

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

24/2/2017

CASE NO: 19931/2006

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

O M

Plaintiff

and

VUYTSILE MOSES RA.JUTILI

Defendant

DATE OF HEARING: 22 NOVEMBER 2016

DATE OF HEADS OF ARGUMENT 12 DECEMBER 2016

DATE OF JUDGMENT 24 FEBRUARY 2017

JUDGMENT

MANAMELA, A.J

Introduction

[1] The plaintiff sued the defendant for damages relating to injuries sustained from a motor vehicle accident which took place on or about 13 November 2005 in Centurion. Pretoria. The plaintiff sued for, and has already been paid an amount of R25 000.00 for her damages by the Road Accident Fund in terms of the provisions of the Road Accident Fund Act 56 of 1996. She is now proceeding against the defendant for her damages in an amount of R3 295 579.53 together with interest and costs of suit.¹

¹ See the pleadings bundle on index pp 4 - 10.

[2] A separation of issues relating to merits from those relating to quantum was ordered by this Court on 4 February 2009 in terms of Uniform Rule 33(4). In terms of the same order the defendant was held liable to the plaintiff in respect of proven or agreed damages less the amount paid by Road Accident Fund. The current determination of the issues relating to *quantum* was postponed *sine die*.

[3] The plaintiff was a minor and passenger in a motor vehicle driven by the defendant at the time of the accident. The summons was initially issued on her behalf of her mother Ms Cornelia Ntebo Makama and she replaced her as the plaintiff herein after attaining majority age.

[4] When the matter came up before me on trial, there was no appearance on behalf of the defendant. Mr .JA Sanders appeared for the plaintiff and submitted that the matter was properly set down by a notice served through the sheriff at the defendant's work address.² The notice was served on another person after failed several attempts by the sheriff including leaving messages for the attention of the defendant.³ However, there has been previous service of documents on the same address including summons.⁴ Attorneys previously on record for the defendant withdrew as far back as 18 June 2009.

[5] Therefore this matter is to be decided almost like a request for default judgment. However I have the benefit of written and oral submissions by counsel for the plaintiff, and medico-legal reports filed by the plaintiff. There are no expert reports filed on behalf of the defendant and the defendant's plea does not shed much light if anything regarding the version of the defendant. I reserved judgment at the end of a very brief hearing and requested counsel to file detailed heads of argument by 12 December 2016. I am grateful to counsel for the written heads of argument.

Injuries and their sequelae (medico-legal opinions)

² See the notice bundle on index p 90.

³ *Ibid.*

⁴ See the pleadings bundle on index p 11.

Orthopaedic Surgeon

[6] According to the report of Dr DA Birrell, an orthopaedic surgeon which in fact is based on opinions expressed in the medical form by Dr Fitzgerald the plaintiff sustained the following injuries: bilateral central disc dislocations of both hips: the right pubic ramus fracture with opening of the sacroiliac joint (which was undisplaced): a sacroiliac joint fracture on the left: a left acetabulum fracture superior and inferior: bilateral femur fractures, mid shaft left and distal on the right; a right malleolus fracture lateral (fibula) undisplaced; a right foot, third fourth and fifth metatarsal fractures with degloving of the right foot and the left foot lateral and medial side of foot wounds, plus-minus 10 cm.⁵

[7] It is no doubt that the above-mentioned injuries are of a series nature and are concentrated or located on the lower limbs inclusive of the pelvis. From an orthopaedic point view the plaintiff would require further medical attention, including an arthrodesis.

Occupational Therapist

[8] Ms Leazanne Toerien furnished a medicolegal report as an occupational therapist, after assessing the plaintiff on 30 January 2013.⁶ According to Ms Toerien, the plaintiff would benefit from occupational therapy intervention in order to, among others, aimed at measures to reduce fatigue and enhance participation: protect affected joints (right ankle) and reduce deterioration: reduce discomfort and inputs on vocational rehabilitation for appropriate career options.⁷

Plastic Reconstructive Surgeon

[9] Mr P Bruce White furnished a report as plastic reconstructive surgeon dated 28 March 2013.⁸ According to Mr White, his examination of the plaintiff revealed, among others, the presence of the following: an extremely abnormal gait: slow-walking movement: inability to place the right heel on the ground: bilateral unsightly hyperpigmented indented surgical scars overlying both trochanteric regions with a

⁵ See the expert bundle on index p 2.

⁶ See experts bundle on indexed pp 30-68.

