

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

Case number: 3520/2017

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

BEATRIX GERDA THEUNISSEN

Plaintiff

and

GOLDFIELDS RESORT (PTY) LTD

1st Defendant

VIGINIA PARK HOTEL (PTY)LTD

t/a TIKWE LODGE

2nd Defendant

CORAM: M E MAHLANGU, AJ

JUDGMENT BY: M E MAHLANGU, AJ

HEARD ON: 9 MAY 2023

DELIVERED ON: 1 JUNE 2023

Introduction

[1] The plaintiff, Beatrix Gerda Theunissen, instituted a dilictual claim against the defendants for damages arising from the injuries she sustained following an incident

that occurred at Tikwe Lodge, the second defendant, on 8 February 2016 during which she stepped onto a manhole which partially disintegrated and gave way causing her to fall into the manhole and sustain injuries.

[2] The merits were settled on 19 November 2019 in terms of which the defendants agreed to pay 70% of the plaintiff's proven and/or agreed damages.

[3] At the start of the trial, the past medical expenses to the amount of R20 318.39 and general damages to the amount of R204 202.44 were settled between the parties.

[4] The only issues to be adjudicated upon by this court are quantum of the plaintiff's claim in relation to loss of earnings and her claim for future medical expenses.

[5] The experts reports of Mrs A Jansen the occupational therapist and Dr E Jacobs the industrial psychologist were accepted and admitted as evidence as per the agreement between the parties.

Plaintiff's evidence, injuries and sequelae

[6] The plaintiff was 40 year old at the time of the incident. She was self-employed as a valuer and had been working as a valuer for a number of years. At the time of the accident, the plaintiff was performing property inspection at the defendants' property. Her occupation as valuer entailed frequent travelling, walking and standing.

[7] After completing her Grade 12 certificate she proceeded with her studies and she obtained a National Diploma in Commercial Administration and a National Diploma in Real Estate Property Evaluation.

[8] The plaintiff sustained the following injuries as a result of the accident: an injury of the lumbar spine resulting in chronic pain and spasm, a soft tissue injury of

the knee with a possible medical meniscus tear and a soft tissue injury on the ankle with residual pain.

[9] Following the accident the plaintiff was transported to her private General Practitioner where she was prescribed with oral analgesics. She cleaned her abrasions at home.

[10] On 17 February 2016 the plaintiff presented herself at Bloemfontein Madi Clinic as she had persistent pain in her lower back, right knee, left knee and left ankle. She was admitted at the Medi Clinic and was discharged on 19 February 2016.

[11] The plaintiff testified that she is still experiencing acute pain as a result of the accident. She struggles to get out of bed, cannot walk long distances, cannot sit for long periods and struggles with any physical activity, especially because of her back pain.

[12] The plaintiff was wearing a back brace whilst testifying in court as per Mrs A Jansen's recommendation.

Expert witnesses' evidence

[13] I do not intend dealing with the detail of the plaintiff's expert reports. I have considered the contents of the said reports, in conjunction with the respective heads of arguments filed by the parties. I will however shortly refer the evidence of Dr Oelofse and Ms Valentini that was orally given to court.

[14] Dr Oelofse, a specialist orthopaedic surgeon, testified that the most debilitating injury sustained by the plaintiff is the lumbar spine injury. He testified that the injuries sustained by the plaintiff had a profound impact on the patient's productivity, working ability and amenities of life, and will continue to do so in future. He testified that, the back pain suffered by the plaintiff will exaggerate her quality of life and will develop progressive pain. The plaintiff would not be able to continue

doing the work she used to do because of the pain. Dr Oelofse's report was accepted by the court as evidence.

[15] The actuarial calculations were prepared by Ms J Valentini, Mr W Boshoff and Mr C Du Plessis of Munro Forensic Actuaries. Ms J Valentini testified that she co-signed the report. The basis postulated by the industrial psychologist were used to arrive at an amount of R1 527 306.00 for the plaintiff's loss of income after apportionment. They further calculated the total capitalised costs for future medical expenses after apportionment in the amount of R930 244.00.

[16] The defendants submitted in paragraph 41 of their heads of arguments that:

"41. If the court finds that plaintiff is in fact able to do sedentary work, which I humbly submit is the case, then the calculations of Messrs Munro Forensic Actuaries is incorrect as Plaintiff would have earning capacity and accordingly the actual future loss of income is less than calculated."

