



THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED
	<u>02/02/2018</u> <u>N. Bam</u>
	DATE SIGNATURE

2/2/18

CASE NO: 15233/16

In the matter between:

K F MARMAN

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

BAM AJ

- [1] The Plaintiff instituted a damages claim against the Defendant for injuries and loss suffered as a result of a motor vehicle accident that occurred on 1 November 2014. At the time of the accident, she was employed in a mine laboratory as a section operator. She sustained serious injuries that necessitated a five-month stay in hospital. She was only able to return to work

a year later where she was accommodated to perform light duties. Due to the gratuitous nature of her current foreman, she has not only retained her position (despite her physical shortcomings to perform all the tasks) she also got a promotion during 2016 – which apparently, she should have gotten during 2015 because it is automatic.

- [2] Before the trial could commence, the parties addressed the court to the effect that the Defendant had conceded the merits of the case as well as the general damages portion of the claim in the amount of R600 000.00 (six hundred thousand rand). It also appeared that the Defendant did not wish to argue against the remaining calculations regarding past and future loss of income and indeed counsel confirmed that the only issue in dispute was the contingencies applicable to the amounts claimed thereunder.
- [3] Counsel for the Plaintiff referred the court to sections of various expert reports in a bid to clarify how the claimed amounts were reached and why the contingencies were proposed to be 5 percent and 15 percent in respect of past and future loss of income respectively. The Defendant on the other hand had not filed any expert reports and sought to argue in favour of increased contingencies on the basis of information contained in the expert reports handed in by the Plaintiff. In short, the argument was that there should be a 20 percent increase in the contingencies to be deducted from the amounts presented by the Plaintiff – at 10 percent more per proposed award. Counsel for the Defendant justified this deduction by pointing out that:

- (i) the plaintiff had a pre-existing condition of hypertension before the accident and this should be taken into account in determining the award due; and
- (ii) the Plaintiff not only got her job back, she also got a promotion, which of necessity should lead to a reduction in the amount to be awarded for loss of earnings.

[4] The Defense counsel had referred to own calculations which were handed up from the bar. The court cannot accept these because not only were they not part of the bundle, the Plaintiff's counsel had not seen them and therefore could not even argue on their reasonableness or otherwise. Thus, at the end of the day, the only evidence that was available to the court was the Plaintiff's, in the form of various expert reports and as well as guidance from the actuarial calculations.

[5] The aforesaid evidence of the Plaintiff painted the following picture:

- 5.1 at 44 years of age, she was productively employed before the accident;
- 5.2 due to the accident, she suffered serious injuries of a permanent nature;
- 5.3 her 5-month stay in hospital and subsequent return to work a year later caused her to earn less due to no overtime and other allowances and also to lose an earlier opportunity to get a promotion;
- 5.4 her inability to perform her tasks as before places her in a vulnerable employment position of possible termination;

- 5.5 future deterioration and probable hip replacement will diminish her capacity to work even further;
- 5.6 if she were to lose her current job, it is highly probable that she will become unemployable;
- 5.7 even if she were to remain in her current employment, her retirement has been hastened due to probable incapacity aggravated by the injuries;

The Plaintiff's heads of argument also cited different cases in a bid to indicated to the court that plaintiffs who suffered similar serious injuries were awarded damages in the range of what the plaintiff is claiming.

- [6] Counsel for the Plaintiff reiterated that the pre-existing condition was not what placed his client in the predicament facing her, it was the accident. There was no evidence to the effect that because of hypertension, she could not perform her tasks previously – in fact, she could in spite thereof.
- [7] Having listened to argument from both sides, the court has to decide whether the contingencies, in light of the facts placed before court, need to be increased as requested by the Defense or accepted as presented by the Plaintiff. Reliance on the other cases presents its own problems as each case has its own peculiar facts even if the overall circumstances may appear similar. However, one can rely on other cases insofar as they provide acceptable parameters and serve as a useful guide to making an appropriate award. (see **Road Accident Fund v Marunga 2003 (5) SA 164 SCA at 169 G-H**). Where, as in this case, the defense has provided nothing to disprove

any of the evidence presented by the Plaintiff, the court has to rely on that evidence to the extent that it is well articulated and probable. Applying contingency deductions to future loss or expenses awards is a problematic exercise because it is informed by speculation regarding relevant events which may or may not eventuate. The use of professional services such as those of actuaries assists the courts to follow a certain generally acceptable standard in determining personal injury related awards. But at the end of the day, the specific facts of the case in front of the judge must be taken into account.

