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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 11809/19

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISE:YES/NO

A M M[...]

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NTHAMBELENI AJ

Introduction

[1] This is a loss of support claim brought by the Plaintiff against the

Defendant in her capacity as wife of the now deceased T J I[...] (hereinafter referred to as “the deceased”), who was fatally injured as a result of the motor vehicle accident on the 12th June 2016 at approximately 18h50, at or near House number [...] [...], [...] Street, [...], Gauteng Province, an accident occurred between a motor vehicle with registration letters and numbers [...], the insured motor vehicle there and then being driven by one Mr. Manuel Martihon (the insured driver) and the deceased who at the time of the accident a pedestrian.

[2] In the matter before the court, the Plaintiff seeks remedies for the under settlement of quantum of the loss of support claim in relation to herself and L[...] herein after referred to as the “minor child” born on the [...].

[3] It is common cause between the parties that the issue of liability was settled and furthermore than an amount of R 24 575 (Twenty-Four Thousand Five Hundred and Seventy-Five Rands) in “full and final settlement” was tendered. This action seeks a determination of the true value of the loss of income as the amount tendered was not a true reflection of the true status of the claim or true value of the claim as envisaged by law.

Evidence of the Plaintiff

[4] The Plaintiff was called to the stand to testify and indicated to the Court that; she was approached by the representatives of the Defendant at Sebokeng Hospital. They introduced themselves as representatives of the Defendant acting within the course and scope of their employment at the Defendant. The representatives advised the Plaintiff to lodge a “direct claim” with them without the representation of attorneys or lawyers as the Plaintiff testified in her loss of support claim against the Defendant.

- [5] It is the evidence of the Plaintiff that she indicated to the Defendant's representatives that she required time to lay her husband to rest and that she would thereafter visit their offices at Sebokeng, which she did. The officials of the Defendant asked for the information related to the claim in the form of the Accident Report (AR), Birth Certificate (BC) of the minor child and the death certificate of the deceased. It is the evidence of the Plaintiff that she was given two sets of forms to complete a claim for herself and that of the minor child. The second set of forms were completed by the deceased's mother for the funeral expenses, as she was responsible for the burial of her deceased son. All that resulted on a direct claim lodged with the Defendant on the 11th October 2016.
- [6] The Plaintiff testified that a long period of time passed without any word from the Defendant. Thereafter, one day, the Defendants officials visited their home to make further enquiries in relation to the mother of the deceased, the minor child and her employment status. The visitors identified themselves as the assessors of the Defendant. The Plaintiff testified that a long period passed once again without hearing from the Defendants and thereafter she received a call informing her that they would come with documentation for her to sign.
- [7] A document was presented to the Plaintiff and upon inspection she noted it was headed "Funeral Costs", tendering an amount of R 24 575 (Twenty-Four Thousand , Five Hundred and Seventy-Five Rands). The Plaintiff testified that no further explanation was given in relation to her loss of support claim. The only amount offered was for the funeral costs. Plaintiff stated that she made follow-up enquiries about the loss of support claim lodged with the Defendant. The officials of the Defendant indicated that they were only sent for her to sign the document being presented to her.

- [8] On a follow-up call to the Defendant to enquire about the outstanding claim, the Defendant's representatives confirmed that the money paid to her was in full and final settlement and that the amount paid were inclusive of the deceased funeral costs; Plaintiff's loss of support claim and that of the minor. On perusal of the papers at 002-30 on case lines, a document from the Defendant appears titled "Offer and Acceptance of Settlement" dated 2017/09/01 and the grand total awarded in an amount of R24 575 (Twenty- Four Thousand, Five Hundred and Seventy Five Rands) Section A of the same document describes the payment details and identified funeral costs in the amount of R 24 575 (Twenty-Four Thousand, Five Hundred and Seventy Five Rands) as the amount being offered by the Defendant in the matter.

