NEL VAN DER MERWE & SMALMAN INC.

Bank Name:

FIRST NATIONAL BANK

Branch Name: FNB LYNNWOOD

Account Number: [...]

Branch Code: 250 655

Reference:

CvdMerwe/WN4041

3. The Defendant will not be liable for interest on this payment on condition that payment be made timeously. In the event of the Defendant not making this payment timeously the Defendant will pay interest at the prescribed rate-of-interest per annum on the amount outstanding as provided for in section 17(3)(a) of the Road Accident Fund Act, Act 56 of 1996.
4. The Defendant to furnish the Plaintiff with an undertaking, ito Section 17(4)(a) of the RAF Act, Act 56 of 1996, for 100 % of the future medical and medical related costs arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on 16 September 2017
5. The defendant is ordered to pay the plaintiffs' taxed or agreed party and party costs on a High Court Scale which costs will include, but will not be limited to, the following:
 - a. The fees for consultation and the costs of the reports, addendum reports and joint minutes of all Plaintiff's experts;
 - b. The costs of plaintiff's Senior-Junior Counsel.
 - c. The costs for the preparation, inspections, consultations, traveling and traveling time, to and attendance of the respective pre-trials, trials by the Plaintiff's representatives;

- d. The trial costs in respect of all the trial bundles of documents and all indexes thereto and uploading same onto CaseLines system, the standing-down costs and the costs for confirming the order on the Settlement Roll;
 - e. The costs attendant upon obtaining payment of the amounts referred to in this Order; and
 - f. The reasonable taxable traveling costs, subsistence and accommodation of the plaintiff to the medico-legal examinations arranged by Plaintiff & Defendant and to attend Trial.
6. Payment of the above costs by the defendant is subject to the following conditions:
- a. Plaintiff is ordered to serve the notice of taxation of plaintiff's party and party bill of costs on defendant's attorneys of record;
 - b. The defendant is ordered to pay the plaintiffs' taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties, by which failure, the defendant shall be liable for interest at the prescribed interest rate per annum on such costs.
 - c. The total amount referred to in paragraph 1 supra will not bear interest unless the defendant fails to effect payment thereof within 180 calendar days of the date of this order, in which event the capital amount will bear interest at 7% per annum calculated from and including the date of judgment to and including the date of payment.

BY ORDER

THE REGISTRAR

Obo Plaintiff:

Adv J Van der Merwe – 083 315 1407

Instructed by NVS Inc

Ref: CvdMerwe/WN4041

[1] (21261/08)

[2013] ZAGPJHC 106

[2] (10133)

[2019] ZAGPJHC 84, [2019] 3 All SA 626 (GJ)

[3] 1984

(1) SA 98 (A)

[4] [2013] ZAGPJHC 240 (25 September 2013)

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