

SOUTH AFRICA / JUDGMENT

Van Ghent v Road Accident Fund (1194/2016) [2017] ZAFSHC 187 (17 November 2017)

[2017] ZAFSHC 187

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue

CASE / FILE NUMBER

1194/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Reportable:

NO

Of

Interest to other Judges: NO

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to Magistrates: NO

Case

number: 1194/2016

In

the matter between: NATASHA
VAN
GHENT
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant
HEARD

ON: 14 NOVEMBER 2017

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 17 NOVEMBER 2017

I.

INTRODUCTION

- [1] The plaintiff is Ms Natasha Van Ghent and adult female of Despatch, Eastern Cape. She is 48 years old and married. She was 42 years old when she was injured in a motor vehicle collision which occurred on 8 May 2012 on the N1 freeway near Bloemfontein.
- [2] On 1 August 2017, the first day of the hearing on the merits, the Road Accident Fund ("RAF"), the defendant in this matter, threw in the towel as it usually does. The RAF conceded liability and agreed to pay 100% of plaintiffs proven or agreed damages.
- [3] The matter was postponed to 14, 15 and 17 November 2017 for the quantum trial to be conducted.
- [4] Numerous expert notices and reports have been filed by plaintiff, to wit by an actuary, two reports by an orthopaedic surgeon, a general practitioner, a psychologist, an industrial psychologist, a clinical psychologist and an occupational therapist. All these reports were filed some time before the merits trial, the effect being that the RAF was in possession thereof for more than five months. Contrary to the diligent efforts of the plaintiffs attorneys to prepare for the quantum trial, the RAF did absolutely nothing. On the first day of the quantum trial, to wit 14 November 2017, the court was informed by counsel that the RAF had conceded the correctness of all the expert reports, including the amounts calculated by the actuary pertaining to past and future loss of earnings. These amounts that also appear from the amended particulars of claim are R414 978 and R1 666 548 respectively.

- [5] The parties agreed on the past loss of medical and hospital expenses in the amount of R4 192.19, exactly the amount as claimed in the amended particulars of claim and the RAF agreed to provide the customary undertaking in respect of future medical and related

expenses in accordance with the provisions of s 17(4)(a) of the Road Accident Fund Act, 56 of 1996 as amended. Finally, there was an agreement that the RAF would pay plaintiff's general damages in the agreed amount of R400 000.

II. THE DISPUTE

- [6] Having agreed on all the headings referred to supra, the only outstanding issue on which no agreement could be reached, is the percentage to be taken into consideration for contingencies to calculate past and future loss of earnings.
- [7] Adv HJ Cilliers, who appeared for the plaintiff, submitted that contingencies should be applied at the rate of 5% in respect of past loss and 8.5% in respect of future loss of earnings, the reason being that the plaintiff was 48 years old at the time of the trial and when the calculation of the actuary was made, taking into consideration the judgment of the Supreme Court of Appeal in *RAF v Guedes* 2006 (5) SA 583 (SCA). In paragraph [9] of the judgment Zulman JA referred to the *Quantum Yearbook*, 2004, by R Koch. I shall return thereto infra.
- [8] Adv CJ Hendriks on behalf of the RAF conceded that he could not make any submissions to counter Mr Cilliers' arguments, but when I enquired of him as to whether he conceded that an 8.5% contingency should be allowed in respect of future loss of earnings and whether he was duly instructed to make such concession, he indicated that it was the RAF's view point that contingencies of 10% for past loss and 20% for future loss of earnings should be applied. He did not see his way open to argue this and did not refer me to any case law at all.

III. CONTINGENCIES IN GENERAL

- [9] Whether contingencies should be applied, and in what percentage, is directly linked with the amount that a court considers just in respect of compensation. In casu the parties agreed in respect of past and future loss of earnings, but they also accept that the court is clothed with a discretion to apply contingencies.

