

SOUTH AFRICA / JUDGMENT

M.M v Road Accident Fund (14250/2016) [2020] ZAGPPHC 96 (17 April 2020)

[2020] ZAGPPHC 96

COURT

North Gauteng High Court, Pretoria

BEFORE

VM Movshovich

CASE / FILE NUMBER

14250/2016

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: YES

(3)

REVISED

YES

CASE NO: 14250/2016

17/4/2020

In the matter between: M[...],
M[...]
Plaintiff
and
ROAD ACCIDENT
FUND
Defendant
Heard: 22 November 2019
Judgment: 17 April 2020

JUDGMENT

MOVSHOVICH AJ:

[1] On 7 June 2015, the plaintiff ("Ms M[...]") was travelling as a passenger in a Red Opel Kadett, which was involved in a motor vehicle collision with a VW Scirocco. As a result, Ms M[...] suffered the following injuries:

[1.1] blunt abdominal trauma;

[1.2] forehead lacerations; and

[1.3] pelvic fracture.

[2] Ms M[...] also lost her 28-week foetus as a result of the collision, and suffers persistent right groin pain. She has a reduced range of motion and pain in her right hip. It is common cause between the parties that she will have difficulty executing some activities of daily living and will be restricted in the type of work activities she can undertake in future. At the time of the accident, Ms M[...] was 23 years of age.

[3] The defendant ("RAF") has accepted liability, and the only remaining disputes concern the following aspects of quantum:

[3.1] past and future loss of earnings / earning capacity; and

[3.2] general damages in respect of pain, suffering, discomfort, emotional shock, trauma, loss of enjoyment and amenities of life, disfigurement and non-patrimonial loss.

Loss of earnings

[4] The principles for an assessment of loss of earnings or earning capacity were set forth by the then Appellate Division in *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A):
[1]

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award. See *Hersman v Shapiro & Co* 1926 TPD 367 at 379 per STRATFORD J:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

And in *Anthony and Another v Cape Town Municipality* 1967

(4) SA 445 (A) HOLMES JA is reported as saying at 451B - C:

"I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at 287 and *Turkstra Ltd v Richards* 1926 TPD at 282 in fin - 283."

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* 1948

(2) SA 913 (W) at 920.)"

[5] In the present matter, no oral evidence was led (or sought to be led) by either side, but the parties were in agreement that I should base my factual and quantification analysis on the joint minutes of the industrial psychologists' consultation dated 15 and 16 October 2019 ("the IP joint minute"), the report of the actuaries dated 28 October 2019 ("the Munro report") instructed by Ms M[...], Munro Actuaries, and the report of the actuaries instructed by the RAF, GW Jacobson Consulting Actuaries (Pty) Ltd, dated 22 November 2019 ("the Jacobson report"). I have also been furnished with a copy of the medico-legal report of the RAF's medical expert, Dr N Ngcoya ("Dr Ngcoya"), which elucidates the injuries suffered by Ms

M[....].

[6] Both the Munro and Jacobson reports calculate the loss of earnings based on two scenarios:

[6.1] scenario 1: where Ms M[...] is expected to be unemployed throughout her life; and

[6.2] scenario 2: where Ms M[...] is expected only to find a lower paying job in the future, earning at the Paterson A2 median basic salary level.

[7] The Munro and Jacobson reports reach different calculations within each of the scenarios, however:[2]

[7.1] in respect of scenario 1, the Munro report concludes that the past loss of earnings is R598,785.00, and the future loss of earnings and learning capacity is R7,167,200.00 (totalling R7,765,985.00).

The Jacobson report calculates the losses at R486,948.00 and R6,667,532.00 respectively (totalling R7,154,480.00).

[7.2] in respect of scenario 2, the Munro report figures are R598,785.00

and R5,627,320.00 (totalling R6,226,105.00), and the Jacobson report figures are R486,948.00 and R4,787,934.00 (totalling R5,274,882.00).

[8] The parties invited me to adopt a Solomonic approach in reaching a final determination of quantum. While I accept that on the strength of the first approach set forth in Bailey, it is open to a Judge, in principle, to "make a round estimate of an amount which seems to him to be fair and reasonable", I do not think it is appropriate to do so by simply finding the mean value between different actuarial calculations. Once a Court adopts the mathematical approach to calculating damages, as I intend to do, it should interrogate the assumptions and methods of calculation and come up with the best mathematical answer, given the facts, correct factual assumptions, risks and contingencies of the matter. Of course, the outcome remains a rough estimate of the present value of the loss,[3] but at least it proceeds on a systematic, logical and principled basis.

