

SOUTH AFRICA / JUDGMENT

S.C v Road Accident Fund (54665/16) [2017] ZAGPPHC 954 (15 December 2017)

[2017] ZAGPPHC 954

COURT

North Gauteng High Court, Pretoria

BEFORE

Nkosi

CASE / FILE NUMBER

54665/16

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54665/16

15/12/2017

Not reportable

Not of interest to other judges

Revised.

In the matter between:-

C: S.

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NKOSI AJ

INTRODUCTION

(1) The Plaintiff is claiming damages as a result of a motor vehicle collision which occurred on the 13 March 2014 and at the time she was a passenger. The issue of merits has already been dealt with and finalised between the parties.

(2) She instituted an action against the Defendant claiming various amounts under the following heads of damages :

2.1 future medical expenses

2.2 past medical expenses

2.3 past and future loss of earnings

2.4 general damages

(3) The parties have reached settlement in respect of general damages, past and future medical expenses. By agreement the Defendant is liable to the Plaintiff for :

3.1 payment of past medical expenses in the sum of R96 409, 58

3.2 furnishing the Plaintiff with a Section 17(4) (a) undertaking

3.3 payment of R900 000,00 for general damages

(4) It has further been agreed upon by the parties that the contingency deduction of 5% in respect of the past loss of earning is correct. Basis II of the Actuarial calculations by the consulting Actuary, Mr Whittaker was also agreed upon by the parties and is calculated as follows:

Basis II: Uninjured employment as an Accountant

Loss before the application of the limit

Past loss

Value of income uninjured

R 826,817

Less contingency deduction: 5.00%

R 41,341

R 785,476

Value of income injured:

R 212,560

Less contingency deduction 5.00%

R 10,628

R 201,932

Net past loss

R 583, 545

- (5) There is no evidence or submission suggesting that the parties dispute that the amount of R583 545, 00 should be allowed as compensation for Plaintiff's past loss of earnings. To the contrary the parties have agreed on a 5% contingency deduction which can only be based on the Actuarial calculations indicated above.

ISSUE

- (6) The issues in dispute relate to the contingencies to be applied in respect of the Plaintiff's :

6.1 uninjured income, but for the accident; and

6.2 injured income having regard to the accident.

- (7) The Defendant argued that a 30% contingency should be applied in respect of both injured and uninjured future loss of income. On the other hand the plaintiff stands by the actuarial calculations which allow a 10% contingency for income uninjured and 40% for income injured.
- (8) If the Plaintiff's submission is upheld the Net future loss of income would amount to R2 586 540,00.

DISCUSSION

- (9) It is now well established that the court has a discretion which must be exercised judicially when considering the issue of contingencies. In the *Southern Insurance Associations v Bailey N.O.*[1] the learned Judge stated the following in respect of contingencies:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable calculations'. He has a large discretion to award what he considers right (per Holmes JA in *Legal Assurance Co Ltd v Botes* 1963(7) SA 608 (A) at 6 7 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. The amount of any discount may vary, depending on the circumstances of the case. "

- (10) Regarding the pre morbid contingency, it was submitted that the Plaintiff would have probably secured employment with her sister alternatively , having regard to a good work record of 19 years with one employer, would have been employed by another accounting firm. What militates against the alternative is the fact that the Plaintiff was born on 22

August 1969 and, at that time of writing this judgment is 48 years old. There is therefore a strong probability that she would struggle to find employment as an accountant at that age. The Defendant argued that the Plaintiff would not have found employment after the divorce. My view is that apart from being employed by her sister there would still be that probability of finding employment. The sensible conclusion under these circumstances is to opt for what is just and reasonable. There is merit in both parties' submissions and because of that I am of the view that a 20% contingency deduction is appropriate in the circumstances of this case. Applying the 20% contingency on income uninjured the net value of income uninjured would be R3 023 323,00

