

SOUTH AFRICA / JUDGMENT

Tayob v Road Accident Fund (36434/2013) [2017] ZAGPPHC 390 (10 May 2017)

[2017] ZAGPPHC 390

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi

CASE / FILE NUMBER

36434/2013

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 36434/2013

DATE: 10/5/2017

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
In

the matter between: HAVA
TAOB PLAINTIFF
vs
ROAD
ACCIDENT
FUND DEFENDANT

JUDGMENT**KUBUSHIJ****INTRODUCTION**

- [1] The plaintiff, Hava Tayob, was involved in a motor collision on 16 October 2010. She was, at the time of the collision, the driver of the motor vehicle with her seat belt fastened, when she was struck by a truck at a traffic light. She sustained bodily injuries as a result and she is in this action claiming damages against the Road Accident Fund.
- [2] At the commencement of the trial I was informed that the defendant has already conceded liability 100% in favour of the plaintiff. I was further informed that the defendant has already settled the damages for past hospital expenses in the amount of R10 577, 55 and provided the plaintiff with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act of 1996 in regard to the future hospital and medical expenses. The other heads of damages - loss of earnings/earning capacity and general damages were postponed sine die. The plaintiff has in the meanwhile abandoned her claim for general damages, before me only damages for loss of future earnings/earning capacity are to be argued.
- [3] The parties are in agreement that no oral evidence will be led to prove the plaintiff's damages but that counsel will argue on the basis of the experts' reports of the parties. The reports are all admitted. In the main, argument will centre on the following reports:
- i. The report of the plaintiff's orthopaedic surgeon;
 - ii. The joint minute of the industrial psychologists;
 - iii. The joint minute of the occupational therapists; and
 - iv. The report of the plaintiff's actuary.

It should also be mentioned that the defendant did not file any report from the orthopaedic surgeon.

FACTUAL MATRIX

- [4] It is common cause or undisputed that as a result of the damage causing event, the plaintiff sustained a whiplash injury to the neck, specified as acute, cervical facet syndrome. She might require surgical intervention in future; and will require conservative treatment going forward.
- [5] It is also common cause that the sequelae of the injuries are constant pain in the neck, trapezius and back of the head, which is varying in intensity and worsens with over-activity.

The pain radiates to the front of the head as well as down the back and lower back. The plaintiff has to take painkillers and her

symptoms are described as severe. She stated that sitting, standing, walking for long periods, running and performing heavy duty physical activities results in pain, compelling her to move about and do stretching exercises to get some relief.

[6] From the experts' reports at my disposal it is evident that the plaintiff was at the time of the collision employed by the Department of Safety, Security and Liaison as an assistant director: budget. She had

been so employed since 2009. In November 2011 that is after the collision, she was transferred to the Department of Sports, Arts and Culture on promotion as deputy

director: financial reporting. In 2016 she was transferred again to the Treasury Department on promotion as director: finance.

The job is said to be mainly administrative in nature and computer based, with her preparing financial statements amongst others.

THE ISSUE

[7] The plaintiff's argument is that she is entitled to be compensated for loss of future earnings/earning capacity whilst the defendant's submission is that the plaintiff has not suffered any loss of future earnings/earning capacity. The issue is whether the plaintiff suffered any loss of future earnings/earning capacity.

THE APPLICABLE LAW

[8] It is trite that any patrimonial claim in respect of future loss of earnings/earning capacity requires:

8.1 A loss of earning capacity as a result of a damage causing event; and

8.2 An actual patrimonial loss of income as a result of the abovementioned loss of earning capacity. In which case, either the one or the other may be claimed for the same amount.[1]

Is the plaintiff's earning capacity compromised?

[9] In argument before me the defendant, relying on the opinion of its industrial psychologist, contends that the plaintiff's earning

capacity has not been compromised by the injuries she sustained in the accident. In her report, the defendant's industrial

psychologist notes that from a psychological perspective, it is evident that based on the findings by the other experts as well as personal observations made during consultation with the plaintiff, the plaintiff has not been compromised by the injury sustained in the accident and that she has no claim against the RAF. This however cannot be true.