- [10] In *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199

Watermeyer JA stated:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case".

- [11] In the well-known and often quoted judgment of Nicholas JA in *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (AD) the learned judge of appeal stated the following at 116G- 117A:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (per HOLMES JA in *Legal Assurance Co Ltd v Boles* 1963 (1) SA 608 (A) at 614F). 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 upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980

(3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."

[12] In *Du Toit obo Dikeni v RAF* 2016 (1) SA 367 (FB) the court also referred to *Bonesse v RAF* and *Ndokweni v RAF*, both judgments by Pickering J and I quote paragraphs

[45] and [46] in *Du Toit*

"[45] In *Bonesse v Road Accident Fund* 2014 JDR 0303 {ECP} Pickering J considered the general principles applicable to contingencies and the dicta in *Bailey*. The learned judge concluded as follows pertaining to the contingencies to be applied in respect of the claim of a 13-year-old girl (at 18):

'Mr Van der Linde submitted . . . that given that Carly was 13 years old at the time of the accident it would be appropriate to apply a contingency factor of 30% to her future loss of earnings. Mr Frost however, submitted that a contingency deduction of 20% should be applied. He referred in this regard to *Koch Quantum Year Book* 2014 page 114 where the learned author states that it has become customary for the court to apply a so-called sliding scale to contingencies

- ie 25% for a child, 20% for a youth and 10% in middle age. It would appear that although contingency factors which have been applied in cases involving youths and/or children range from 15% to 40% the courts have generally been inclined to apply a

contingency figure of 20% in respect of youthful plaintiffs in their teenage years. Having regard to all the circumstances of this matter, including Carly's age, I am of the view that a contingency factor of 25% should be applied.'

[46] In *Ndokweni v Road Accident Fund* 2014 Corbett & Honey 2014 Quantum of Damages 7A4 and at 13 Pickering J considered that in that matter there was no good reason to depart from the normal deduction of 15% in respect of contingencies. In that regard he referred to numerous judgments, and I merely quote two, to wit, *Zarrabi v Road Accident Fund* 2006 Corbett & Honey Quantum of Damages 584 (T); and *Mngani v Road Accident Fund* 2011 Corbett & Honey Quantum of Damages 684 (ECM)." (emphasis added)

[13] Eksteen J considered contingencies very recently in the case of

G.E.B v Road Accident Fund Eastern Cape division, Port Elizabeth. case number 2477/2015, a judgment delivered on 5 September 2017. The plaintiff was 40 years old and resided in a tiny hamlet in the Eastern Cape. She not only suffered from a mild traumatic brain

injury, but sustained a severe degloving injury of the scalp fractures of both mandibula and an injury to the right shoulder. The court accepted that the plaintiff was unemployable, but stated that contingency deductions must also necessarily be made depending upon the facts of each case. In paragraph [59] of the judgment the court *inter alia* referred to the plaintiff's employment history and lack of employment opportunities in the tiny hamlet and consequently found that her future loss of earning capacity should be reduced by 30%. In that case the contingency deduction proposed on behalf of plaintiff's counsel was 20%, whilst the RAF's counsel argued that 40% should be applied.

[14] In *Barend Johannes Coetzer v RAF* a judgment by Maier-Frawley AJ in the Gauteng Local Division, Johannesburg. case number 4885/2015, delivered on 8 July 2017, the learned acting judge referred to *Guedes supra* and the sliding scale by Mr Koch mentioned by the SCA. Notwithstanding the fact that the court indicated that applying a 0.5% contingency

deduction per annum, in line with Mr Koch's suggestions, which would equate to a 11.5% pre-morbid contingency deduction, she eventually considered 20% to be more appropriate. In that case the plaintiff was 42 years old at the time of the trial and would have remained employed for 23 more years.