[9] As such, during the hearing on 22 November 2019, owing to certain inconsistencies between the actuarial reports, I directed the parties to produce either a more detailed calculation of the past and future loss of earnings, breaking down the aggregate figures set forth in those reports, or a joint minute of the actuaries identifying and

explaining the differences between them. The parties opted for the latter and delivered the joint minute dated 27 November 2019 in early December 2019 ("the actuarial joint minute").

[10] I confine the discussion below only to the essentials.

[11] The following appear to be the issues which I need to decide, as they emerge from the papers, and which account for the differences in calculation:

[11.1] whether Ms M[...] has, on the probabilities, been rendered unemployable in the open labour market or is it more probable that she will gain some employment in future. This has a bearing on whether scenario 1 or scenario 2 calculations are applicable;

[11,2] whether the Paterson earnings, as per The Quantum Yearbook 2019 by Dr RJ Koch, should be applicable as from January 2019 (as applied in the Munro report); or July 2019 (as assumed in the Jacobson

report);

[11.3] whether Ms M[...] would probably have completed her Diploma qualification in 2 years (in which case her progression to earnings at the B4/B5 level occurs in January 2018) or 3 years (in which case the progression is only effective in January 2019); and

[11.4] what are the correct deductions for contingencies to apply in this case?

[12] Once these issues are resolved, there appears to be no disagreement between the actuaries or the parties in respect of the methodology applicable to the calculations. This is reinforced by the content of the actuarial joint minute. I thus propose to deal with each of the above issues in turn.

Scenario 1 or scenario 2?

[13] In my view, whether Ms M[...] is likely to be employed in the future is a matter of evidence. The only relevant evidence in this regard is to be gleaned from the IP joint minute.

[14] Ms M[...] was, at the time of the accident, 23 years old and unemployed. At a point prior to the accident, she worked as a cashier at a BP fuel filling station, a job that required her to be on her feet all day and to pack fridges.

[15] The industrial psychologists are in agreement that, as a result of the accident, Ms M[...] has been "rendered a compromised and vulnerable individual unsuited for employment of the nature that she would otherwise have obtained". As a result of the injuries, she will endure "lower back and right hip pains on a daily basis while on duty" and should ideally "be restricted to office bound jobs, but will endure challenges with prolonged sitting as well due to reported right gluteus pain on prolonged sitting. She will thus not be a fair competitor [in the open market]." They add that "Ms M[...] is no longer competitive in the manual and most retail jobs" and "will no longer be able to successfully compete with well bodied individuals for employment." This is particularly so in a market such as South Africa which the IP joint minute notes "is characterised by a supply of labour which simply far exceeds the demand."

[16] The IP joint minute further notes that any post-accident employment will require a very sympathetic employer and that "[t]he likelihood of such employment is considered highly slim considering her ill health and the reality that she has no work experience at all." The minute concludes that it is "most likely that [Ms M[...]] will remain out of monetary gainful employment for the rest of her life". The "reality is that employers are 'spoilt for choice' such that they do not readily employ those that are unable to work at optimal levels of output."

The industrial psychologists leave open the possibility, however, that Ms M[...] may obtain employment at some point. In the unlikely event that this eventuates, she would gain entry at a relatively lower median range basic salary (Paterson A2) "with no career growth prospects but for annual inflationary increases".

- [17] The weight of the evidence and expert opinion is thus that Ms M[...] will probably not obtain gainful employment in future. This appears persuasive to me, given the circumstances. The nature of the labour market, Ms M[...]’s inexperience and lack of skills, and her severe physical limitations after the accident fortify that conclusion. I am thus of the view that the correct scenario calculations to apply are those of scenario 1. Given that there is a possibility that she may gain some employment in future (along with other facts and factors), it is my considered view that a higher contingency factor should be applied than that assumed in the Munro report. More on this later.

January or July 2019?

- [18] In its calculations, the Munro report assumed that the Paterson earnings as per Dr RJ Koch’s The Quantum Yearbook 2019 are effective from January 2019, the date at which the report considers most employers in South Africa grant salary increases. The Jacobson report, conversely, avoids quantifying the intricacies of pay increase timing and simply accounts for the figures set forth in The Quantum Yearbook by using the effective date indicated in the Yearbook, being 1 July 2019.
- [19] There was no evidence led as to when employers (in the industry in which Ms M[...] would likely have been employed had the accident not occurred) grant annual increases. Similarly, I am not convinced that the median salaries which are indicated in The Quantum Yearbook 2019 as being effective as at 1 July 2019 may be assumed to apply from 1 January 2019. I am thus persuaded that the approach taken in the Jacobson report is the more appropriate one.

Completion of the Diploma qualification in 2 or 3 years?

