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

Case number: 5373/2019
Reportable: YES/NO
Of interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

MFUNEKO AUBREY NDUNGANE Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

CORAM: **M E MAHLANGU, AJ**

JUDGMENT BY: **M E MAHLANGU, AJ**

HEARD ON: **2 AND 3 MAY 2023**

DELIVERED ON: **10 MAY 2023**

INTRODUCTION

[1] On 26 March 2017 the plaintiff was injured in a motor vehicle accident. As a result of the injuries, the plaintiff claimed damages from the defendant.

[2] The defendant conceded the merits of the plaintiff's claim and that it is liable to compensate the plaintiff for 100% of any proven damages arising from the collision. The defendant also tendered an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act). The adjudication of the plaintiff's claim in respect of the past medical and hospital expenses is postponed to the pretrial roll of 28 August 2023.

[3] The remaining disputes between the plaintiff and defendant are limited to the contingency to be applied to the loss of income and the amount to be awarded for general damages. The values calculated by the actuary for both the past and future loss of income are not in dispute the only issue in dispute is the contingency to be applied to the calculation.

[4] No oral evidence was led by the plaintiff. The defendant accepted the following expert reports duly delivered by the plaintiff in terms of the Uniform Rule 36(9)(b):

4.1 Prof. P.F. Coetzee- Plastic and Reconstructive Surgeon;

4.2 Dr. A.L Vlok -Orthopaedic Surgeon;

4.3 Dr. A. Van Aswegen-Neurosurgeon;

4.4 Ms Swart-Clinical Psychologist;

4.5 Ms L. Van Zyl-Occupational Therapist;

4.6 Dr. E.J. Jacobs-Industrial Psychologist.

Injuries and sequelae

[5] The general injuries and sequelae of the plaintiff can be summarised that the plaintiff sustained a fracture of the left ulna, frontal haematoma and concussive head injury. He was taken by ambulance from the scene of the accident to Mediclinic Welkom and was discharged on 4 April 2017.

[6] As a result of the injuries sustained by the plaintiff, he had daily headaches, experienced pain in his shoulders when handling loads and when ironing clothes, he experienced pain in his left forearm and he also experienced pain in his two legs and knees.

[7] Born in 1954, the plaintiff was 62 years old at the time of the accident. He was self-employed and owned a mobile kitchen to supplement his income. He was not able to continue with his business after the accident.

Facts in dispute

[8] I have not been tasked to calculate the plaintiff's loss of earnings, but merely to decide the basis on which such calculations were made by the actuary.

[9] Adv H.J. Van Der Merwe, submitted on behalf of the plaintiff that, contingencies should be applied at the rate of 5% in respect of past loss of earnings and 15% in respect of future loss of earnings. He further submitted that an amount of R900 000.00 for general damages would be a fair and reasonable amount.

[10] Ms M. Booysen on behalf of the defendant submitted that, contingencies should be applied at the rate of 15% in respect of past loss of earnings and 25% in respect of the future loss of earnings. She further submitted that, an amount of R350 000.00 would be a reasonable and fair amount for the plaintiff's general damages.

[11] In the matter of **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (AD)** at paragraph 116G-117A Nicholas JA stated that:

> "*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 "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. The amount of any discount may vary, depending upon the circumstances of the case. See Van der Plaats v Sount 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 **Sandler v wholesale Coal Suppliers Ltd 1941 AD 194** at paragraph 199 Watermeyer JA stated that:

> "*The amount to be awarded as compensation can only be determined by the broadest 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 case*."

[13] Munro Forensic Actuaries were instructed by the plaintiff to calculate the past and future loss of earnings based on contingencies of 5% and 15% respectively. The actuaries arrived at the net past earnings of R577 980 and the future loss of earning of R135 745. The plaintiff's total amount of the loss of earning was R713 725.00. The defendant submitted that, applied the 15% and 25% contingencies on their calculations of the past and future loss of earnings. The defendant arrived at the amount of R491 283.00 on the past loss of earnings and R101 808.75 on the future loss of earnings. Ms Booysen submitted that the past loss of earnings amount of R491 283 was as per the RAF instructions and had conceded that it should have been R517 140. She further conceded that the 25% contingency calculation applicable to the future

loss of earnings could have been R119 775. The total amount of the defendant's loss of earnings as per the calculations was R636 915.00.