[15] In *casu* plaintiff's own legal representatives instructed the actuary, Mr Nilen Kambaran, to calculate past and future loss of earnings based on contingencies of 5% and 15% respectively. The actuary did this and bearing in mind the figures referred to *supra*, he arrived at nett past earnings of R394 229 and nett future earnings of R1 416 566, giving a total of R1 810 795 in respect of loss of earnings.

[16] The cases referred to bear some similarity to the matter in *casu* and in none of them the half percent per annum was used as a basis for calculating contingencies. No doubt, as mentioned by Mr Koch as quoted in paragraph [9] of *Guedes supra*, the contingency to be applied in respect of a child should normally be higher than is the case with a middle-aged person. The reasoning behind this is not difficult to understand and I shall in my evaluation of the evidence deal with the factors to be taken into account. Even in *Guedes*, and notwithstanding the reference to a sliding scale and a 0.5% per year contingency deduction

to retirement age, the SCA still considered several factors before coming to its conclusion. I refer to inter alios paragraph [17] of the judgment. It must also be understood that in Guedes the plaintiff was still able to work post-morbid and in order to arrive at his nett future loss of income, the court worked on two values, i.e. the value of income prior to the collision and the value of income thereafter or having regard to the collision. In the first instance a 20% contingency deduction was allowed instead of the 10% allowed by the court a quo, but the 30% contingency deduction in respect of the income having regard to the collision remained the same. The effect of the SCA's judgment, upholding the appeal, was that the claim was eventually reduced from R3 119 048 to R2 323 633. If Guedes is properly interpreted, no rigid formula was adopted to be applied in all cases.

IV. EVALUATION OF THE EVIDENCE AND THE SUBMISSIONS OF COUNSEL

- [17] Plaintiff is now 48 years old. She passed grade 12 and did a nail technician course. She is a resident in Despatch, a small town close to Port Elizabeth in the Eastern Cape. She is married for 22 years and her husband is a store manager at Sutherland transport. She has three children, one from her previous marriage who is self-employed, and two from her present marriage who must be 18 and 15 years old now, bearing in mind the information contained in some of the expert reports.
- [18] In 1993 and 1994 plaintiff worked at Ashton's Art Gallery where she held an administrative post and organised exhibitions. The company closed down. In 1995 she started working for Media 24 (die Burger newspaper). She initially worked as a casual at reception, thereafter at telesales and finally as personal assistant to the department manager. She stopped working in 2004.
- [19] Plaintiff started a nail technician course in 2004 and ran her own salon from 2004 until 2006. She could not cope due to long working hours and the demands of her young children and sold the salon where after she started working at home, doing nails and hair for customers until 2010. Her nett income in 2010 was R900 per month.
- [20] The family relocated to Bloemfontein and on 1 August 2011 she obtained work at Engo Gardenia Youth Centre where she worked as a childcare worker until the collision on 8 May 2012. Her salary was approximately R5 500 per month in cash. She enjoyed several fringe benefits such as the use of company car, free lodging, meals and water and lights. The total value of her income was calculated to be R16 700 per month. She returned to her work after the collision, but could not cope and she left at the end of April 2014.
- [21] Her husband returned to the Eastern Cape and she and the family all currently live in Despatch. Plaintiff sustained serious injuries, inter alia fractures of ribs, but more importantly a fracture of the right proximal humerus neck. The physical injuries of an orthopaedic nature are such that Dr LA Oelofse found that she had become an unfair competitor in the open labour market. She is unable to secure the same type of work she did prior to the collision due to the painful arm.

[22] Mr Hennie Minnaar, a psychologist, saw plaintiff for the first time on 3 February 2016, i.e. close to four years after the collision. She presented with a major depression and post-traumatic stress syndrome ("PTSD"). It must be mentioned that the plaintiff was transporting children at the time of the collision and that one child was fatally injured during the collision. It is evident that, save for consultations with the psychologist as mentioned in his report, plaintiff did not undergo any treatment prior to February 2016 in order to try and solve her emotional problems.