- [20] The actuarial joint minute acknowledges that there is no firm evidentiary foundation for the factual assumptions as to the likely duration of Ms M[...]’s Diploma studies which would have progressed her career to a semi-skilled level of functioning earning on a Paterson job grade B4/5 median range basic salary.
- [21] The IP joint minute does not proffer any time-scale. That minute does, however, state that the qualification would, most likely, have been pursued on a part-time basis.
- [22] Although, in quantifying damages, the Court is required to do the best it can with whatever evidence it has at its disposal, I am not convinced that it is proper to make assumptions in favour of a plaintiff’s case in circumstances where the plaintiff could have, but did not, lead evidence to resolve the factual uncertainty in question, or to support the factual assumptions made by her expert.[4]

- [23] In these circumstances, and taking into account that: (i) the Diploma qualification would probably have been pursued on a part-time basis; and (ii) Ms M[...] did not have any track-record in Diploma or higher studies, it seems reasonable and proper to assume that the completion of the Diploma would have taken three as opposed to two years.

Correct contingency deductions

- [24] The Munro and the Jacobson reports agree that a 5% contingency deduction is applicable to past loss of earnings.
- [25] In respect of the future loss of earnings / earning capacity, the Munro report uses a contingency deduction of 15% whilst the Jacobson report opts for 20%.
- [26] As recently reiterated by the Supreme Court of Appeal, "[c]ontingencies are arbitrary and also highly subjective" and a trial court "has a wide discretion when it comes to determining contingencies." [5]
- [27] In the present matter, there are several factors that suggest that a higher contingency deduction is appropriate. Ms M[...] was relatively young at the time of the accident. She had not enrolled for, let alone completed, the Diploma qualification which would have enhanced her earning capacity. She was unemployed at the time of the accident and had a sparse work history. To that should be added the possibility (albeit slim) that Ms M[...] will find some employment in future. On the other hand, the industrial psychologists were relatively confident that Ms M[...]

had the aptitude and drive to complete a Diploma qualification which would have made her far more marketable to employers. Ms M[...] was also "in active and positive pursuit of a successful career within her financial constraints", which reinforces that, all other things being equal, she would likely have taken all possible steps to progress her career.

- [28] In the Guedes case,[6] a 20% contingency deduction for a 26 year-old male was deemed appropriate. In Kerridge, the Supreme Court of Appeal applied a 35% contingency deduction in respect of compensation for loss of future earning capacity of a 23 year old male who had an education history which engendered considerable doubt as to his ability to complete further qualifications. The Court also emphasised that, given the facts of the case, the industrial psychologists in that matter made very optimistic assumptions about the path of the plaintiff's future studies and career.
- [29] I think the facts of the present case and the contingencies are materially different to the Kerridge case, but the contingency deduction proposed by Ms M[...]’s representatives and actuaries is too low, given the uncertainties pertaining to the vicissitudes of life and Ms M[...]’s young age. I am thus inclined to the figure of 20% proposed by the RAF and used in the Jacobson report.

General damages

[30] What remains to consider is the appropriate level of general damages.[7] As held by this Court in *Yimba v Road Accident Fund*:

[30.1] the Court enjoys a wide discretion when awarding general damages;

[30.2] comparable cases may "offer some guidance in assisting a court to arrive at its award" but "should not be viewed as an absolute standard"; and

[30.3] "a modern approach should be infused into the process of assessing damages and to consider individual freedom of opportunity, rising

standards of living and the recognition that past awards have been significantly low." [8]

[31] Counsel for Ms M[...] referred to two damages awards in support of his submissions that an award of R250,000.00 to R300,000.00 is appropriate in this case:

[31.1] *Fortune v Road Accident Fund*, [9] an arbitration award by Naude Visser in July 2004, which involved a 27 year-old female security officer suffering multiple injuries to her ankle, face, mouth and ribs, with the attendant pain, suffering, fear and embarrassment, as well as having to abort a foetus at 3 months of pregnancy as a result of the accident. An award of approximately R333,000.00 in 2019 monetary terms was made

(R150,000.00 at the time of the award); and

[31.2] *Sebatjane v Federated Insurance Company Limited*, a decision of this Court handed down on 31 August 1989, [10] which involved a 26 year-old married woman who lost a foetus at 24 weeks of pregnancy and suffered substantial mental harm and anguish as well as physical harm as a result. The loss of the foetus was said to be a permanent mental scar and caused emotional distress. The plaintiff also suffered discomfort in the sterno-clavicular joint and a "minor" problem of a pain in the chest, neck and shoulder controllable by medication. The Court made an award of approximately awarded R16,000.00 as general damages, which is equivalent to approximately R135,000.00 in 2019 monetary terms.

[32] Counsel for the RAF did not refer to any case law, but submitted that an award of R250,000.00 was appropriate, in light of all the circumstances.