[10] It is evident from the joint minute compiled on 18 April 2017 by the occupational therapists instructed respectively by both parties that the plaintiffs residual capacity has been compromised. According to the joint minute, as a result of the injuries sustained

by the plaintiff, she does not present with constant sitting ability due to poor biochemical posturing while assuming a sitting position. She, as a result, requires occupational therapy intervention at her work place - her work station will have to be adjusted in an ergonomically correct way with adequate back and neck saving principles and assistive devices implemented to assist with placing less stress on the spine. In the event of surgery to the cervical and/or lumbar spine, she would be more reliant on recommended assistive devices. As result of all this, the experts are of the opinion that the plaintiffs optimal efficacy in the work place will remain dependant on the treatability of her symptoms as well as her conclusiveness of her working environment.

[11] The orthopaedic surgeon also confirms that the plaintiff has been compromised by her injuries. In his report, the expert states that the patient has sustained a loss of work capacity of between 5% and 6% due to the accident.

[12] The evidence cannot be ignored. I am, therefore, inclined to accept it as proof that the plaintiffs earning capacity has been compromised. What I now have to determine is whether the plaintiffs compromised earning capacity has resulted in a diminution in her patrimony.

Has the plaintiffs estate been diminished?

[13] Although inextricably connected, loss of earning capacity and loss of income are two different concepts. Loss of income arises from a loss of earning capacity and in order for the plaintiff to succeed in her claim there must be patrimonial loss. The plaintiff is entitled to be compensated to the extent of such diminution in patrimony.[2]

[14] In *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 at para 18 the following is said:

“Earning capacity is part of a person's patrimony, but this capacity can only be proven to have been lowered, and the damages for this quantified by proving an actual loss of income. However, when both of these losses have been shown to exist, then the claim for one is also the claim for the other and they appear to be interchangeable.”

[15] The defendant, relying on his industrial psychologist opinion, submits that the plaintiff has not suffered any diminution in her

patrimony resulting from the compromised earning capacity.

[16] In her report, the defendant's industrial psychologist opines that the plaintiff's future career path in the Treasury Department,

as noted by her during the consultation, is regarded as sedentary/low range light physical work which she will be able to perform without limitation provided she avails herself to the recommended therapeutic interventions. The expert opines further that the plaintiff's earning scenario is unaffected by the injuries she sustained in the accident in 2010 and she will as such suffer no loss of future earnings. Her employability rating is still excellent and will realise her employment potential capacity commensurate with her educational attainment through sustainable employment.

[17] It is my view that the defendant is correct on this point. The evidence of the experts as presented to me confirms that the plaintiff's employment potential post- accident remains the same as pre-accident.

[18] Firstly, it is common cause that pre-morbid and post-morbid the plaintiff will continue in her chosen career path until normal retirement age. The industrial psychologists in their joint minute agree that pre-morbid, the plaintiff would have worked until the normal age of retirement - the plaintiff's experts suggests 65 years of age whilst the defendant's expert suggests a retirement age as applicable to government employees. Her own occupational therapists' opinion is that the accident injury sequelae do not constitute the need for early retirement. The prognosis by the plaintiffs own orthopaedic surgeon is that the plaintiff will not retire earlier due to the accident.

[19] Secondly, the plaintiffs own evidence in her experts' reports confirms that the plaintiffs employment potential post-accident remains the same as pre-accident. For instance-

19.1 The plaintiffs industrial psychologists opines that pre-morbid the plaintiff would have functioned in various skilled middle and senior management job roles, with progression to executive job roles, namely deputy director, director and chief director, or to positions of equivalent complexity within the public service sector of the labour market. The plaintiff would have functioned in the latter capacity until normal retirement. The situation is similar post-morbid. According to the expert, the plaintiff will, post-accident, continue to function as director with progression to a chief director or a position of equivalent complexity within the public service of the labour market. She will function in the latter capacity until normal retirement.