- (11) I now turn to deal with the Plaintiff's value of income injured. The plaintiff sustained severe injuries in the motor vehicle accident in question. She suffered a severe traumatic brain injury, fracture of the neck of the right scapular, multiple right rib fractures with hemopneumothorax, pulmonary contusion; facial fractures and multiple lacerations. She now suffers from neurocognitive, neuropsychiatric and neuropsychological deficits.
- (12) The occupational therapists are in agreement that should the Plaintiff lose her current employment from her sister's firm, she would struggle to find and/or sustain employment in the open labour market, due to her physical, neurocognitive and psychological fallout. They further agree that post- accident, she is restricted to work that is structured routine in nature with high levels of supervision, and work that is sympathetic in nature. They conclude by saying the plaintiff is unemployable in the open labour market due to neurocognitive and psychosocial fallout.
- (13) Her employment at her sister's firm is purely sympathetic. It cannot be concluded with certainty she would continue working for her sister's firm until retirement age. There are many risks inherent in such a type of employment. her sister may decide to retire and close her business, she may sell her business, she may get into a partnership with a partner who would not accommodate such

sympathetic employment or she might be unable to carry on with her firm due to illness or similar risks. I am not advocating for a contingency less than what the actuary is proposing. A 30% deduction suggests that the Plaintiff can still retain employment other than the sympathetic employment. I cannot ignore the joint minute of the Occupational therapists indicating that the plaintiff is unemployable. I also agree with the Defendant's submission that the Plaintiff will still carry on working for her sister but I disagree that she would work until retirement as a fact. In conclusion I accept the 40% deduction as being reasonable. I will therefore not interfere with the actuary's calculation of the value of income uninjured.

SUMMARY

- (14) I therefore order the following award in favour of the Plaintiff :

14.1 Past medical expenses R 96 409, 58

14.2 Future medical expenses Section 17(4) (A)

UNDERTAKING

14.3 Loss of income

R 2 792 170,40

14.4 General damages

R 900 000, 00

R3 788 579,98

ORDER

(15) The draft order marked 'X', dated 15 December 2017 and signed is hereby made an order of court.

NKOSI, AJ

APPEARANCE

For Plaintiff

: Advocate Combrink

Instructed by

: Erasmus De Klerk Attorneys

For Defendant

: Advocate N Moses

Instructed by

: TM Chauke Attorneys

Date of Hearing

: 27 November 2017

Date of Judgment : 15 December 2017

On the 28TH day of November 20 17 before the Honourable Acting Judge Nkosi

CASE NO.: 54665/16

In the matter between:

C.: S.

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

HAVING HEARED COUNSEL for the Plaintiff and the Defendant it is ordered that:

1. The Defendant shall pay the sum of R3 788 579.98 three million seven hundred and eighty eight thousand five hundred and seventy nine rand to the Plaintiff's attorneys, Erasmus de Klerk, in settlement of the Plaintiff's claim which amount shall be payable by direct transfer into their trust account, details of which are as follows:

ERASMUS DE KLERK INC

ABSA Bank

Account number: [...]

Branch number: 632 005

Rosebank

Ref.: J Erasmus/C. S.

2. The amounts referred to above will not bear interest unless the Defendant fails to effect payment thereof within 14 (FOURTEEN) calendar days of the date of this Order, in which event the capital amount will bear interest at the rate of 10.25% per annum calculated from and including the 15 (FIFTEENTH) calendar day after the date of this Order to and including the date of payment thereof.
3. The Defendant shall provide the Plaintiff with an Undertaking as envisaged in Section 17 (4) (a) of Act 56 of 1996, 100% for the costs of the future accommodation of the Plaintiff in a hospital or nursing home and such treatment, services or goods as the Plaintiff may require as a result of the injuries that the Plaintiff sustained as a result of the accident which occurred on 13

March 2014, as set out in the medico legal reports obtained on behalf of the Plaintiff, after such costs have been incurred and upon proof thereof, which costs shall include:

3.1 The agreed or taxed cost to be incurred in the establishment of a trust to inter alia protect, administer and/or manage the capital amount and the proceeds thereof referred to in paragraph 1 supra;

3.2 The costs of the trustee in administering the capital amount referred to in paragraph 1 supra as determined by the Administration of Estates Act, Act 66 of 1965 (as amended) , according to the prescribed tariff applicable to curators as reflected in the Government Gazette Notice R160 of 1 July 1991, and in particular paragraphs 3(a) and 3(b) of the Schedule thereto;