[33] Although the two cases provide some assistance, I am not convinced that the facts of the present matter are on all-fours with either case. One major shortcoming in the present matter is that Ms M[...] did not testify in support of her case for general damages. Counsel for Ms M[...] relied squarely on the common cause fact that Ms M[...] lost a 28-week foetus as a result of the accident and the other facts set forth in the IP joint minute. We do not have evidence of what precise effects the loss of the foetus had on Ms M[,], as happened in the *Sebatjane* matter. I accept, however, that such a loss can and most likely will leave a fundamental and irreversible emotional scar and mental anguish. To that must be added the ongoing permanent physical pain and distress as set forth in the IP joint minute and as noted in Dr Ngcoya's medico-legal report. Ms M[...] is now a compromised and vulnerable

individual with impaired "physiological and psycho-emotional functioning". These aspects too, however, would have benefitted from oral testimony or further facts.

[34] It would also have been useful to have evidence of the precise psychological effects that Ms M[...]'s inability to work and function has had and is likely to have in future.

[35] Doing the best I can with the evidence which was presented to me by the parties, and taking a more modern approach to the assessment of general damages, I am of the view that an award of R250,000.00 in general damages is appropriate.

Undertaking

[36] There was no dispute between the parties that RAF must furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 1996 and I intend to make an order to this effect.

Costs

[37] Ms M[...] has been substantially successful and I do not see why costs should not follow the event. Notwithstanding this, given that the issue of costs was not fully traversed at the hearing, I propose to allow the parties a period of 21 calendar days within which to make submissions to this Court, if so advised, failing which the order in paragraph [38.3] below shall become final.

Order

[38] In the circumstances, I make the following order:

[38.1] The defendant shall pay the plaintiff the following amounts:

[38.1.1] R486,948.00 in respect of past loss of earnings;

[38.1.2] R6,667,532.00 in respect of future loss of earnings / earning capacity; and

[38.1.3] R250,000.00 in respect of general damages,

together with interest on the aforesaid sums at 9.75% per annum from the 15th calendar day after the date of the judgment to the date of final payment.

[38.2] The defendant shall furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 1996 in respect of 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service to her or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision on 7 June 2015, and the sequelae thereof, in terms of which the defendant will be obliged to compensate the plaintiff in respect of the said costs after the costs have been incurred and on proof thereof.

[38.3] The defendant shall pay the plaintiff's costs of suit, including the reasonable qualifying, preparation, reservation and attendance fees, as well as the accommodation and travelling costs, if applicable, of all experts employed by or on behalf of the plaintiff.

[38.4] The order in [38.3] above is suspended to afford the parties to make further written submissions in relation to the issue of costs within 21 calendar days of the date of judgment. Should no written submissions be received by the Court by such date, the order in [38.3] shall become final.

Hand-down and date of judgment

[39] This judgment is handed down electronically by circulation to the parties' representatives by email, as envisaged in the Judge President's Directives: Special Arrangements to Address COVID-19 Implications for All Litigation in the Pretoria and Johannesburg High Courts [2020] ZARC 9 (25 March 2020) and [2020] ZARC 14 (2 April 2020). The date and time of hand-down of the judgment is deemed

to be 14:30 on 17 April 2020.

VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Plaintiff's Counsel:

PJ Coetsee

Plaintiff's Attorneys:

SK Ntsumela Attorneys , Polokwane, c/o Lesiba Mailula Attorneys, Pretoria

Defendant's Counsel:

P Mabena

Defendant's Attorneys:

Morare Thobejane Inc., Pretoria

Date of Hearing:

22 November 2019

Date of

Judgment:

17 April 2020

[1] At 113F to 114E.

- [2] The figures are after the application of the statutory cap set forth in the Road Accident Fund Amendment Act, 2005
- [3] Ibid at 113F to 114A. See, too, Road Accident Fund v Kerridge 2019 (2) SA 233 (SCA), para [40].
- [4] Lazarus v Rand Steam Laundries (1946) (Pty) Ltd 1952 (3) SA 49 (T)
- [5] Kerridge supra, paras [42] - [43].
- [6] Road Accident Fund v Guedes 2006 (5) SA 583 (SCA).
- [7][7] Of course, the award of damages in respect of loss of future earnings or earning capacity is also considered general damages. See, the Full Court decision in Prince v Road Accident Fund [2018] ZAECHGHC 20 (20 March 2018), para [5]. The general damages referred to in this section of the judgment are the damages sought by Ms M[....] in respect of pain, suffering, discomfort, emotional shock, trauma, loss of enjoyment and amenities of life, disfigurement and non-patrimonial loss.
- [8]
- [2019] ZAGPPHC 485 (19 September 2019); 2019 JDR 2129 (GP), paras [13] to [17].
- [9] Arbitration Forum: Case No AF001/15/269, reported in The Quantum Yearbook 2019.
- [10] Also reported in the 2019 Quantum Yearbook (TPD case no 12262/87)

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