19.2 In assessing the plaintiffs post-morbid employability profile, the industrial psychologist also found the identified demographic-, personal- and career development variables similar to those outlined in the pre-morbid employability profile. The expert found the employability rating of the plaintiff, post-morbid, still excellent.

19.3 As per the assessment by her own occupational therapist, the plaintiff's physical demand pre-accident was sedentary physical strength and even post-accident her work demand remains the same.

19.4 Her own occupational therapist opines that the plaintiff presents with the physical capacity to cope with the majority of her pre-and-post accident job demands. She is suited to tasks of a sedentary selected light physical nature. She states in her report that from a physical perspective, the plaintiff meets most of the physical demands of her work and that with successful rehabilitation and implementation of reasonable accommodation and use of assistive devices she should be able to continue in her own occupation.

[20] The plaintiff's ambition, as stated by the expert, is to remain in the Government, her future aspirations being to apply for a position of a chief director. There is no indication on record that the plaintiff might want to leave the public service or that her injuries will prevent her from getting the position of a chief director in the public service if she applied for one. There is actually no evidence to indicate that the plaintiff will not proceed on the career trajectory as set out by the experts in their respective reports. She has already been promoted twice since the accident - first as a deputy director and again as a director. There is, as such, no proof of diminution in the value of her patrimony or that same will occur in future. If anything her earning capacity has increased and has resulted in an increase in her patrimony.

Does the plaintiff not have any other remedy?

[21] It is not in dispute that post-morbid the plaintiff complains of constant pain in the neck, trapezius and back of the head, which is varying in intensity and worsens with over-activity. Sitting, standing, walking for long periods, running and performing

heavy duty physical activities results in pain, compelling her to move about and do stretching exercises to get some relief. She has been back at Redimed clinic, amongst others, on a number of occasions for treatment for pain. She has, as such, since the accident worked and performed her duties with a considerable degree of discomfort. Pre-morbid she was in good health. The doctors who examined her post-accident depicted no history of previous notable diseases, serious injuries or operations other than a previous caesarean

section and removal of an impacted tooth.

[22] The loss in work capacity, as has affected the plaintiff in this instance, is at most non patrimonial in nature because the plaintiff has not shown a diminishment in her estate. The extra pain and suffering which is endured by the plaintiff in order to avoid patrimonial loss should, in accordance with the Deysel-judgment above, be

factored under the heading of general damages. The challenge, however, is that in the circumstances of this case the plaintiff does not qualify for general damages. She has been excluded to claim under the narrative test. This head of damages was abandoned at the commencement of the trial.

CONCLUSION

[23] I have to conclude, therefore, that even though the plaintiff has proved disabilities which give rise to a reduction in her earning capacity, she has, however, failed to prove that this has resulted in patrimonial loss. She has failed to discharge the onus of proving that she suffered a loss or reduction of earning capacity as her post-accident earning capacity has improved. [3]

[24] Consequently the claim is dismissed with costs.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Counsel for Plaintiff : Adv. U Lottering

Instructed by : Savage Jooste&Adams Inc.

Counsel for Defendant : Adv. Z Mahomed

Instructed by : Maponya Inc.

Date heard :

24 April 2017

Date of judgment :

10 May 2017

[1] See Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) at para [11] and in Deyssel v Road Accident Fund (2483/09) [2011] ZAGPJHC 242 at paras [15],[22] and [28].

[2] See Liebenberv Road Accident Fund (56326/11) [2015] ZAGPPHC 295 at para 16 and Rudman v Road Accident Fund [2002] 4 All SA 422 (SCA) at para D.

[3] Union and National Insurance Co. Ltd v Coetzee 1970 (1) SA 295 (A) at 300A.

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