

SOUTH AFRICA / JUDGMENT

Mpulwane v Road Accident Fund (46661/2016) [2019] ZAGPPHC 563 (25 October 2019)

[2019] ZAGPPHC 563

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

46661/2016

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Policy**IN THE HIGH COURT OF SOUTH AFRICA****(GAUTENG DIVISION, PRETORIA)****(1)**

REPORTABLE:

YES/NO

(2)

OF

INTEREST

TO

OTHERS

JUDGES:

'YES/NO

(3)

REVISED

Case

number: 46661/2016

Date

of hearing: 23 October 2019

Date

delivered: 25 October 2019

In

the matter between: MPULWANE,
 E
 Plaintiff
 and
 ROAD
 ACCIDENT FUND
 Defendant

JUDGMENT

SWANEPOEL AJ:

- [1] Plaintiff is Ms. Ester Mpulwane , a 48 year old correctional supervision officer. This claim arises out of an accident which occurred on 16 May 2019 when plaintiff was 43 years of age. Plaintiff was seated in a stationery vehicle when a truck carrying sulphuric acid overturned and spilt acid over plaintiff's vehicle and over her body.
- [2] As a result of the accident, plaintiff suffered severe burn injuries to her back, both legs, buttocks, both feet, and her right forearm and hand. In total she had burns to some 45 % of her body. Plaintiff was treated in the burns unit of the hospital for six weeks, and was nursed at home for another two months.
- [3] Currently, plaintiff suffers from severe scarring. She has difficulty in walking due to reduced mobility. She has constant pain in her legs and a sensation of "pins and needles". She has swelling of her legs if she sits for a few minutes, and she has difficulty in wearing shoes. She has difficulty in using her right hand (her dominant hand) and she cannot use a pen. She has difficulty in sleeping due to the pain. Her scars are unsightly, her limbs are disfigured, and her skin is discoloured. She has also suffered wasting of the right quadriceps, hamstring and gastrocnemius muscles.
- [4] Psychologically, the injuries have had a devastating effect on plaintiff's functioning. She has been diagnosed with chronic post traumatic stress disorder, which is directly linked to the accident. She is sad and depressed. She has low energy and drive, she is short tempered and easily irritated. She has shortterm memory loss, a lack of concentration, and she avoids friends and social gatherings. In short, the accident has had a devastating effect on her life.
- [3] The respective counsel agreed to argue the matter on the papers as they stand, and there is in reality very little in issue between them. Past medical expenses have been agreed on R 354 625.52. I am to determine past and future loss of income and general damages.

LOSS OF INCOME_AND EARNING_CAPACITY

- [4] As far as loss of past income is concerned, the loss of R 8 628.00 is not in dispute.

[5] In respect of future loss of earning capacity, the figures upon which the actuary has based his calculations are not in dispute. Plaintiffs future income, premorbid is calculated at R 6 515 825, and post morbid, at

R 6185 873.00. A contingency deduction of 10% has been applied to the premorbid amount, and 30% to the postmorbid amount. The result is, if the aforesaid contingencies are applied, then plaintiff's loss of future earnings amounts to R 1 534 132.00. The parties only differ on the contingency deductions to be applied.

[6] Mr. Mphaga SC, acting for plaintiff, argued for the contingencies applied by the actuary. Mr. Marishane, for defendant, contended for a 10% premorbid and an 18% postmorbid deduction, resulting in an 8% spread.

[7] In my view defendant's submission does not take into consideration that plaintiff is, although still employed as a correctional service officer, a vulnerable employee. She is unable to fulfil her previous duties, and she has been assigned to light duty, which entails manning a gate. Even this task is arduous for her, and there seems to be a very real possibility that she may not even be able to continue in this post for the foreseeable future. Plaintiff cannot use a firearm, she cannot drive long distances (which limits her promotional aspirations), and she struggles to maintain her work performance. There is a very real possibility of an early retirement, and she is likely to develop a Marjolin's ulcer, a form of skin cancer. All of these considerations, in my view, justify a higher post morbid deduction.

[8] In my view therefore, I am persuaded by Mr. Mphaga's submissions regarding the contingency deductions.

GENERAL DAMAGES

[9] I have outlined the plaintiff's injuries above. Her life has been turned upside down by the accident and by her unfortunate injuries. The parties have tried to find comparative cases from which one can attempt to determine what awards have been made in the past. However, there are very few cases that compare narrowly to this matter.