⁷ See experts bundle on indexed pp 54-55.

noticeable drain site scar just below each of these areas: bilateral hyperpigmented raised surgical punctate scars overlying both lateral femoral regions: diminished movement of the toes of the right foot and diminished sensation of the dorsum of the right foot.⁹ Mr White recommends further conservative and operative intervention, but opines that even after such intervention the plaintiff would remain with unsightly permanent scars and gross unsightly scarring on the right foot which cannot be revised.¹⁰

Educational Psychologist

[10] There is an educational psychologist's report prepared by Miss Madelien Mills,¹¹ after assessment of the plaintiff on 15 October 2013. Ms Mills states that the plaintiff or her mother reported that before the accident she did not repeat a grade, but repeated grade 9 as she was unable to write her examinations due to hospitalisation. She thereafter also failed grade 11 and passed grade 12 in 2010 when she was about 19/20 years of age.¹²

[11] It is also reported by Ms Mills that the plaintiff wanted to pursue legal studies at the University of Pretoria, but despite qualifying matric grades or marks and favourable financial policy of this institution, the plaintiff decided to take a gap year. During the gap year, she "suddenly" took up a position of trainee fitter at a mining company and did not even apply for admission for the subsequent years. Her mother says the plaintiff lacks the courage to leave a familiar environment in order to go to university.¹³ She has been working at Anglo-American Platinum since 2011 and obtained an N2 Certificate in engineering drawing and science, and fitting and machining theory on a part-time basis in 2012. She was aspiring to obtain a trade certificate or artisan qualification at the end of 2013.¹⁴

[12] Ms Mills reported that during the assessment the plaintiff did not show any obvious signs of distractibility and seemed to do her best in given tasks but stated that the results

⁸ See experts bundle on indexed pp 69-81.

⁹ See experts bundle on indexed pp 73-74.

¹⁰ See experts bundle on indexed p 77.

¹¹ See experts bundle on indexed pp 89-115.

¹² See experts bundle on indexed pp 97-98.

¹³ See experts bundle on indexed pp 98-90.

¹⁴ *Ibid.*

of the assessment should provide adequate estimation of her current level of functioning.¹⁵ She further reported that the results of assessment indicate that the plaintiff is currently struggling with symptoms in keeping with severe depression, anxiety and stress, and that anxiety and stress result in a state of nervous tension, irritability, impatience and overreaction to situations.¹⁶ According to Mills the plaintiff's emotional problems will have a negative effect on social relationships and ability to function adequately in the work place.¹⁷

[13] Ms Mills recommends psychiatric assessment to determine whether the plaintiff will benefit from medication for depression and anxiety. She also recommends psychotherapy sessions to help the plaintiff cope with her problems and address her low self-image.¹⁸

Industrial Psychologist

[14] Miss Cecile J Nel prepared a report as an industrial psychologist for the plaintiff.¹⁹ She evaluated the plaintiff on 3 December 2015. She stated in her report that the plaintiff was still in the employ of Anglo-American Platinum as at the date of evaluation and was earning a monthly salary of R20 265.00 plus benefits like standby allowance, rental subsidy, market allowance, provident fund, medical aid, 13th cheque and 6 monthly production bonus etc.²⁰

[15] Ms Nel is of the view that the plaintiff does not qualify for past loss of income as she was a learner at the time of the accident save for the delays occasioned by the accident.²¹ She reported that the workplace feedback regarding the plaintiff's performance states her performance as below average: struggling with her legs: unable to carry or lift heavy objects and requiring intermittent use of other people's assistance.²² However, her memory is good and there are no complaints or disciplinary

¹⁵ See experts bundle on indexed p100.

¹⁶ See experts bundle on indexed p112.

¹⁷ *Ibid.*

¹⁸ See experts bundle on indexed p115.

¹⁹ See experts bundle on indexed pp116-140.

²⁰ See experts bundle on indexed p 123.

²¹ See experts bundle on indexed p 124.

²² See experts bundle on indexed p 125.

actions against her although the plaintiff is accommodated by being placed in a section with fewer stairs and receives assistance much of the time.²³

[16] The industrial psychologist concluded that the plaintiff's chances have been curbed in respect of her continued and future employment prospects: "her earning capacity and likely future earnings have been curtailed to a moderate to significant degree, depending on the job content, and resulted in a partial loss of income, since the plaintiff is considered to be employable albeit not at her pre-morbid level of functioning in the open labour market."²⁴ She recommended, among others, that the plaintiff's loss of earnings be based on premature retirement: consideration that a moderate to significant truncation of a range of job choices level of occupational functioning and competitiveness in the open labour market has occurred.²⁵

Some joint experts' opinions

[17] The industrial psychologists and other experts postulate three possible scenarios regarding qualifications for the plaintiff: her acquiring recognised certificate (NQF level 05 in terms of the South African Qualifications Authority (SAQA) higher than her current trade qualification (NQF level 05) or recognise diploma (NQF level 06 i.t.o. SAQA) or university degree (NQF level 07 i.t.o. SAQA).²⁶ ²⁶ This, if attained, would result in different job or career and salary prospects for the plaintiff.

[18] However, the following are stated as limitations to the plaintiff's qualification or career prospects due to the accident: physically demanding work (should rather opt for sedentary to occasionally light physical work). and financial constraints on her ambitions of becoming a lawyer, although this is an option with better employment prospects as lawyers mostly work in a sedentary position.²⁷ I hasten to point out that I find the latter limitation arguable, as it was indicated above that the plaintiff had obtained qualifying marks for admission to legal studies and the University of Pretoria has favourable financial policy for students, but it was only the plaintiff who opted to obtain her current employment

²³ See experts bundle on indexed p 125-126.

²⁴ See experts bundle on indexed p 138.

²⁵ *Ibid*

²⁶ See experts bundle on indexed p 134-135.

