

SOUTH AFRICA / JUDGMENT

Mathenjwa v Road Accident Fund (53084/2016) [2017] ZAGPPHC 1273 (15 December 2017)

[2017] ZAGPPHC 1273

COURT

North Gauteng High Court, Pretoria

BEFORE

Nkosi

CASE / FILE NUMBER

53084/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO: 53084/2016

15/12/2017

SIPHESIHLE SHARON MATHENJWA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NKOSI AJ

INTRODUCTION

- (1) The plaintiff was approximately 20 years old when she got involved in a motor vehicle accident which occurred on the 20 September 2015. At that time, she had already passed her Grade 12 and enrolled for an auxiliary nurse course with Lunghile Nursing College in Randburg and was due to commence her studies at the end of September 2015. Whilst waiting to commence her studies she worked as a volunteer library assistant at a secondary school.
- (2) The Defendant conceded merits 100% in favour of the Plaintiff. Her claims for general damages and future medical expenses have also been settled . The parties eventually managed to settle the issue of the past loss of earnings by agreeing that a sum of R89 957, 00 should be awarded to the Plaintiff. Her claim for future loss of earnings remains in dispute.
- (3) The injuries sustained by the Plaintiff in the motor vehicle accident in question are common cause. The sequelae of the injuries is to a large extent common cause but the remaining disputed part of it impacts on the question of contingencies which the court is called to adjudicate upon.
- (4) The Plaintiff sustained the following injuries:
 - 4.1 a laceration on the right side of the scalp ;
 - 4.2 extensive abrasions and lacerations of both arms and the right forearm;
 - 4.3 massive abrasions and lacerations of the back;
 - 4.4 lacerations and abrasions of the left knee; and
 - 4.5 an abrasion of the left forehead.
- (5) The back injury is her most serious injury and is described by both orthopaedic surgeons ,Dr Mare and Dr Mukantsi respectively as follows:

“Sy het erge Littekening met keloied op die rug en fibrotisering gan die sagte weefsel. Sy kla ook van meganiese rugpyn.”

And,

“The patient has had severe back injury that resulted in severe abrasions of the whole back. She is now presenting with scoliosis and back pain.”

ISSUE

- (6) The parties are miles apart regarding the extent of contingency deductions to be applied to the calculations already done by the

Actuary. The actuary has applied a 15% contingency deduction to the pre-morbidity earnings capacity and 30% to the post morbidity

earnings capacity. The Defendant submitted that a deduction of 50% to the pre and as well as the post morbidity earnings capacity should be applied . The court must therefore decide what would be a fair, just and reasonable contingency deduction.

EVIDENCE

- (7) The bundles containing Plaintiff's expert reports and the joint minutes of the relevant experts were submitted into the record as evidence and were marked "exhibit A and B" respectively.
- (8) The main dispute emanates from the postulations of the industrial psychologists. It was for that reason that the parties chose to limit their argument to the opinions of the Industrial Psychologists as informed by opinions of other experts.
- (9) The Plaintiff led the evidence of Ms Nicolene Kotze, an Industrial Psychologist. She testified that when she compiled her report she already had at her disposal reports of the following Plaintiff's experts, Orthopaedic surgeon, Plastic and Reconstructive surgeon , Occupational Therapist, Physiotherapist, Psychiatrist, Clinical Psychologist and Educational Psychologist.
- (10) Her counterpart, Ms Kheswa did not have a report of a clinical psychologist when she compiled her report. I have perused her joint minute, it does not make mention of any opinion of the Defendant's clinical psychologist. I can safely conclude that she did not have the report of the Defendant's clinical psychologist when she compiled her own report, and had not received it when she compiled the joint minute.
- (11) She confirmed that the plaintiff pre-accident scenario is now common cause. They are both of the opinion that pre-accident , the Plaintiff would have obtained a post matric certificate and entered the labour market at Paterson level A3, progressing to median of Paterson level B4/B5 (with annual guaranteed package) by the age of 45. Thereafter only annual inflationary increases would have applied.
- (12) After the accident she worked as an extra on set with PJ Agency earning R150 per day 4-5 times a month. She was never called again and her contract ended. In June 2016 she worked for Sizwe Internet Cafe earning R100 per month. She was retrenched because she was very forgetful. She never commenced her intended studies to qualify as Auxiliary nurse.
- (13) Mrs Kotze did consider the opinion of Ms Grobler who from, an educational psychologist perspective, concluded that the Plaintiff's pre and post-accident potential is essentially similar. Notwithstanding Ms Grobler's view, she maintains that the plaintiff is now in a worse position than she was before the accident. She finds support from Mr. Roper, the clinical psychologist whose views are summed up in the following manner:

"It can be concluded that the plaintiff has been left psychologically more vulnerable and has been rendered with significant psychological symptoms, as evidenced by her Posttraumatic Stress Disorder and her Major Depression Disorder. In addition, the reported loss of her aunt and an additional passenger as a result of the accident has likely perpetuated her symptoms, leaving her

more psychologically prone to distress and dysfunction. She has furthermore been rendered more psychologically vulnerable by her involvement in the accident and the resulting physical sequelae. The Plaintiff's decreased physical and cognitive functioning as well as her psychological difficulties have impacted negatively on her self-esteem, cognitive and interpersonal functioning as well as quality and enjoyment of life. A combination of difficulties since the accident is expected to have an ongoing negative impact on her self-esteem, cognitive, interpersonal and possible occupational functioning as well as quality and enjoyment of life" [1].

- (14) Dr Smuts, a neurologist states in his report that the plaintiff sustained concussive head injuries and serious scarring of the back

resulting in chronic back pain. Her long term learning ability might be limited by chronic back pains and emotional problems.

- (15) The Defendant did not call any witness but relied on Ms Kheswa's opinion as contained in the joint minute. Ms Kheswa noted that the Plaintiff failed Grade 11 twice and concurs with Ms Segabutle, the defendant's educational psychologist, that the Plaintiff had a very fragile cognitive faculty pre accident or cognitive challenges of an unspecified magnitude. According to them it is very difficult or unfair to blame the accident solely for post-accident cognitive challenges. Their view is that the accident had only further insulted an already fragile cognitive faculty. She suggests that the plaintiff would benefit from psychotherapy and career counselling. She further supports the view of the educational psychologist that her pre and post-accident potential remain essentially similar.
- (16) The difficulty with the defendant's submission and indeed the defence is that it is limited to the conclusion of the educational psychologist and does not go further to deal with the clinical psychologist's conclusions. When dealing with the question of contingency deductions the entire circumstances of the case must be considered.

DISCUSSION

- (17) The opinion of Ms Kotze cannot be wished away, it is relevant to the issues before court. It takes the circumstances of the case beyond what was considered by the educational psychologist. It should further be noted that the actuarial report is based on her report which contains the views of the clinical psychologist.
- (18) Her evidence was not shaken during her cross examination. She made a good impression to the court and consequently the court has no difficulty accepting her evidence as being probable. On the other hand the Defendant opted to close its case without calling a witness to testify.
- (19) The contingency deductions of 15% pre morbid and 30% post morbid factored in by the actuary in his calculations have already taken into consideration the postulations of Ms Kotze and the joint minute of the educational psychologist.

(20) Contingencies are normal consequences and circumstances of life which beset every human being and which directly affect the amount that the plaintiff would have earned[2]. Robert Koch[3] states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuary's calculation. The deduction is in the prerogative of the court...general contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved costs, loss of employment, promotion prospects, divorce etc.

(21) In *Southern Insurance Association Ltd v Bailey* NQ[4] , Nicholas JA said:

"In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (cf *Goldie v City Council of Johannesburg* 7948

(2) SA 973 (W) at 920.)"

(22) Mr Kobus Pretorius, the consulting Actuary made the following calculations in respect of Plaintiff' s future loss of earning capacity:

Future Loss of earnings capacity

Gross pre-morbidity earnings capacity

R5 411 557

Less 15% contingency deduction

R 811 734

Net pre-morbidity earnings capacity

R4 599 824

Gross post-morbidity earnings capacity

R2 141 378

Less 30% contingency deduction

R 642 413

Net post of earnings capacity

R1 498 965

Future loss of earnings capacity

R3 100 859

Reduction due to RAF Cap

R 0

Total capitalised value of loss of earnings capacity

R3 190 717

(Inclusive of R89 957, 00 for past loss of earnings)

(23) The Defendant does not dispute the amounts for Gross pre-morbidity earnings capacity and Gross post-morbidity earnings capacity. The dispute is about the percentage of contingency deduction. The Defendant proposed a 50% deduction in respect of both pre and post morbidity earnings capacity. In respect of the unemployed victim Koch states that:

"Deductions can be as high as 50% (see AA Mutual v Maqula 7978 7 SA 805 (A,)) but 35%, and even less can be justified depending on employment history and occupation.[5]

(24) In this instance, the Defendant contends that a 50% contingency deduction would be fair and reasonable. That being the case the Defendant ought to persuade the court that his contention should hold. I am not persuaded for reasons I have already dealt with above. The Defendant has failed to demonstrate that the deductions made by the Actuary were not well founded. The Plaintiff has demonstrated that the contingencies as proposed by the Actuary find support in the postulations of the clinical psychologist and the industrial psychologist. I therefore do not have any reason to deviate from the calculations of the Actuary. The Plaintiff's future loss of earning capacity is R3 100 859, 00. In my view, having regard to the Plaintiff's circumstances as well as the evidence of the various experts the said amount is fair, just and reasonable.