[23] Dr Peter Whitehead, an industrial psychologist, consulted plaintiff on 27 July 2016. He stated the following in his report at paragraph 15.4: "It is envisaged that into the future Ms Van Ghent will continue to struggle with the sequelae of her injuries. She has not worked since 2014 and as outlined in the Post-Morbid Career section of the current report, it is regarded as probable that she will continue to find herself unemployed."

I accept that plaintiff not only have limited use of her injured right

arm and that it would be about impossible to perform hair dressing or nail care work, but she has also suffered significant emotional

trauma. According to Dr Whitehead her PTSD has become chronic because it was left untreated and therefore she was still suffering from the effects thereof at the time of consultation.

[24] Mr DJ Stigant, a clinical psychologist, consulted the plaintiff on 6 April 2017. He referred to the fact that the plaintiff is suffering from a traumatic brain injury ("TBI") which has significant and serious consequences for her cognitive functioning. Mr Stigant stated the following:

"My experience and research indicates that a PTSD that has become chronic in nature is extremely difficult to treat successfully, requiring years of treatment from professional persons highly specialised therein. Even then, it is doubtful whether persons ever recover from a severe PTSD and they thereby remain dysfunctional for the remainder of their life with regard to their engagement with their personal social and work life..... Accordingly, claimant's quality of life negatively has been compromised especially with regard to her employment prospects, due to the TBI and PTSD sequelae. In my opinion it is certain that claimant will not be able to continue to perform at her premorbid levels and hence she has become a vulnerable employee, due to the cognitive personality dysfunctions, as seen in this assessment and reports of others."

[25] Notwithstanding the comments made by Mr Stigant, he mentioned the following at page 18 of his report:

"Despite the time lapse as mentioned above it will be useful for claimant to attend occupational therapy sessions, hopefully to salvage and rehabilitate some of her cognitive dysfunctions as mentioned, thereby to ameliorate some of the sequelae of the TBI."

He then suggested that several counselling sessions should be undertaken. The plaintiff must also remain on the prescribed course

of psychotropic medication to manage her depression.

[26] Ms Ansie Van Zyl, an occupational therapist, assessed the plaintiff on 20 June 2016 and 20 September 2016. Her report is dated 20 March

2017. She states that the plaintiff was "limited to jobs with light physical demands or complete sedentary work. This does not take her anxiety and depression into account, but is only from a physical prospective". She also concluded as follows from a physical perspective: "Natasha (the plaintiff) is not able to work as a hair stylist and she will not be able to manage the physical demands of her job as a child care worker." In paragraph 5.2.6 of the report Ms Van Zyl states the following:

"From a cognitive perspective the claimant would benefit from practical group work sessions and/or support group sessions run by an occupational therapist working specifically in the field of psychiatry. The claimant will benefit from 10 hours occupational

therapy. The longer term, the claimant will require ongoing access to an occupation therapist during times of change or crisis. I recommend that allowance be made for 1 hour home visit every six months for the rest of her life."

[27] Mr Cilliers argued with persuasion that the so-called normal contingency rate applied to future loss of income, to wit 15%, should not apply in casu. He submitted the difference between 65 years, i.e. plaintiff's date of retirement but for the injuries, and 48 years, her age at present, is 17 years and therefore, using the sliding scale suggested by Mr Koch, 0.5% per annum until retirement age should be calculated, to wit 17 years divided by two equalling 8.5%. I have not been told why plaintiff's stance changed from the instructions given to the actuary to the date of the hearing and/or why a deviation from the standard percentage should be granted.

[28] Mr Cilliers emphatically argued that the court could not look beyond what was stated in the reports of the experts insofar as these reports have been admitted by the RAF. On a question by the court why the primary evidence of the plaintiff was not tendered, he submitted that this was unnecessary and irrelevant, bearing in mind the aforesaid concession. I do not agree. I believe that I would have had much more clarity if I was afforded primary evidence, which would obviously be subjected to cross-examination, in order to consider deviating from the norm of 15%.