²⁷ See experts bundle on indexed p 134-135

in the mining sector.²⁸

Appropriate damages award (a discussion)

[19] The issue to be determined in this matter is whether the plaintiff's job prospects have been limited or curtailed by the injuries sustained in the accident resulting in a reduced earning capacity. This is further from any issue of general damages which I will deal towards the end.

[20] The expert opinions, some of which are discussed above, state that the Plaintiff cannot do heavy work due to her injuries or their *sequelae* but only sedentary to moderately light work. The experts conclude that her future earning capacity is curtailed by this limitation. I agree.

[21] However, I am also hearing in mind the fact that the plaintiff has been employed by one employer since 2011, even though the employer's feedback indicates below average performance with some level of accommodation of the plaintiff's limitations. She has nevertheless escaped disciplinary action by the employer and no complaints were lodged against her.

[22] As hinted above, I hold the view that there is a possibility that the plaintiff could still pursue a job or career which does not require the lifting of heavy objects, like qualifying as a lawyer, given the fact that she reportedly obtained the relevant grades to gain admission to tertiary institution in this regard. I have already stated my doubts regarding the views on financial limitation. Besides, the plaintiff may opt to study on a part-time or distance basis; use her current employment status to obtain financing for her studies or even save money for this objective. But I accept the limitations or complaints, like depression and stress, may have a bearing on her career or academic qualification prospects.

Actuarial Calculations

²⁸ See par 11 above.

[23] Gerard Jacobson Consulting Actuaries prepared a report dated 26 January 2016.²⁹ The actuary suggested various scenarios and bases obviously influenced by expert opinions, particularly the industrial psychologist's. I do not intend crisscrossing every aspect of the actuarial report. Also, I am mindful of the fact that actuarial reports and other expert reports for that matter, although based on expertise and being of immense benefit to the Court, are only a guide and part of all of the other evidence before the Court.³⁰

[24] In my view, despite what I said above regarding the plaintiff pursuing legal studies, it is reasonable to conclude that the plaintiff would have obtained a diploma qualification by 2018, but for the accident: would have worked until retirement age of 65, but for the accident, and is now to retire slightly early at the age 63, having regard to the accident.³¹ Therefore, I prefer "Basis 11A" of actuarial calculations. Therefore, I will apply contingency deductions I consider appropriate under the circumstances to arrive at the damages award befitting the damages suffered by the plaintiff.

Conclusion

Loss of earning capacity

[25] However, instead of applying 40% contingency deduction to the plaintiff's value of income having regard to the accident, I will only apply a 30% contingency deduction in this regard. This would result in a contingency deduction in an amount R2 026 822.20 from R6 756 074.00 (income having regard to accident) and a balance of R4 729 251.80 (net value of income having regard to accident). The result is a net future loss of R1 454 045.20. Therefore, I will award to the plaintiff an amount of R1 692 732.20 (i.e. R238 687.00 for past loss and R1 454 045.20 for future loss) as past and future loss of income.

General Damages

²⁹See the actuarial report on indexed pp 141-152.

³⁰ See Potgieter et al Visser & Potgieter Law of damages 3rd ed (Juta Cape Town 2012) at p 467: See Klopper HB Law of Third-party Compensation 3rd ed (LexisNexis Durban 2012) at p 177.

[26] The plaintiff had claimed an amount of R500 000.00 with regard to this head of the damages claim. Plaintiff's counsel referred me to various comparable cases for which I am grateful. I have also considered other available authorities and opinions of experts herein but do not deem it necessary to detail aspects thereof for a determination to be made here.

[27] However prominent in my mind is the conclusion by the plastic and reconstructive surgeon that even with intervention the plaintiff will not be fully relieved of "unsightly scarring" or disfigurement to her body, which is permanent.³² This, in my view, also has a bearing on the plaintiff's emotional and psychological status apart from the consequential pain and suffering. Therefore, based on all the above, I consider an amount of R450 000.00 as appropriate award to the plaintiff in respect of general damages.

[28] Therefore, the total amount of loss awarded to the plaintiff in respect of the damages suffered is in the amount of R2 117 732.20 (i.e. R1 692 732.20. in respect of loss of earning capacity plus R 450 000.00. in respect of general damages. less R25 000.00 already paid by the Road Accident Fund).

Order

[29] I therefore make the following order:

1. The Defendant shall pay to the Plaintiff the amount of **R2 117 732.20 (two million one hundred and seventeen thousand seven hundred and thirty-two rand twenty cents)**:
2. Interest on the amount of **R2 117 732.20 (two million one hundred and seventeen thousand seven hundred and thirty-two rand twenty cents)** at the rate of 10.5% per annum from date of this order to date of payment:
3. Costs of suit.

K. La M. Manamela
Acting Judge of the High Court

³¹ See the actuarial report on indexed p 147.

24 FEBRUARY 2017

Appearances:

For the Plaintiff

Instructed by

Adv .JA Sanders

Van Velden Duffey Attorneys

c/o Weavind and Weavind,

Pretoria

For the Defendant

trial)

In person (hut no appearance at

³² See par 9 above.