(25) The Defendant is accordingly liable to pay the Plaintiff the sum of R3 190 717, 00.

ORDER

(26) The draft order attached hereto marked "X", dated 14 December 2017 and signed is hereby made an order of the court.

NKOSI, AJ

APPEARANCE

For Plaintiff

:Advocate L Coetzee

Instructed by

:Surita·Marais Attorneys

Pretoria

For Defendant

:Advocate J Makumbila

Instructed by

:TM Chauke Attorneys

Date of Hearing :22 November 2017

Date of Judgment :15 December 2017

IN THE HIGH. COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO : 53084/1

ON WEDNESDAY, 15 DECEMBER 2017

BEFORE HIS LORDSHIP MR JUSTICE

In the matter between :

S S MATHENJWA

Plaintiff

AND

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

1. The defendant is ordered to effect payment to the plaintiff in an amount of R3 190 717.00 (three million One hundred and ninety thousand seven hundred and seventeen rand.
2. The defendant is ordered to pay the plaintiff's costs of suit, including the costs of 22 NOVEMBER 2017, such costs to include further :
 - 3.1 the costs of senior junior counsel;
 - 3.2 the costs of erecting a trust.
 - 3.3 the reasonable taxable fees for consultation and preparation for trial, qualifying and reservation fees (if any) and on proof thereof as well as the costs of the reports and joint reports of :
 - 3.3.1 Dr D Mare;
 - 3.3.2 Wilma van der Walt;

3.3.3 Andrea Grobler;

3.3.4 Dr L Berkowitz;

3.3.5 Leon Roper;

3.3.6 Christel Botes;

3.3.7 Leon Fine;

3.3.8 Dr J Smuts;

3.3.9 Nicolene Kotze.

3.4 the costs of obtaining all actuarial reports from the actuary Prima Actuary;

3.4.1 Testifying fee for Nicolene Kotze

3.5 the plaintiff's reasonable hotel accommodation, transportation costs for attending consultation with the medico-legal experts for plaintiff and defendants' experts as well as reasonable transportation for attending to Court.

3.5 The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, subject thereto that:

3.5.1 In the event that the costs are not agreed:

3.5.2 the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

3.5.3 the Plaintiff shall allow the Defendant 7 (seven) Court days from date of allocatur to make payment of the taxed costs.

3.5.4 should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

3.6 such costs shall include:

3.6.1 the costs incurred in obtaining payment of the amounts mentioned in paragraphs 1 and 4 above;

3.6.2 the costs of all medico-legal, radiological, actuarial, addendum and joint reports obtained by the Plaintiff as well as such reports

furnished to the Defendant and/or to the knowledge of the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles;

3.6.3 the reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the experts as in 3.2 above;

3.6.4 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.

3.6.5 the costs consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 5 (five) copies thereof;

3.6.6 the costs of holding all pre-trial conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant 1 including counsel's charges in respect thereof;

3.6.7 the costs of and consequent to compiling all minutes In respect of pre-trial conferences;

3.6.8 the costs of and consequent to the parties of both parties attending joint meetings as well as costs of and consequent to compiling

minutes of joint meetings between the experts;

3.6.9 the costs of and consequent to the holding of all expert meetings between the medico-legal experts appointed by the Plaintiff;

3.6.10 the reasonable travelling costs of the Plaintiff, who is hereby declared a necessary witness.

4 It is noted that the amount in paragraph 1 and the costs are to be paid into the trust account of Messrs Surita Marais Attorneys as follows :

Bank : Standard Bank

Account holder : Surita Marais Trust

Account number : [...]

Branch code : 01-15 45

7. It is noted that the plaintiff has agreed to furnish the defendant with at least 7 (SEVEN) days written notice of taxation.
8. There is a signed contingency fee agreement between the Plaintiff and attorney dated 30 September 2015.

BY ORDER

REGISTRAR

- [1] Mr Leon Roper at pg121-exhibit A para 17.1
- [2] AA Mutual Insurance v Van Jaarsveld 1974 (4) SA 729 (A) also see Es v Road Accident Fund (36448/ 2011) [2014] ZAGPPHC 650 (22 August 2014)
- [3] Robert Koch The Quantum Yearbook 2017 page 126
- [4] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 see also Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at para [8], and Gwaxula v Road Accident Fund (09 / 4189 6) [2013] ZAGPJH C 240 (25 September 2013) at para17

[5] Robert Koch, *supra* at page 126

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Prepared on 27 October 2026 · Esheria