

SOUTH AFRICA / JUDGMENT

van Rooyen v Road Accident Fund [2023] ZAGPPHC 116; 73266/2017 (22 February 2023)

[2023] ZAGPPHC 116

COURT

North Gauteng High Court, Pretoria

BEFORE

Molahlehi

CASE / FILE NUMBER

73266/2017

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Policy**IN THE HIGH COURT OF****UTH AFRICA****(GAUTENG DIVISION,
PRETORIA)****Case****No: 73266/2017**

REPORTABLE:

No

OF

INTEREST TO OTHER JUDGES: No

REVISED:

NO

22

February 2023

IN

THE MATTER BETWEEN: VAN
ROOYEN
PLAINTIFF
AND
ROAD
ACCIDENT
FUND
DEFENDANT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 22 February 2023.

Summary: Claim for damages- bodily injuries- past and future loss of income due to the injuries sustained – determination of quantum, liability having been conceded. The court to award compensation that is fair and just.

JUDGEMENT

Molahlehi J

- [1] This action is prosecuted by Adv. Van Rooyen N.O, as the plaintiff and curatrix ad litem on behalf of Mr Oberholzer, the patient, against the defendant, the Road Accident Fund. The compensation claim arose from the motor vehicle accident on 25 August 2016. The patient was a passenger in the motor vehicle driven by the insured driver at the time of the accident.
- [2] The liability was finalised at 100% in favour of the plaintiff, including a section 17 (4) (a) undertaking for future medical expenses. The plaintiff does not claim past medical expenses.
- [3] The parties held a virtual pre-trial conference on 27 October 2022 and focusing mainly on the issues relating to expert witnesses. The defendant accepted the plaintiff's reports for what they purported to be.
- [4] At the time of the accident, the plaintiff was a passenger in the motor vehicle driven by the insured driver. The motor vehicle driver passed away due to the injuries he sustained in the accident.
- [5] There is no dispute that the patient sustained severe injuries from the accident. The defendant's counsel contended during argument that the patient suffered moderate head injuries.
- [6] The documentation before this court reveals that the plaintiff suffered the following injuries as a result of the accident:

- a. significant concussive head injury with an associated moderately severe to severe diffuse axonal brain injury;
 - b. anosmia, as he cannot smell at times and he has a runny nose, his nose is severely deformed, but this can also be due to frontal brain trauma;
 - c. left-sided hemiparesis;
 - d. multiple complicated facial fractures and lacerations;
 - e. loss of sense of smell;
 - f. neurocognitive disorder with behavioural disturbance;
 - g. personality change due to traumatic brain injury.
- [7] In support of the contention that the patient is entitled to compensation for the injuries and loss, the plaintiff relied on various experts' opinions. In their joint minutes, the Orthopaedic Surgeons agreed that the patient sustained a head injury, an open depressed skull fracture on the right side, and facial lacerations. They also agree that the patient does not pass the narrative test for 5.1 severe long-term impairment or loss of body function for his orthopaedic injuries.
- [8] The neurologists, Dr Thobejane and Dr Smuts agreed that the patient suffered a concussive head injury. They, however, classified the injury differently. Dr Thobejane classified the injury sustained by the patient as moderate, while Dr Smuts found him to have a moderate to severe diffused brain injury.
- [9] Although they disagreed on the issue of his employability they deferred to the occupational therapists who shared the view that his employability was limited due to his cognitive and physical limitation. Despite the initial GCS being 11/51, which is consistent with a moderate head injury, it was not disputed that the extent and complexity of the head injury was severe.
- [10] The psychiatrist, Dr Marinda Joubert, found that the patient sustained a severe head injury which resulted in distressing and impairing neuropsychiatric sequelae. Although he does not have major depression according to the diagnosis, he does struggle with depressive disorder.
- [11] The speech- language therapist and audiologist, Ms Groenewald, believes that the patient presents several language and communication challenges from the accident. This has resulted in a higher level of difficulties in cognitive and linguistic functionality. This will also present serious difficulties if he was to pursue new employment. The language difficulties will also impose limitations on any future attempt at further education.
- [12] The other expert for the plaintiff is the specialist maxillo-facial and oral surgeon Dr Pius Jacobs. He found that the patient had suffered a depressed skull fracture with a nose fracture, resulting in loss of smell sensation and compromised taste.