Common cause facts

- [9] It is common cause that the Defendant appointed the services of an Actuary, Rosewood Technologies, on or about 11th August 2017 and the report was sourced by one Golden Selala at the Defendant's offices in Johannesburg. The actuaries were requested to estimate the present value of the financial loss of support suffered by the dependents of the deceased as a result of his death on 12th June 2016 due to a road accident of 12th June 2016. The calculations sourced by the Defendants' did not factor any vocational improvements on the earnings of the deceased in the matter. On careful analysis of the deceased's employment history, it is clear that he earned a significantly higher salary at CSI Engineering of R 46.60 (Forty-Six Rands and Sixty Cents) per hour which translate to a total figure of R 7 812 (Seven Thousand Eight Hundred and Twelve Rands) a month.
- [10] The Rosewoods calculations incorrectly assumed that the deceased at the point of his untimely death had reached his career ceiling and that only inflationary increases must be taken in to account in calculating the

deceased's prospective income but for his untimely death. It should however be noted that these assumptions were made in the absence of an Industrial Psychologist report. The aforesaid postulation is factually incorrect as it is not supported by the necessary evidentiary report of the expert being an Industrial Psychologist. The deceased was 33 years at the time of his untimely death and the conclusion that he has reached his career ceiling is untenable and the postulation made by the Defendant's actuary is to be rejected on that basis.

- [11] The admissibility of expert evidence hinges on simple rules of evidence that affords the presiding judge discretionary powers to adjudicate with the benefit of expert testimony to assist the Court to reach at a justifiable award. It was clearly not the case in this matter as a reasonable actuary would have foreseen that due to his young age the deceased could not have reached a career ceiling at age 33. Furthermore, the calculations were done without deference to an Industrial Psychologist.

The Negligence of the Defendant in handling and Quantifying the Plaintiff's Claim

- [12] It is trite that the Road Accident Fund Act 56 of 1996, as amended is considered to be social security legislation (*Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) para 17). The object of Road Accident Fund Act (RAFA) as stated in Section 3, thereof is '*the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.*' The courts have held through the years that the primary objective of road accident compensations is to provide '*the greatest possible protection, ..., to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle*' (*Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) 285E-F, *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 23, *Mvumvu and Others v*

Minister of Transport and Another 2011 (2) SA 473 (CC) para 20). In the majority of the case law that deals with RAFA and its predecessors, courts have followed an extensive interpretational approach to widen the ambit of the impact of RAFA. (See *inter alia Berry and Another v SPE Security Patrol Experts and Another* 2011 (4) SA 520 (GNP), and *Jeffrey v Road Accident Fund* 2012 (4) SA 475 (GSJ)).

[13] Therefore, when the Defendant invites the public through their direct claims systems and advises them not to engage the services of attorneys who are professionals in personal injury litigation, the Defendant assumes the professional responsibility to properly quantify their claims and follow all the required protocols in settlement of such claims to avoid the dangers of being the coach, player and referee in their own game which was clearly the case in this matter.

[14] In this matter, the Defendant failed to discharge its full legal and statutory obligations in the settlement of the Plaintiffs claim and the duty it owed to the Plaintiff as it failed to engage the services of an Industrial Psychologist to opine on the probable realistic career path of the deceased and the Plaintiff. Consequently, the Defendant's actuary proposed arithmetic calculation without taking into consideration the deceased career progression up until his age of retirement.

[15] On the evidence presented before the court at the time of the deceased untimely death the deceased was earning an amount of R 39 000 (Thirty- Nine Thousand Rands (per annum, which is R 40 000 (Forty Thousand Rands) less than what the deceased would have earned in the semi-skilled environment as a crane operator. It is clear that there was a complete misrepresentation of the deceased's earnings in the Defendant's actuarial calculations.

[16] Therefore, a prudent claim handler representing the Defendant ought to have sourced the services of an Industrial Psychologist for

guidance to ensure that a proper calculation of the deceased earnings is done.

The Test for Professional Negligence

[17] It is a settled principle of law in South Africa that a person who undertakes to provide professional services to a client, impliedly undertakes that, in the execution of their mandate, in that they will exercise reasonable care and diligence. In this matter, the same is expected from the Defendants in the settlement of the direct claim on behalf of the Plaintiff and the minor child.