[29] Save for referring me to Guedes and Du Toit obo Dikeni v RAF supra, no further judgments were relied upon for the submission that the court should deviate from the normal contingency rate of 15%. I repeat that Guedes is not authority that the sliding scale of Mr Koch should be followed rigidly in each and every case.

[30] Notwithstanding the seriousness of the injuries from a physical and psychological point of view, the experts did not state unequivocally that plaintiff would not be capable to do any work at all in future. Improvement may be obtained through counselling and sessions with experts.

[31] Corbett, *The Quantum of Damages in Bodily and Fatal Injury Cases*, Vol 1, (General Principles) at 51 to 52 sets out the contingency factors to be applied in any given case. These include:

1. the possibility of errors in the estimation of the injured party's life expectancy;
2. the likelihood of illness and unemployment which would have occurred in any event or which may in fact occur;
3. inflation or deflation in the value of money;
4. tax alterations in the costs of living allowances and accidents;
5. other contingencies which would have affected the plaintiffs

own capacity in any event.

[32] As mentioned in Bailey *supra* at 1178 - D, contingency factors may not only be negative, but can be positive as well. I think it is apposite to mention just one example. Unlike the situation two or three decades ago, women and black people in this country are now much more favourably positioned to climb the corporate ladder and thereby getting promoted sooner and even instead of their white male counterparts. No favourable factors have been shown to exist in casu or might be applicable in the future.

[33] Clearly, the plaintiff followed her husband in the past from the Eastern Cape to Bloemfontein and back to the Eastern Cape. Her chances of in future obtaining the kind of income relied upon by the actuary, pre-morbid, in a small town like Despatch and especially bearing in mind the downward economic spiral in which our country has found itself in the last few years without any reasonable prospect of a turnaround soon, cannot be ignored. I accept that beauty salons will always attract female customers, but on the other hand, it is a fact of life that when people are suffering economically, they first of all cut down on luxuries such as hairstyling, manicures and pedicures.

[34] Although plaintiff mentioned to the various experts that she always had a passion for hair styling and nail do's, it is not so easy to conduct once own business and to keep up with it. History has shown us that plaintiff has sold her salon previously because of the long working hours and demands of her children. Chances are that she would in any event not be prepared to work long hours in order to earn a constant and sufficient income pre- morbid. Her unsteady work record is also taken into consideration.

- [35] No doubt, our country experiences an extremely high, and ever increasing unemployment rate. It is fair to say that our country is in an economic crisis and the future is not bright at all. The Government is looking at all possibilities to generate more money and taxpayers have already experienced a recent increase in the tax rate. All indications are that another tax rate increase will be announced during the 2018 budget speech. These are further factors to take into consideration.
- [35] I am also satisfied that, notwithstanding the reports of the experts and what I have just said, there is always a possibility that plaintiff may, post-morbid and after counselling, be recuperating to such an extent that she may do some sedentary work as she has done in the past, although possibly at a lower salary.
- [36] According to the 2017 report of Dr Oelofse the plaintiff has been suffering from hypertension which is recorded as part of her previous medical history. A person in his/her early forties suffering from hypertension may well experience related illnesses in future, such as heart attacks, heart failure and strokes. Obviously such illnesses may either cause premature death or early retirement.
- [37] Having considered all aspects mentioned in the reports of the experts as well as specifically dealt with herein and the arguments of Mr Cilliers, I am not persuaded that the contingency deduction in respect of future loss of income should be as low as 8.5%. In my view it would be just and fair to both the plaintiff and the RAF to apply a contingency factor of 15% on future loss of income. In the words of Pickering J referred to supra, I have not been persuaded that there should be a deviation from the norm of 15%.

V.