- [13] The occupational therapist, Mrs Zungu noted that the highest educational level of the patient is Grade 12 and had undergone formal training as a Sales Person at Cash Crusaders. According to her, the patient will be suitable to work of light physical demand.
- [14] The industrial physiologist Mr Moodie, who assessed the occupational impact that the accident had on the patient, postulated that the patient would have completed N6 mechanical engineering studies and would have secured an apprenticeship but for the accident. In this regard, he took into account the opinion of the educational psychologist concerning the pre-accident earning potential.
- [15] Mr Moodie further deals with the post-accident income potential of the patient. After analysing the patient's career progression, he concluded that the patient's traumatic brain injury overshadows the other injuries. He further notes that the patient may retain his employment but his physical and cognitive functioning" which has impacted his ability to perform on the same or even a similar level, then his uninjured self will severely constrain him. As a result of this he would be highly restricted in finding another employment if he was to lose his current employment. He concludes that a higher post-accident contingency deduction is to be applied to cater for his future impairments that will affect his ability to continue working.
- [16] The industrial psychologist postulates on the retirement of the patient, who at the time was 25 years, meaning that he still has another 40 years of working life if he was to retire at 65 years.
- [17] As I understood the submission on behalf of the defendant, there is no material dispute about the injuries sustained by the patient. The disagreement is with the quantification of the damages. In this respect, reference was made to a number of cases, including *Sohaba vs RAF*, [1] where the plaintiff, who sustained a head injury, shoulder dislocation and deep laceration on the left eye and also the nose, was awarded general damages in the sum of R850 000,00. The brief principles and guidelines to follow in dealing with claims of this nature are: (a) The authorities have cautioned against the tendency of the courts to award higher amounts of damages. This is underpinned by the fact that the calculation under this heading is not mathematically accurate. [2] It is generally accepted that there is no mathematical or scientific formula for the computation of the monetary value of pain and suffering, loss of amenities of life and disabilities. [3] The court must be fair to both sides, i.e. an award must be a just compensation. [4] (b) The court must take care to see that its award is fair to both sides – it must give just compensation for the plaintiff.
- [18] In *Hully v Cox*, [5] the court cautioned the courts against allowing their "sympathy for the claimants" to influence their judgments. Comparable cases are a helpful guide and not a hard and fast rule to be strictly applied. [6] Another case that the defendant referred to as part of the analysis in the comparative consideration of the compensatory award is *S V RAF*, [7] where the court dealt with a mild, moderate brain injury and awarded damages in the sum of R600 000,00 in 2016.

Loss of earnings

[19] The patient's past and future loss of income has been actuarially calculated by actuaries of the plaintiff, Munroe Actuaries. The defendant has not presented any actuarial calculation. The plaintiff's actuaries calculated the past and future earnings of the patient on the basis of the information provided to them. They were in this regard informed that the earnings of the patient were as follows:

a. June 2018

R8 000,00

b. October 2018

No earnings

c. April 2021

R12 663 per month.

[20] In paragraph 4.3 of their report the actuaries applied the following contingencies in determining the defendant's liability:

a. Uninjured: 5% and 20% on past and future earnings respectively.

b. Injured: 30% on future earnings.

[21] They formulated the capital value of loss of earnings as follows:

Uninjured Injured

Loss

of Earnings Earnings

Earnings

Past R267 000

R 315 600 R -61 950

Less contingencies 5%

R 253 650 R 315 600

Future R 12 464 900

R 4 418 800

Less contingencies 20% 30%

R 9 971 920

R 3 093 160 R 6 878 760

TOTAL LOSS OF EARNINGS

R 6 186 810

- [22] It clear that in arriving at the conclusion that the loss of earnings is R6 816 810.00 the actuaries made certain assumptions such as price inflation, earnings inflation, investment returns and Tax.
- [23] The uncontested expert opinion indicates that the patient had the potential to complete the N6 qualification and would have completed his trade test soon thereafter. His potential earning capacity in the labour market was very high, having regard to the need and shortage of skilled artisans in the country.
- [24] The medical evidence indicates quite clearly that as a result of the accident-related injuries, the patient is significantly left impaired. As shown above, he sustained a severe diffuse axonal brain injury, which has left him struggling with cognitive and psychological difficulties. It is thus clear when comparing his pre-accident ability and potential that he had been left significantly occupationally impaired.
- [25] The patient is consequent to the above faced with having to pursue employment in the semi-skilled or unskilled labour market sectors. The implication of this is that he has now become functionally unemployable. In the circumstances, he qualifies to be compensated for the past and future loss of income.

Compensation for damages.

- [26] The plaintiff referred to several cases in support of the contention that the patient is entitled to compensation in the sum of R1 500 000, 00. The compensation in those cases varied between R1 000 000.00 and R1 975 0000.00.
- [27] In *Raupet v RAF*,^[8] the student who suffered extensive fracturing of the skull with bi-frontal lobe contusion with bi-frontal traumatic subarachnoid haemorrhage was awarded the 2022 monetary value of the sum of R 1 284 000.00.
- [28] In *Torress v Road Accident Fund*^[9], a 24 year old male who sustained a severe diffused brain injury, the soft tissue injury to the neck and soft tissue injury to the face was awarded an amount that equates to R1 344 000.00 on the 2022 terms.
- [29] In *Anthony v Road Accident Fund*^[10] a 22-year-old female student who suffered bilateral medial orbital fracture, inferior blow out fracture, multiple facial lacerations and open wounds, bruising to the upper arm, broken and lost teeth, moderately severe head injury and severe scarring and disfigurement, was on the 2022 terms awarded R1975 000.00.
- [30] In consideration of all the facts and circumstances of this case and in exercising the discretion noted in *Road Accident Fund v Marugo*,^[11] I am of the view that the patient should be awarded the sum of R1 200 000.00 for general damages. As concerning loss of income the patient qualifies for compensation in the sum of R6 186 810.00

Conclusion

[31] The amount to be awarded in terms of the order below is to be protected by a trust proposed by the curatrix ad litem, which is attached to this

judgement.

Order

[32] In the circumstances amid the following order:

1. Judgment is granted in favour of the plaintiff in the following terms:

1.1 The defendant is ordered to pay the capital amount of R7 386 810,00 in respect of the plaintiff's delictual damages for General Damages and Past and Future Loss of Earnings, within 180 days to the credit of the trust account of the Plaintiffs attorneys of record, Podbielski Mhlambi Inc, Carletonville, whose trust account details are as follows:

Name of account holder: Podbielski Mhlambi Inc

Bank Name: Nedbank

Branch Name: Western Gauteng

Branch Code: [...]

Account Number:[...]

Type of Account: Trust Account

1.1 The aforesaid capital amount will not bear interest unless the defendant fails to effect payment thereof on the specific date, in which event the capital amount will bear interest at the prescribed rate of interest per annum, calculated from and including the 15th day after the date of this order, up to and including the date of payment thereof.

1.3 The Defendant shall capture the payment of the capital amount onto its "Registered Not Yet Paid" I (RNYP) list by no later than 30 (thirty) days from the date of the Court Order in this matter.

2. Plaintiff's attorneys are given leave to invest the said amount on behalf and for the benefit of the patient, following having received the capital amount in an interest-bearing account as envisaged in Section 86(4) of the Legal Practice Act, 2014, until a trust as set out hereinunder is established and registered.

3. The Plaintiff's attorneys are ordered to pay the capital amount, less provision for attorney and own client fees, expenses incurred and accounts rendered by experts and counsel employed, to the trustees of a trust to be established of which the Patient, IVAN GEORGE OBERHOLZER with identity number [...] is to be the sole capital and income beneficiary following the registration of the said trust with the Master of the High Court and following the furnishing of security by the trustee to the satisfaction of the Master of the High Court as stipulated hereinunder.