[18] The test for professional negligence is a delictual test:

“Professional negligence is the failure by an attorney to act with the competence reasonably expected of ordinary members of the attorney’s profession. An attorney must be meticulous, accountable. He or she must serve his clients faithfully and diligently and must not be guilty of unnecessary delays” [Ramonyai v LP Molohe Attorneys 2010/29310 [2014] ZAGPJHC65 (26 September 2014)]

[19] Furthermore , and above the test for negligence, in the matter of *Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E-F* it was stated as follows:

“For the purposes of liability culpa arise if a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence and the defendant failed to take such steps.”

[20] In *Leketi v Tladi NO & Others* [2010] 3 ALL SA 519 (SCA) at para 18, the court said the following:

“In order to determine whether the appellant exercised reasonable care his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge”.

[21] In this matter the representatives of the Defendant while acting in the course and scope of their employment approached the Plaintiff to use their direct claim system and to avoid the services of “professional attorneys” who generally litigate against the Defendant in personal injury claims. It is trite that the standard of responsibility set out for attorneys is high as confirmed by the Supreme Court of Appeal in *Ramonyai* as cited at paragraph 17 supra.

[22] It is thus clear that the representatives of the Defendant assumed the responsibility of being the *dilegens paterfamilias* to assist the Plaintiff in the handling of her claim. Therefore, there was a clear duty to act in a matter that will avoid the Plaintiff suffering any patrimonial loss as set out in *Kruger* and the *Leketi* matters in paragraph 17 and 18 above. The failure to employ the services of an Industrial Psychologist is a failure to exercise reasonable care on the part of the Defendants employees.

[23] It is thus clear that the employees in this claim tasked with the duty and responsibility to properly assess and compensate the Plaintiff fairly neglected and or failed to do their work properly to the extent where it resulted in the Plaintiff suffering significant loss in respect of what ought to be the true value of her loss of support claim together with that of the minor.

Quantum Claim of the Plaintiff

[24] On the assessment of what was presented as full and final settlement to

the Plaintiffs claim it is clear that the Plaintiff and the minor could not be sustained with an amount of R 24 575 (Twenty-Four Thousand, Five Hundred and Seventy-Five Rands) as a loss of support claim based on the Defendant's wrong calculations.

[25] It is thus clear that the failure to engage the services of an Industrial Psychologist resulted in wrong calculations. In addition, it is abundantly clear that the services of an Industrial Psychologist would have changed the conclusions of the actuary based on the following reasons:

25.1 deceased's age as a 33 old;

25.2 at an early development of his career;

25.3 there were possibilities to obtain further skills in his industry;

25.4 it is thus untenable that he could have reached his career ceiling at the age of 33;

25.5 it is postulated that at age 45, he would be earning about R15 500 (Fifteen Thousand and Five Hundred Rands) monthly on an upper quartile scale of a semi-skilled work environment.

[26] The services of an Industrial Psychologist are sourced to determine the possible career progression including the determination of the future value of the loss as confirmed in the matter of *BB v Road Accident Fund* (11676/2017) [2020] ZAWCHC 15 (28 February 2020) paragraph 3 where it was stated as follows “ *An industrial psychologist, Dr Richard Hunter, who testified at the instance of the plaintiff, opined that: considering his age, education and training, employment history, as well as collateral obtained, it seems reasonable to conclude that had the deceased not died in the accident he would probably have remained with his employer until normal retirement age’, I am in*

agreement with that assessment”.

- [27] On the claim before the court the Plaintiff obtained the medico-legal report of Joey Buitendach & Associates the Industrial Psychologist who correctly postulated the pre-accident and post-accident scenarios of the deceased. The deceased monthly income was R 3 000 (Three Thousand Rands).
- [28] In the sector where the deceased was working, he was categorized as a semi- skilled worker (Koch 2020 *Quantum yearbook*) and on the scenario where the accident would not have happened; he would have worked until his normal retirement age of 65 years at the year 2048.
- [29] Post-accident the minor and the Plaintiff have been adversely impacted by the death of the deceased and have thus lost a source of solid financial support as a result of his death. However, the court notes that the Plaintiff is a 36 year -year-old with high prospects of re-marriage and as such a 7% contingency should be applied based on a statistical guide (Koch 2021 at page 16).
- [30] The Plaintiff commissioned the services of an actuary Ekhaya Risk Services to calculate the loss of support that was suffered by the minor and the Plaintiff in this matter. The loss of support to be considered by the court is scenario 2 that caters for the loss until the age of 21 years for the minor. The total for the spouse in the scenario is R 456 086 (Four Hundred and Fifty-Six Thousand and Eighty-Six Rands) and R224 612 (Two Hundred and Twenty- Four Thousand, Six Hundred and Twelve Rands) is for the minor. As a result, the total loss of support claim to be R 680 699 (Six Hundred and Eighty Thousand, Six Hundred and Nighty Nine Rands).
- [31] In the circumstances, it is ordered that:

1. The Defendant shall pay to the Plaintiff the total of R 680 699 (Six

Hundred and Eighty Thousand and Six Hundred and Eighty Nine Rands) divided as follows:

- 1.1 an amount of R 456 086 (Four Hundred and Fifty-Six Thousand and Eighty-Six Rands) in respect of the loss of support towards the Plaintiff;
 - 1.2 an amount of R 224 612 (Two Hundred and Twenty-Four Thousand, Six Hundred and Twelve Rands) in respect of the Minor.
2. Plaintiff Attorneys are ordered to create a trust to the sole benefit of L[...] the minor born on the [...] and costs to be incurred for the creation and administration of the trust are to be paid by the Defendant.
3. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10% per annum calculated from the 15th calendar day after the date of this Order to the date of payment.
4. The Defendant shall pay the Plaintiffs taxed party and party costs on High Court scale, subject thereto that:
 - 4.1 In the event that the costs are not agreed:
 - 4.1.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record.
 - 4.1.2 The Plaintiff shall allow the Defendant 14 (fourteen) court days from the date of allocatur to make payment of the taxed costs.
 - 4.1.3 Should payment not be effected timeously, the Plaintiff

will be entitled to recover interest at the rate of 10% per annum on the taxed or agreed costs from the date of allocator to date of final payment.

4.2 Such costs shall include

4.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 1 and 3 above;

4.2.2 The costs of counsel, including counsel's charges in respect of his full-day fee for 02 December 2020, 14 May 2021, 13 May 2021, and 18 May 2021, as well as reasonable preparation costs;

4.2.3 The costs to date of this order, which costs shall include but not limited to necessary travelling costs and expenses (time and kilometers), preparation for trial and attendance at Court which shall include all costs previously reserved, the reasonable cost of consulting with the Plaintiff to consider the offer, the cost incurred to accept the offer and make the offer an order of the court, if any;

4.2.4 The cost of the Industrial Psychologist, Actuarial Report and their affidavits obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiffs bundles, irrespective of the time elapsed between any reports by an expert;

4.2.5 The reasonable and taxable preparation of, qualifying and reservation fees, if any, in such amount as

allowed by the Taxing Master, of the experts as in 3.2.4 above;

4.2.6 The cost and expenses incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations.

4.2.7 The costs of holding all pre-trial conferences and judicial management meetings, as well as round table meetings between the legal representatives for both the plaintiff and the defendant, including counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials, if any;

4.2.8 The costs of and consequent to compiling all minutes in respect of pre-trial conferences, including counsel's charges;

4.2.9 Costs of an interpreter;

4.2.10 The full travelling costs of the Plaintiff, who is hereby declared necessary witnesses;

4.2.11 The reasonable costs for the preparation, attending, travelling expenses and time spent for conducting an inspection in loco, if any;

5. The amount referred to in paragraphs 1, 2 and 3 will be paid to the Plaintiff's Attorneys, Nhlanhla Hlongwane Attorneys, by direct transfer into their trust account, details of which are the following:

Account Holder : Nhlanhla Hlongwane Attorneys

Bank First	:	First National Bank
Account Number	:	[...]
Account Type	:	Trust Account
Branch	:	Sunny Park
Branch Code	:	250645
Reference no	:	NHAR0011

6. There is a Contingency Fee agreement applicable between the Plaintiff and the Plaintiff's counsel is ordered to upload the agreement on caselines.

RR NTHAMBELENI
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Appearances

PLAINTIFF'S COUNSEL: Adv R Maphutha

INSTRUCTED BY: Nhlanhla Hlongwane Attorneys

DEFENDANT'S COUNSEL: No appearance

HEARD ON: 18 May 2021

DATE OF JUDGMENT: 31 May 2021