[14] Mr Van Der Merwe submitted that, the court should take into consideration the age of the plaintiff when the accident happened and the age the plaintiff is left to live. He further submitted that, if the plaintiff was a child, the contingency could have been higher, therefore the 5% and the 15% contingencies were reasonable according to him. The plaintiff was 68 years old at the time of the hearing.

[15] In the unreported judgement of the **Eastern Cape, Grahamstown case no 2159/2012, Ndokweni v RAF** Pickering J considered that, there was no good reason to depart from the normal deduction of 15% in respect of contingencies. I am also not being persuaded to deviate from the plaintiff's 5% and 15% contingency calculation. The defendant has made no case to deviate from the plaintiff's contingency calculations. The calculations were made as the information contained in the Industrial Psychologist report which was accepted by the court as per the agreement between the parties.

[16] In the matter of **De Jongh v Gunther and another 1975(4) 78 (w)** at 80F it was stated that:

> "*In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of certain type of almanack, is not numbered among the qualifications for judicial office*".

[17] That being said, on consideration of all the factors and evidence, I am of the view that a contingency adjustment of 5% to plaintiff's past loss of earnings and 15% to plaintiff's future loss of earnings would be appropriate in the circumstances.

General damages

[18] With regard to general damages, the plaintiff had claimed R900 000.00. Ms Booysen on the other hand submitted that the amount of R350 000.00 would be a reasonable amount for general damages.

[19] In the matter of **AA Mutual Insurance v Maqula 1978(1) SA 805** at paragraphs 809A-B, the then Appellate Division held that it is settled law that a trial court has a wide discretion to award what it in the particular circumstances considers to be fair and adequate compensation to the injured party for his bodily injuries and their sequelae.

[20] Dr Jacobs, the plaintiff's Industrial Psychologist, stated in his report that at paragraph 5(c) '*Mr Ndungane mentioned the following during the interview dated 25 February 202: (c) He had a mobile kitchen outside Bongani Hospitals at the time of the accident (since 2015)*'. He further mentioned in paragraph 12.5(2)(a) that, '*He most likely would have worked in the capacity of his food business (mobile kitchen) to the age of 70 years*.'

[21] Dr Oelofse together with Dr Deacon, the plaintiff's Orthopaedic Surgeons, stated in paragraph 17(1) of their report that *'17.1 From an orthopaedic perspective, the accident and accompanying injuries did not have a detriment effect to his life expectancy*.'

[22] The plaintiff was 62 years of age at the time of the accident and was 68 years of age at the time of the hearing of this matter. That is an indication that the injuries he sustained during the accident did not affect his life expectancy. It was also not denied that the plaintiff was self-employed at the time of the accident. He operated his business to supplement his salary and according to the expert report, he could have been employed until he was 70 years old. Counsel for both sides have referred me to previous comparable cases as is the norm. I do not intend to deal with each case specifically save to state that they are mainly distinguishable from the present because the injuries and consequences in those cases were either more severe or less so. So too do

the personal circumstances of the plaintiffs in those cases differ from that of the plaintiff. However they do serve as a helpful guideline.

[23] I have given all the above factors due consideration and have concluded that an award of R600 000.00 would reflect as a fair compensation for general damages.

Conclusion

[24] I therefore conclude that, it would be fair and just if the contingencies are applied as follows, 5% in respect of past loss of income and 15% in respect of future loss of income. I consequently conclude that the defendant is to pay the plaintiff an amount of R713 725.00 in respect of the past and future loss of earnings.

[25] I have also concluded that an amount of R600 000.00 would be a reasonable and a fair amount to the plaintiff's general damages.

Order

[26] Therefore the following orders are made:

The draft order marked "X" is made an order of this court.

MAHLANGU AJ

REPRESENTATIVES

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