[10] In *Gumede v Minister of Correctional Services* 2015 (7G2) (KZD) the plaintiff suffered burns to his axilla, thorax, both forearms and hands, amounting to 28% of his body. He was hospitalized for a week, and he suffers from scarring and psychological sequelae. This case is clearly not as severe as the present case. The award was R 300 000.00, which equates to R 370 000.00 in 2019. In *Oosthuizen v Homegas (Pty) Ltd* 1989 (4G2) QOD 1 the plaintiff suffered severe facial burns, also to his scalp, ears, torso, upper back and left arm, with lung damage. He was awarded R 45 000.00 which equates to R 348 000.00 today (this amount was agreed upon).

- [11] In *Mofokeng v Fedgen Versekering Bpk* 1992 4 COD G211, plaintiff suffered severe burns to his left cheek, neck, both shoulders, eyelids and left ear, resulting in permanent scarring. The result was significant emotional trauma. He was awarded R 40 000.00, equal to R 206 000.00 in today's terms.
- [12] Ms. Mpulwane's injuries are, in my view, more severe than the injuries suffered by the plaintiffs in the foresaid cases. I also respectfully suggest that the above awards might well have been conservative, given the devastating and often irreversible effect that burn wounds have on a victim. Mr. Marishane suggested that R 700 000.00 is an appropriate award, while Mr. Mphaga contended for between R 700 000.00 and R 1 million.
- [13] Having perused the comparable cases, I am of the view that the higher watermark suggested by Mr. Mphaga of R 1 million is not appropriate. In my view, defendant's contention for R 700 000.00 is more comparable to the past authorities. In the premises I shall award R 700 000.00 as general damages.

DRAFT ORDER

- [14] I have been presented with a draft order in which I have inserted the awards for loss of future earnings and general damages in manuscript. The draft order also makes provision for an undertaking in respect of future medical costs, and for the creation of a trust. I expressed my skepticism to the parties whether plaintiff, by all accounts a capable woman, would require the protection of the award in a trust, and I suggested that she testify in this regard.
- [15] There is a suggestion that plaintiff may be vulnerable emotionally to exploitation, and upon hearing her evidence, it is clear that plaintiff is of the same view, ie that the monies should be protected. Consequently I shall make an order to that effect.
- [16] In the premises I make the following order:

[16.1] The draft order marked "X" and initialled by me is made an order of Court.

Swanepoel AJ

Acting Judge of the High Court,

Gauteng Division, Pretoria

(GAUTENG DIVISION, PRETORIA)

HELD AT PRETORIA ON THIS THE 23RD DAY OF OCTOBER 2019 AT COURT 8D BEFORE THE
HONOURABLE JUSTICE SWANEPOEL (AJ)

CASE NO: 46661/2016

ROAD ACCIDENT FUND

Defendant

ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and the Defendant:

THE COURT GRANTS AN ORDER in favour of the Plaintiff against the Defendant in the following terms:

1.1 The Defendant shall pay the following amounts to the Plaintiff's attorneys, Adams & Adams, in settlement of the Plaintiffs claim:

1.1.1 Past Medical Expenses:

R354 625.52;

1.1.2 Past & Future Loss of Earnings R 1542 76000

1.1.3 General Damages:

R700 00000

TOTAL:

R2 597 38552

1.2 The aforesaid total amount in the sum of R 2 597 38552 (Two million five hundred and ninety seven thousand three hundred and eighty five and fifty two cents) , shall be payable by direct transfer into their trust account. details of which are as follows:

Nedbank

Account number : [...]

Branch number :198765

Pretoria

Ref: JPR/JLR/P1995

2. The Defendant has furnished the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of the Plaintiffs accident related medical expenses.
3. The Defendant is liable for payment of 100% of the reasonable costs of the Trustee appointed in terms of paragraph 4 hereof, in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his fees in this regard, which shall be recoverable in terms of the Undertaking issued in terms of Section 17(4)(a), and which costs shall also include and be subject to the following:

3.1 The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time, and shall include but not be limited to disbursements incurred and collection commission calculated at 6% on all amounts recovered from the Defendant in terms of the Section 17(4)(a) Undertaking;

3.2 The monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;

3.3 All the abovementioned costs shall be limited to payment of the reasonable costs which the Defendant would have had to pay regarding

appointment, remuneration and disbursements had the Trustee been appointed as a curator bonis;

3.4 The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed;

3.5 The appointment and reasonable costs of a case manager.

4. That the net proceeds of the payments referred to above, subject to paragraph 8.8 below, as well as the Plaintiffs taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiff's attorney and own client legal costs (the "capital

amount"), shall be payable to a Trust, to be established within six months of the date of this order, which Trust will:

4.1 contain the provisions as more fully set out in the draft Trust Deed attached hereto marked Annexure "A";

4.2 have as its main objective to control and administer the capital amount on behalf of the Plaintiff;

4.3 CONSTANT WILSNACH will be the first trustee with powers and abilities as set out in the draft Trust Deed attached hereto marked Annexure "A";

4.4 The trustee(s) will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his/her obligations towards the trust.

5. Should the aforementioned Trust be established within the six month period, the Trustee thereof is authorised to pay the Plaintiff's attorney and own client costs out of the Trust funds in so far as any payments in that regard are still outstanding at that stage.

6. Should the aforementioned Trust not be established within the six month period after date of this order:

6.1 The Plaintiff's attorneys are directed to approach the court within six months thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilised in favour of the Plaintiff;

6.2 The Plaintiff's attorneys are authorised to invest the capital amount in an interest bearing account in terms of Section 78(2A) of the Attorneys Act to the benefit of the Plaintiff with a registered banking institution pending the finalisation of the directives

referred to in paragraph 6.1 above;

6.3 The Plaintiff's attorneys are prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court, subject to the provisions contained in paragraphs 4 to 7 hereof.

7. Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of the trust deed, the Plaintiffs attorneys are authorised and ordered to pay from the capital amount:

7.1 Any reasonable payments to satisfy any of the Plaintiff's needs that may arise and that are required in order to satisfy any reasonable need for treatment. care, aids or equipment that may arise in the interim;

7.2 The attorney and own client costs of the Plaintiffs attorneys;

7.3 Such other amount(s) as may reasonably be indicated and/or required for the well being of the Plaintiff and/or in her interest which a diligent curator bonis would have paid had such curator been appointed

8. The Defendant shall make payment of the Plaintiffs taxed or agreed party and party costs on the High Court scale which costs shall include, but not be limited to, the following:

8.1 The fees of Senior Counsel on the High Court Scale, inclusive of counsel's full reasonable day fees for 7 and 23 October 2019, the

reasonable costs in respect of the preparation of the Heads of Argument and the costs associated with the preparation of the settlement memorandum as required in terms of the Practice Directive, dated 20 September 2019;

8.2 The reasonable taxable costs of obtaining all expert, medicolegal, RAF4 Serious Injury Assessment, addendum medicolegal and actuarial

reports from the Plaintiff's experts which were furnished to the Defendant;

8.3 The reasonable taxable preparation, qualification, travelling and reservation fees for 7 and 23 October 2019, if any, of the following

experts, of whom notice has been given, being:

8.3.1 Dr DA Birrell (Orthopaedic Surgeon);

8.3.2 Dr Z F Annandale (Plastic and Reconstructive Surgeon);

8.3.3 Dr J C Pearl (Neurologist);

8.3.4 Dr L Nel (Psychiatrist);

8.3.5 Dr B Prinsloo (Orthotist);

8.3.6 Ms K Havenga (Counselling Psychologist);

8.3.7 Ms A Rossouw (Occupational Therapist);

8.3.8 Mr W J Wessels (Industrial Psychologist); and

8.3.9 Mr G Whittaker (Actuary).

8.4 The costs of a consultation between the Plaintiff and her attorney to discuss the terms of this order;

8.5 The reasonable taxable accommodation and transportation costs (including Toll and EToll charges) incurred by or on behalf of the Plaintiff in attending medicolegal consultations with the parties' experts, consultations with the legal representatives and the court proceedings, the quantum of which is subject to the discretion of the Taxing Master;

8.6 The above costs will also be paid into the aforementioned trust account;

8.7 It is recorded that the Plaintiffs attorneys do not act in terms of a contingency fee agreement in this matter;

8.8 The Plaintiff's attorneys are authorised to pay to the Plaintiff directly an amount of R500 000.00 (FIVE HUNDRED THOUSAND RAND) upon receipt of the net proceeds referred to in paragraph 4 above.

9. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

9.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

9.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

9.3 Should payment not be effected timeously, Plaintiff will be entitled to recover interest at applicable rate on the taxed or agreed costs from date of allocatur to date of final payment.

BY ORDER OF THE COURT

ADAMS & ADAMS

JPR/JLR/P1995

COUNSEL FOR PLAINTIFF: ADV MOSES MPHAGA – 0820545967

COUNSEL FOR DEFENDANT: ADV MARISHANE 0828479293

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