

SOUTH AFRICA / JUDGMENT

Mukhari v Road Accident Fund (200/2016) [2017] ZALMPPHC 45 (25 October 2017) [2017] ZALMPPHC 45

COURT

Limpopo High Court, Polokwane

BEFORE

Sikhwari

CASE / FILE NUMBER

200/2016

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO
DIVISION, POLOKWANE)
CASE
NO: 200 / 2016
Not
reportable
Not
of interest to other judges
Revised.
25/10/2017
In

the matter between:

MUKHARI,
VUKATIMUNI
SYLVIA PLAINTIFF
and
ROAD
ACCIDENT
FUND DEFENDANT

JUDGMENT**SIKHWARI AJ**

- [1] In this matter merits are settled 100% in favour of the plaintiff. The issue of future medical expenses has been settled by way of a certificate in terms of Section 17(4)(a) of the Road Accident Fund Act. Plaintiff's injuries and possible treatment thereof is common cause.
- [2] The issue of general damages was referred to the HPCSA. The issue before court is for the determination of applicable contingencies on the loss of earning.
- [3] It is common cause that the plaintiff is 40 years of age, having been born on the 9 May 1977. The cause of action arose from a motor vehicle accident that occurred on the 21 October 2012 at Bambeni village along the main road from Giyani to Mageva area in Limpopo province where the plaintiff was a passenger in the insured motor vehicle to wit CNR 233 L being driven by Shiviti Mbhazima Norman.
- [4] It is common cause between the parties that plaintiff sustained injuries which are described as soft tissue injury to the cervical

spine, soft tissue injury to lumbar spine and soft tissue injury to the thoracic spine. The parties agreed to argue the matter on papers without leading evidence.

- [5] The plaintiff's submission is that past loss of earning should be subject to 5% contingency deduction and future loss of earning should be subject to 30% deduction. Plaintiff submitted that at the time of the accident she was employed as a domestic worker. After the accident she could only do incidental to light duty functions. She will not be able to do medium and heavy duty activities. The employer is not satisfied with the plaintiff's performance and the risk of losing her job is very high. It was submitted that there is likelihood that in 2022 plaintiff will be unemployed.
- [6] Plaintiff prays that 5% contingency deduction be done in respect of past loss of earning of R160 720. For the same reasons, a deduction of 30% contingency be effected on the future loss of earning on the earning capacity of R334 990. The plaintiff prays that the fair and reasonable award will be a total amount of R236 510.
- [7] The defendant argued that the plaintiff's injuries are minor as there is no bone injury. The plaintiff's injuries were conservatively treated and was not left with exercises and bed rest. It was argued that the intensity of the symptoms has deteriorated since the accident.
- [8] Defendant argued that the plaintiff was paid all her salary notwithstanding that she stated that she was not paid. Her salary

scale is R1 500 per month as opposed to R1 600 per month which she claimed to earn. It was argued that there was no past loss of earning. The defendant concedes that the only scenario that could be justified is scenario 2 which has the amount of R46 620 as the fair and reasonable amount to be awarded to the plaintiff.

- [9] Contingency determination is a matter which is within the discretion of the court. That discretion has to be exercised judicially. In the case of *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) at page 614F that “in assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations”.
- [10] In the case of *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at para [9] it was stated that “in our law under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes his estate”.
- [11] In the case of *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194, the court stated that “it is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the court of the duty of doing so upon the evidence which has been acted on in several cases in South African”.
- [12] In the case of *Goodall v President Assurance Company* 1978 (1) SA 389 (WU) at pages 392H – 393A, Margo J stated that “in the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the sort of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.”
- [13] Margo J stated further at page 393A–E that “In *Van Rensburg’s* case the plaintiff was 25 years old, and in *De Jongh’s* case, which was a claim by dependents for loss of support, Nicholas J, adopted the figure of 20 per cent for contingencies in relation to the deceased’s earning power, the deceased having been approximately 25 years of age at the time of his death. *Van RD, N.O v Employers’ Liability Assurance Corporation Ltd*, 1964 (4) SA 737 (W), but reported on this point only in *Corbett and Buchanan*, Vol. 1 at p.618, in another instance of 20 per cent being allowed for

contingencies, the plaintiff in that case being a minor who had not embarked on a firm career. In the well-known case of *Sigourmay v Gilbanks*, 1960(2) SA 552 (AD), SCHREINER, JA, at p.569, made provision for contingencies in an amount equal to approximately 16 per cent. The plaintiff in that case was 33 years of age, a fact which appears from the report of the case in the Appellant Division, or in the court of first instance, or *Corbett and Buchanan*”.

[14] Margo J stated further in page 393F–G in Goodall case (supra) that “In the present case, however the plaintiff is 46 years of age, as already noted, so that the period for which contingencies must be taken into account will be much shorter than in the cases cited above. Although his working career has been undistinguished, he has been a pretty steady employee, changing his job only in an endeavor to improve his prospects.

“He has enjoyed good health apart from his injuries and the consequences thereof, and he appears, to judge from his background to be a responsible and reasonable individual. In these circumstances I consider that the allowance for the possibility of yet further

promotion to the post of sectional manager, I consider that the provision for contingencies should not exceed 10 percent.”

[15] In my view, the plaintiff has not suffered any past loss of earning. The plaintiff’s claim for past loss of earning will fail. suffered future loss of earning.

[16] as regard to the future loss of earning capacity, the plaintiff has been able to show such loss; and as such she will succeed in that front. The awarded amount will be subject to contingency deduction of 30% for future loss of earning capacity. Although her injuries were treated to a large extent, but the pain and the sequelae will be there for a fairly longer period. The plaintiff’s claim on future loss of earning should succeed with costs.

[17] Accordingly I make the following order:

1. That the plaintiff’s claim for past loss of earning is dismissed.
2. shall pay the plaintiff the sum of R236 510.00 (two hundred and thirty-six thousand five hundred and ten rand) for loss of earning.
3. Interest on the above amount at the rate of 10.25% per annum from the 1 December 2017 to the date of final payment.
4. That the defendant shall furnish the plaintiff with an undertaking in terms of Section 17 (4) (a) of the Road Accident Fund Act, Act No. 56 of 1996, as amended, in respect of future medical expenses.
5. That the defendant shall pay the plaintiff’s taxed or agreed party and party costs, including the costs and / or qualifying fees of the following experts:

5.1 Dr TJ Enslin

5.2 Dr HB Enslin

5.3 Dr Joachim FL Mureriwa

5.4 Rixile Consulting

5.5 Dr Mpho Zwane

5.6 Munro Actuaries

MS SIKHWARI AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For Plaintiff

: Adv MD Mphahlele

Instructed by

: Baloyi Attorneys

For Defendant

: Adv TI Ngwana

Instructed by

: Hamman-Moosa Inc

Date of Hearing : 22 August 2017

Date of

Judgment

: 25 October 2017

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