[17] The plaintiff submitted in paragraph 8 of her heads of arguments that:

"8. The acceptance of the medico-legal reports of Jansen and Dr Jacobs by the Defendant thus affectively closed the door on any arguments, opinions and factual averments contrary to the expert opinions evidenced in these reports. It must therefore be accepted that the Plaintiff, as evidenced by Jansen and as catered for in the report by Dr Jacobs does retain a residual working capacity of the premises that such work will have to be of a sedentary nature."

[18] I am in agreement with the plaintiff's submissions. The expert reports of Mrs J Jansen and Dr Jacobs have been admitted into evidence undisputed. There is no basis for the defendants arguments as there is no evidence to substantiate it.

Contingencies in general

[19] It is trite that the issue of contingencies fall within the discretion of the court.

[20] 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”.

[21] 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.”

[22] Mrs A Jansen, the occupational therapist stated in her report that, spondylosis and chronic pain might affect the productivity of the plaintiff when required to perform sedentary work. She further opined in her opinion that, considering the plaintiff’s injuries as well as the mobility restrictions, the plaintiff might not be considered suited for manual labour occupations where she would be required to perform prolonged

walking and standing or full light and medium to heavier types of physical work and she could therefore be limited in her choices for employment within the open labour market. The chronic pain and degeneration of the spine will further impede the plaintiff's choice of employment.

[23] Dr Jacobs, an industrial psychologist, stated the following in his report at paragraph (3)(a):

“a) The following guidelines were made known by the experts: (1) her capacity is at risk (2) she is only suitable for sedentary work demands with reasonable accommodation (3) she is no longer equally competitive for jobs in the labour market (4) she is not suitable for her pre-incident job as valuer”.

[24] I accept that plaintiff has chronic pain that would impede her from performing her daily duties as a valuer. Considering the plaintiff's evidence and the expert evidence which was not contested, there is no doubt that the plaintiff suffered loss of earning capacity.

Loss of earnings

[25] The actuaries calculated the past and future loss of earnings based on contingencies of 5%, 15% and 35% respectively. The actuaries arrived at the net past earnings of R643 245.00 and the future loss of earning of R1 538 620.00. The plaintiff's total amount of the loss of earning as per the actuaries calculations amounted to R1 527 306 after apportionment. The defendant submitted that, they applied the 12,5%, 20% and 25% respectively on their contingency calculations for the past and future loss of earnings. The defendant arrived at the amount of R592 462.50 on the past loss of earnings and R1 312 435.00 on the future loss of earnings. The defendant's total amount after apportionment is R1 333 428.25.

[26] I am not being persuaded to deviate from the plaintiff's 5%, 15% and 35% contingency calculation. The defendant has made no case to deviate from the plaintiff's contingency calculations. The actuaries calculations were based on the

information contained in the Industrial Psychologist report which was admitted by the court as evidence.

[27] 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”.

[28] The plaintiff referred the court to the matter **Duma v Road Accident Fund (672/2014P) [2019] ZAKZPHC 17 (1 March 2019)** the court stated the following in paragraph 36:

“.... It has generally been accepted that contingencies of 5 per cent to 15 per cent for past and future loss of income have been accepted as ‘normal contingencies’

[29] That being said, on consideration of all the factors and evidence, I am of the view that a contingency adjustment of 5%, 15% and 35% to plaintiff's loss of earnings would be appropriate in the circumstances.

Future Medical expenses

[30] As it has been mentioned herein above, the actuaries calculated the total capitalist costs for future medical expenses after apportionment to the amount of R930 244.00. There is no evidence by the defendants to dispute the amount. I am therefore of the opinion that based on the injuries suffered by the plaintiff as alluded to herein above, the future medical expenses as calculated by the actuaries are fair and reasonable to the plaintiff.

CONCLUSION

[31] I accordingly find that the actuaries contingency calculations, namely, 5%, 15% and 35% respectively applied to the plaintiff's loss of earnings are fair and reasonable. The amount of R1 527 306.00 is a reasonable amount for the plaintiff's loss of earnings. I further find that the future medical expenses as calculated by the actuaries to the amount of R930 244.00 are a fair and reasonable.

[32] Consequently, the draft order marked "X" is made an order of court.

E. MAHLANGU AJ

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