4. The Plaintiff's attorneys are authorised to make any reasonable and necessary payments until such time as the trustee is able to take control of the capital amount and to deal with the same in terms of the trust deed, to satisfy the needs of the patient that may arise, and that is required in order to satisfy any reasonable need for treatment and/or equipment as may be necessary in the interim period.
5. It is confirmed that the defendant was ordered to furnish the plaintiff with a Section 17(4)(a) undertaking in terms of the Road Accident Fund Act, 56 of 1996, in which the defendant undertakes to pay 100% of the costs of future accommodation of the patient in a hospital or nursing home, or treatment of, or the rendering of a service or supplying of goods to him resulting from a motor vehicle accident on or about 25 August 2016 after the costs have been incurred and on proof thereof.
6. The Defendant is to pay the reasonable costs of the trustee appointed in terms of paragraph 7 hereof, including the costs of establishing the trust and any other reasonable costs that the trustee may incur in the administration thereof, including his/her fees, which fees will include and be subject to the following:-
 - 6.1 The fees and administration costs shall be determined based on the directives pertaining to a curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Estate Act, Act 66 of 1965, as amended from time to time;
 - 6.2 The 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;
 - 6.3 The costs associated with the yearly audit of the trust by a chartered accountant as determined in the trust deed;
 - 6.4 All the above-mentioned costs shall be limited to the payment of the reasonable costs which the defendant would have had to pay in respect of the appointment, remuneration, and disbursements had the trustee been appointed as a curator bonis.
7. The nett proceeds of the payment referred to above, together with the plaintiff's taxed or agreed party and party costs payable by the defendant, after deduction of the plaintiff's attorney and own client legal costs, expenses and accounts rendered by all experts, costs consultant and counsel employed (the capital amount), shall be payable to a trust, which trust will:
 - 7.1 contain the provisions as fully set out in the draft trust deed attached hereto marked Annexure "A";
 - 7.2 have as its main objective to control and administer the capital amount on behalf of the patient;

7.3 have Tjaart Oosthuizen, a practising chartered accountant and director of Integritus Trust Administrators (Pty) Ltd, as its first trustee, with powers and abilities as set out in the draft trust deed attached hereto marked Annexure "A", and the trustee 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 obligations towards the trust.

8. The trustee of the trust is authorised to pay the plaintiff's attorney and own client costs out of the trust funds insofar as any payments in that regard are still outstanding at that stage.
9. The Defendant is ordered to pay the plaintiff's taxed or agreed party and party costs of the action on the High Court scale up to date hereof, within the discretion of the Taxing Master, including the trial date of 18 November 2022, the costs of making this Order an Order of Court today and subject thereto that:

9.1 in the event that the costs are not agreed:

9.1.1 the plaintiff shall serve a notice of taxation on the defendant's attorney of record;

9.1.2 the plaintiff shall allow the Defendant 14 Court days from date of the allocation to make payment of the taxed costs;

9.1.3 should payment not be affected timeously, the plaintiff will be entitled to recover interest at the prescribed interest rate on the taxed or agreed costs from date of allocation to date of final payment.

9.2 The costs referred to in paragraph 9 shall inter alia include but not be limited to:

9.2.1 the costs incurred to obtain payment of the amounts in paragraphs 1.1, 1.2 above and the amounts in this paragraph 9 and obtaining of the Undertaking in terms of Section 17(4)(a)

9.2.2 The costs of senior-junior counsel for the action, including costs for the trial date on 18 November 2022 and up until today and for making this draft and Order of Court today, further including but not limited to costs of senior-junior counsel's attendance to consultations, all scheduled pre-trial conferences, as well as preparation for same and drafting of pre-trial agenda, questions and minutes for all pre-trial conferences and drafting of the practice notes, draft order, heads of argument and submissions in support of settlement;

9.2.3 The costs of the plaintiff's expert's reports and addendum reports and joint minutes, if any, to be determined by agreement or by the Taxing Master of the Plaintiff's following experts, further including all reasonable costs in obtaining the said reports:

9.2.3.1 Dr. AH van den Bout - Orthopaedic Surgeon, including costs of his Joint Minute;

9.2.3.2 Prof FJ Jacobs — Maxillo Facial & Oral Surgeon;

9.2.3.3 Dr. Henk Swanepoel — Clinical & Neuro Clinical Psychologist;

9.2.3.4 Dr JA Smuts — Neurologist, including costs of the RAF4 and Joint Minute completed by him;

9.2.3.5 G Vlok — Occupational Therapists;

9.2.3.6 Dr L Berkowitz — Plastic & Reconstructive Surgeon, including costs for the RAF4 completed by him;

9.2.3.7 Dr M Joubert — Psychiatrist;

9.2.3.8 Dr JPM Pienaar — Plastic & Reconstructive Surgeon, including costs for the RAF4 completed by him;

9.2.3.9 Dr DP Rossouw — Ear, Nose and Throat Surgeon;

9.2.3.10 Dr WA Minnaar — Dental Surgeon;

9.2.3.11 Dr PJ Viviers — Pulmonologist;

9.2.3.12 M du Plessis-Emmerich — Educational Psychologist;

9.2.3.13 H Groenewald — Speech-language Therapist and Audiologist;

9.2.3.14 B le Roux — Physiotherapist;

9.2.3.15 B Moodie — Industrial Psychologist, including costs of his Addendum Report and costs for his attendance at court to testify as expert witness on 18 November 2022;

9.2.3.16 Munro — Actuary, including costs of their

9.2.4 the reasonable costs incurred by and on behalf of the plaintiff in attending the medical-legal examination of all experts from both parties, including both fees for travelling time, accommodation and disbursements incurred in such amount as allowed by the taxing Master;

9.2.5 The reasonable costs on the High Court scale for the application for the appointment of the curatrix ad litem;

9.2.6 The reasonable fees and expenses of the curatrix ad litem, including but not limited to her:

9.2.6.1 preparation;

9.2.6.2 all consultations attended with the patient, experts as well as all other consultations relating to this matter;

9.2.6.3 travelling to consultations;

9.2.6.4 preparation of her reports and addendum reports and costs for attendance at court on the basis of her day fee as a senior-junior counsel on 18 November 2022.

9.2.7 Attorney's correspondent's fees on a High Court Scale, as allowed by the Taxing Master;

9.2.8 The costs occasioned by the Plaintiffs attorney's preparation of all trial bundles and time spent uploading these as well as all other relevant pleadings and notices on the court's digital Caselines system.

10. In the event that costs are agreed, the party and party costs are payable within 14 days from the date of taxation, alternatively date of settlement of costs, whereafter interest will be payable at the prescribed rate of interest per annum from the date of taxation alternatively date of settlement of costs to date of payment.
11. The Plaintiff's attorneys shall take all necessary steps to assist the trustee in the formation and registration of the trust for the benefit of the patient to ensure, inter alia, the proper protection, administration and management of the financial and/or related affairs of the said patient according to law.
12. It is recorded that the plaintiff entered into an hourly fee agreement with the attorney of record and not a contingency fee

agreement.

MOLAHLEHI J

Judge of the High court

of South Africa, Pretoria

Representations;

Counsel for Plaintiff: J Bisschoff

Instructed by: Kritzingers Attorneys

For the Defendant: Mr Khuduga Phokwane

Instructed by: State Attorney

Hearing date: 18 November 2022

Delivered: 22 February 2023

[1] (96985)/2016) ZAGPPJHC 293 (4 July 2019).

[2] See *De Jong v Du Pisanie NO* [2004] All SA565 [SCA].

[3] See *A. A. Mutual Insurance Association Ltd v Magagula* 1978 [1] SA805 [A] and *Rad Accident Fund v Guaeds* 2006. [5] SA 583 [SCA].

[4] See the *Pitt v Economic Insurance Co Ltd* 1957 [3] SA 284 [A] at 287 E-

[5] 1923. AD 234 at 246.

[6] See *RAF v Marunga* 2003, [5] SA 165 [SCA].

- [7] 74930/2014) ZAGPPHC 1048y.
- [8] 2011 6 QOD A4 – 52 [ECP],
- [9] 2007
- (6) QOD A4 – 11 [GSJ],
- [10] (20 7454/2013) [2017] ZAGPPHC 161 (A),
- [11] 2003,
- [5] SA 165 [SCA],
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