CONCLUSION

- [38] I therefore conclude that, notwithstanding Mr Hendriks' reluctance to make any submissions contrary to those of Mr Cilliers, it would be fair and just to both parties if contingencies are applied as follows:

5% in respect of past loss of income and 15% in respect of future loss of income.

I have taken cognisance of the fact that the RAF was prepared to settle the matter on the basis that contingencies of 10% and 20% be applied in respect of past and future loss of income respectively, but I am not prepared to be so lenient towards the RAF. This will be to the detriment of plaintiff and no case has been made out in this regard. If the RAF really wanted to make an impact on my discretion, it should have placed credible evidence before the court to either discredit the versions of plaintiff's experts or to show what negative factors should have been accepted for me to increase the contingency percentages. It failed to do this and relied upon the court's mercy to assist it. I would have expected forceful and persuasive arguments and not a

capitulation. I repeat that past medical and hospital costs have been settled in the amount of R4 192.19 and general damages in the amount of R400 000. I calculated the nett past and future loss of earnings, based on the aforesaid contingencies having been applied, in the amounts of R394 229 and R1 416 566 respectively. The total amount payable is therefore R2 214 987.19.

VI.

ORDERS

[39] Therefore the following orders are made:

1. Defendant shall pay Plaintiff in full and final settlement an amount of R2 214 987.19 (TWO MILLION TWO HUNDRED AND FOURTEEN THOUSAND NINE HUNDRED AND EIGHTY SEVEN RAND AND NINETEEN CENTS), the amount to be paid directly into the account of the Plaintiff's attorneys, the particulars of their account being as follows :

HONEY ATTORNEYS - TRUST ACCOUNT

NEDBANK, Charlotte Maxeke Street, BLOEMFONTEIN

Branch Code: 1102 3400

Account No: [...]

REF: H L Buchner/J03462

2. Defendant shall provide the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund, Act 56 of 1996, as amended, for the costs of future accommodation of the Plaintiff in a hospital, a nursing home or treatment of or rendering of service to her or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision on 8 May 2012, after such costs have been incurred and upon proof thereof, as referred to in the medico-legal reports filed by the Plaintiff in

terms of Rule 36(9)(a) and (b).

3. Defendant is liable for payment of the Plaintiff's taxed or agreed party and party costs, which include the following :

3.1 The Plaintiff's reasonable travelling and accommodation expenses for attending medico legal examinations (if any);

3.2 The reasonable preparation, qualifying, reservation, accommodation, travelling fees and expenses as well as the income forfeiture fee for court attendance (if any, as per invoice), including travelling expenses of obtaining the expert reports (if any) of:

3.2.1 Mr Nilen Kambaran of ARCH Actuarial Consulting;

3.2.2 Dr LA Oelofse (Orthopaedic Surgeon);

3.2.3 Dr Francois Visser of Bayradiology;

3.2.4 Dr Lerato Yvonne Latha (General Practitioner);

3.2.5 Hennie Minnaar (Psychologist);

3.2.6 Dr Peter Whitehead (Industrial Psychologist);

3.2.7 Daniel Johannes Stigant (Clinic Psychologist), and

3.2.8 Ansie van Zyl (Occupational Therapist)

3.3 The costs attended upon obtaining the payment of the amounts referred to in this order;

3.4 The Plaintiff shall serve the Notice of Taxation on the Defendant's attorney of record;

3.5 The Plaintiff shall allow the Defendant fourteen (14) court days to make payment

3.6 Defendant shall be liable for payment of interest on the amount referred to in paragraph 1 above as well as taxed costs calculated at 10.5% per annum from 15 November 2017 should Defendant fail to make timeous payment on or before 15 December 2017, as well as payment of the taxed costs within the time stipulated in paragraph 3.5 above.

JP DAFFUE, J

On behalf of plaintiff: Adv HJ Cilliers

Instructed by:

Honey & Partners

Bloemfontein

On behalf of defendant: Adv C Hendriks

Instructed by:

Maduba Attorneys

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