[8] The Plaintiff in this case has resolved to stay within the "normal contingency" bracket of 5 and 15 percent in respect of past and future loss of income respectively. The Defendant on the other hand wants to have these percentages increased but offers no basis upon which this increase can be justified. The issues of pre-existing condition and promotion by themselves do not assist the court and more importantly, do not displace any of the evidence tendered by the Plaintiff. The hypertension did not affect the Plaintiff's performance and the promotion; which is not performance based; was delayed by over one year as a result of the sequelae of the accident. It is my view that the contingencies applied by the plaintiff's counsel are reasonable and should not be interfered with.

[9] I now wish to join the chorus of concerns raised by courts over and over regarding the conduct of cases of this nature by the Road Accident Fund's legal representatives. On top of the list is lack of preparedness. Most of the attorneys seem to attend pre-trial conferences without having obtained instructions on the well-known issues that are to be addressed there. The

normal responses noted in the minutes vary from “Noted”, “Will revert”, to “Yes, but rights are reserved”. In a majority of cases, this remains the position until the date of trial. Counsel is often briefed late and comes to court to find that the instructions are inadequate and do not afford him or her any room to challenge the plaintiff’s case. One would like to think that attorneys have ample time to take instructions on the known aspects of the litigation process. A prudent attorney should be in a position to advise his client when their case is weak and offer legal solutions which will result in reduction of costs.

- [10] It is also a fact that attorneys struggle to get instructions from the claim processors and are often left red faced when they have to apply for a postponement which if granted comes with a heavy costs order. Often this is due to the last minute realisation that the merits are weak and/or quantum is likely to be successfully negotiated. This practice of settling, especially RAF matters, on the door step of the trial court should be discouraged because it disrupts the smooth running of the judicial processes and clogs the roll with matters which collapse on the trial date which date could have been allocated to other matters. I hope the court’s bid to bring this untenable situation to the attention of the Fund’s Chief Executive Officer will bear fruit soon. [(see Spilg J’s comments in **Ndlovu v The Road Accident Fund 2014 (1) SA 415 (GSJ)** at 434E – 437G) and those of Satchwell J in **Motswai v Road Accident Fund 2013 (3) SA 8 (GSJ)**]

- [11] The Plaintiff handed up a draft order which I had to hold in abeyance pending my determination of the contingencies argument. In light of the fact that the Defense has failed to satisfy the court that the contingencies proposed by the

Plaintiff were unreasonable and liable for an upwards adjustment means that the draft order is in line with my findings in this matter. The costs have already been addressed and included in the draft order.

In the premises I make the following Order:

1. The draft order annexed hereto and marked "X" is hereby made an Order of Court and the contents thereof are to be read as if incorporated herein.



LJN BAM

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION

APPEARANCES:

AD CASE NUMBER: 15233/16

PLAINTIFF

Counsel for the applicants: JP van den Berg

Instructed by: Adams & Adams
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Pretoria
Tel: 012- 432 6000
Ref: NK/hns/P1811

DEFENDANT

Counsel for the Defendant: Mr Singo
Instructed by: Mkhonto & Ngwenya Inc.
471 Belvedere Street

Arcadia, Pretoria

Tel: 012 – 323 7210/645 1039

Ref: DLAMIMNI/RAF/001854/np

Date of hearing: 29 January 2018

Date of judgement: 2 February 2018

"X" N.Bam
31/01/2018

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

HELD AT PRETORIA ON THIS THE 29TH DAY OF JANUARY 2018 AT COURT ROOM 8G BEFORE
THE HONOURABLE JUSTICE BAM, AJ.