3.3 The costs of the furnishing of annual security in terms of section 77 of the Administration of Estates Act, Act 687 of 1965 (as amended);

3.4 The Plaintiff shall appoint i=nonix Trust Administration in this regard.

4. That the attorneys for the Plaintiff, Erasmus de Klerk Incorporated, are ordered:

4.1 To cause a trust ("the trust") to be established in accordance with the Trust Property Control Act No 57 of 1988 to administer the estate of the Plaintiff;

4.2 To pay all monies held in trust by them for the benefit of the Plaintiff, to the trust;

4.3 The trust instrument contemplated above shall make provision for the following:

4.3.1. that the Plaintiff is the sole beneficiary of the trust;

4.3.2. that the first trustee(s) shall be Marisca de Beer of Enonix (Pty) Ltd acting through its nominee(s) from time to time;

4.3.3. that the trustee(s) are to provide security to the satisfaction of the Master;

4.3.4. that the ownership of the trust property vest in the trustee(s) of the trust in their capacity as trustees;

4.3.5. procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;

4.3.6. that the trustee(s) be authorised to recover the remuneration of, and costs incurred by the trustee(s), in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant;

4.3.7. the suspension of the Plaintiff's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the Plaintiff;

4.3.8. that the amendment of the trust instrument be subject to the leave of this Honourable Court;

4.3.9. the termination of the trust upon the death of the Plaintiff alternatively upon the consensus c;>f the trustees , in which event the trust assets shall pass to the estate of the Plaintiff;

4.3.10. that the trust property and the administration thereof be subject to an annual audit.

5. The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs include (but not limited to):

5.1 The costs of senior-junior counsel (which is to include, inter alia, preparation, perusal, and counsel's day fees for 27 November 2017 and 28 November 2017), as well as costs of drafting of heads of argument;

5.2 The costs of attorney's, which includes reasonable travelling costs, costs for preparing for Pre-Trial Conferences, and costs for actual attendance to Pre-Trial Conferences, the costs of and consequent to compiling all Pre-Trial Agenda's and Pre-Trial minutes, including counsel's charges, the costs of holding round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials, all costs for preparing for trial. and the attorney's day fees in attending to trial on 27 November 2017 and 28 November 2017 which shall include all costs previously reserved, the reasonable cost of consulting with the Plaintiff to consider the offer, the cost incurred to accept the offer and make the offer an order of court;

5.3 All the cost in obtaining all medico legal/expert and actuarial reports as well as the Plaintiff's travelling and lodging costs in attending the Plaintiff's experts. The Plaintiff filed the medico legal/expert reports referred to in sub-paragraph 5.5 below;

5.4 The reasonable costs for preparation for trial and consultations with Plaintiff and witnesses and experts and Counsel;

5.5 The reasonable taxable preparation, reservation, travelling and attendance fees, if any, of the following experts of whom notice have been given, being:

5.5.1. Dr C Barlin (Orthopaedic Surgeon);

5.5.2. Dr H.J. Edeling (Neurosurgeon);

5.5.3. Dr D Shevel (Psychiatrist);

5.5.4. Dr D.S. Brown (Clinical Neuropsychologist);

5.5.5. Dr H Roodt (Ophthalmologist);

5.5.6. Michelle Gaspar (Speech Therapist & Audiologist);

5.5.7. Kobus Lubscher (Agricultural Economist);

5.5.8. Alison Crosbie Inc - Jeanne Morland (Occupational Therapist);

7. No contingency fee agreement was concluded between the Plaintiff and her Attorney.

BY ORDER OF THE COURT

REGISTRAR

Adv. Danie Combrink for the Plaintiff (082 452 1299)

Adv. Nicole Moses for the Defendant (073 968 4124)

[1] 1984 (1) SA 98 (AD) at 116A-H see also AA Mutual Insurance v Van Jaarsveld 1974 (4) SA 729(A) ,and Es v Road Accident Fund (36448/2011) (2014] ZAGPPHC 650 (22 august 2014)

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