CASE NO: 15223/2016

In the matter between:

MARMAN, K, F

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and Defendant and by agreement between the parties

THE COURT GRANTS JUDGMENT in favour of the Plaintiff against the Defendant in the following terms:

- 1.1 The Defendant shall pay the sum of **R 1 520 962.27 (ONE MILLION FIVE HUNDRED AND TWENTY THOUSAND NINE HUNDRED AND SIXTY-TWO RAND AND TWENTY-SEVEN CENTS)** to the Plaintiff in settlement of the Plaintiff's claim to the Plaintiff's attorneys, Adams & Adams, payable by direct transfer into their trust account with the following details:

Nedbank

Account number : 160 431 8902

Branch number : 198765

Pretoria

NB

Ref: NK/P1811

- 1.2. The aforementioned total amount of **R 1 520 962.27 (ONE MILLION FIVE HUNDRED AND TWENTY THOUSAND NINE HUNDRED AND SIXTY-TWO RAND AND TWENTY-SEVEN CENTS)** is comprised of as follows:

1.2.1	Past medical expenses	R 834.27 ✓	
1.2.2	Future medical expenses	Section 17 (4)(a) Undertaking ✓	
1.2.2	Loss of income and earning capacity	R 920 128.00 ✓	
1.2.3	General damages	R 600 000.00 ✓	
		R1 520 962.27	

- 1.3 The total amount referred to in paragraph 1.2 above will not bear interest unless the Defendant fails to effect payment thereof within 14 (FOURTEEN) calendar days of the date of this Order, in which event the capital amount will bear interest at the rate of 10.25 % per annum calculated from and including the date of judgment to and including the date of payment thereof.
- 1.4 The Defendant shall forthwith provide to the Plaintiff an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 1996, for the payment of 100% of the costs of **KELEBOGILE FLORENCE MARMAN's** future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her resulting from the injuries sustained by her in the motor collision which occurred on 1 November 2014, after such costs have been incurred and upon proof thereof.
2. The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include the following:

WB

- 2.1 All the fees of Senior Counsel on the High Court Scale;
- 2.2 All fees of the translator, Mr Mphela Mogaladi.
- 2.3 The reasonable taxable costs of obtaining any further expert / medico-legal and actuarial reports from the Plaintiff's experts which were furnished to the Defendant, if any;
- 2.4 The reasonable taxable preparation and reservation fees, if any, of the following experts:
 - 2.4.1 Dr. J J Du Plessis;
 - 2.4.2 Dr M Mazabow;
 - 2.4.3 Dr K Truter;
 - 2.4.4 Dr VM Close;
 - 2.4.5 Dr F Greef;
 - 2.4.6 Dr I J Van Heerden;
 - 2.4.7 Dr B P White;
 - 2.4.8 Mr L Randall
 - 2.4.9 Mr E Noble; and
 - 2.4.10 Mr G Whittaker.
- 2.5 The costs incurred in obtaining payment of the amount mentioned in paragraph 1.2 above;
- 2.6 Reasonable travelling costs incurred by the Plaintiff in attending medico-legal appointments with the parties' experts;
- 2.7 The costs of a consultation between the Plaintiff and her attorney to discuss the settlement offer received from the Defendant and the terms of this order;



- 2.8 The above costs will also be paid into the aforementioned attorneys trust account.
3. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-
- 3.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;
- 3.2 The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;
- 3.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25 % on the taxed or agreed costs from date of allocatur to date of final payment.
4. Contingency fee agreement is applicable.

BY ORDER OF THE COURT

**ADAMS & ADAMS
NK/SKS/P1811**

Counsel for Plaintiff:
Adv. J Van den Berg
012 452 8725
Brooklyn Chambers

Counsel for Defendant:
Adv. H Singo
078 869 2976

