

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 54766/12

Date: 6 February 2015

Not reportable

Not of interest to other judges

In the matter between:

F[...] Z[...] P[...] & OBO J[...] H[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

VAN DER WESTHUIZEN, AJ

[1] On 2 September 2010 at or near Eloff, a collision occurred between two vehicles, one being driven by the plaintiff and in which her daughter, J[...] H[...] (H[...]), was a passenger. Both were injured in the collision. At the time of the collision, the daughter was 8 years old.

[2] The plaintiff instituted action against the Road Accident Fund for compensation in respect of the damages and injuries suffered by the plaintiff personally and on behalf of her minor daughter, H[...], in respect of those suffered by H[...].

[3] The matter was set down for trial on 28 January 2015.

[4] Prior to the hearing of the matter, the defendant conceded the merits on a 70/30% basis in favour of the

plaintiff.

[5] In respect of the plaintiffs claim in her personal capacity the claims were settled and the parties agreed upon the apportionment of the various rubrics, the issue of costs and ancillary relief and collated in a draft order that I shall incorporate in the order I propose to make.

[6] With regard to the plaintiffs claim on behalf of the minor daughter, the only issue in dispute related to the alleged future loss of earning capacity on the part of the minor daughter as a result of the *sequelae* of the accident. The dispute is limited to whether in fact H[...] suffered a loss in her earning capacity in future due to the *sequelae* resulting from the accident.

[7] The balance of the plaintiffs claims in respect of her minor daughter were settled between the parties and contained in a draft order prepared by the parties and which I shall incorporate in the order that I propose to make.

[8] It is common cause that the defendant had submitted no independent expert reports and had accepted those submitted by the plaintiff in respect of the minor without qualification.

[9] At the trial the plaintiff, on the issue in dispute, led the evidence of two expert witnesses, that of Mr Leon Roper, a clinical psychologist who specialises in neuropsychological effects due to trauma, and Dr Yvette Wilms, an Industrial Psychologist. Both had submitted clinical reports prior to the hearing of the trial. The defendant admitted the reports by Mr Roper and Dr Wilms without qualification.

[10] The plaintiff submitted further clinical reports prepared by other experts in their respective fields and the defendant also admitted those reports without qualification. All the aforementioned reports were contained in a bundle handed in as Exhibit B. Both plaintiff and defendant referred to reports by other experts as contained in Exhibit B and in particular those of:

(a) Dr Anton H van den Bout, an orthopaedic Surgeon (dated 27 September 2012);

(b) Dr Piet Engelbrecht, an Orthopaedic Surgeon (dated 5 November 2014);

(c) Susan Verhoef, an Occupational Therapist (dated 24 November 2014);

(d) Madelien Mills, an Educational Therapist (dated 3 December 2014).

[11] The plaintiff also relied on an actuarial report prepared by Human & Morris Actuaries dated 14 January 2015. In argument the defendant's counsel referred to the actuarial report in respect of the defendant's alternative defence, namely that relating to the monetary value, should the plaintiff succeed in proving the

claim relating to the issue in dispute.

[12] The defendant tendered no independent expert reports in evidence, nor did it lead any evidence of expert witnesses in support of its contentions. The defendant was content on relying on the reports of the expert witnesses submitted by the plaintiff and the cross-examination of Mr Roper and Dr Wilms. The defendant closed its case without leading any evidence.

[13] When the reports mentioned above are considered, a golden thread runs through each of those reports, namely, that H[...] suffered and continues to suffer *sequelae* of the accident that relates particularly to post-traumatic stress symptoms which impact negatively on the minor's functioning interpersonal and scholastical.

[14] The plaintiff called Mr Roper, a clinical psychologist. He assessed H[...] approximately four years after the accident and prepared a report. He confirmed his report. In his evidence in court, Mr Roper expanded on his report and explained that due to the accident, certain *sequelae* presented that could have a negative impact upon the future earning capacity of H[...].

[15] Mr Roper testified that after the accident, H[...] suffered full-blown post-traumatic stress disorder of which some symptoms abated over time, whilst other symptoms remained. In this regard Mr Roper testified that the headaches that H[...] continues to suffer since the accident cause severe discomfort resulting in H[...] requesting leave from the school to return home. Mr Roper testified that such severe physical discomfort thus sustains to some extent the post-traumatic symptoms. Mr Roper further testified that as a result of the accident, H[...] suffers from anxiety, increased levels of irritability and hypervigilance in respect of her vulnerability whenever travelling in a motor vehicle or when a situation arises that might cause her physical harm.

[16] At the time of assessment of H[...], Mr Roper testified that she suffered from *subsyndromal Posttraumatic Stress symptoms* as evidenced by the admitted symptoms of: avoidance, intrusion and increased arousal, all relating to the documented anxiety and hypervigilance, the latter especially relating to injury and travelling in a motor vehicle.

[17] Mr Roper further testified that a neuropsychological assessment of H[...] was undertaken which revealed neuropsychological deficits such as fluctuating attention abilities and verbal and visual memory difficulties. The neuropsychological deficits that presented leads to a reasonable conclusion that H[...] has post-morbid been left in a psychological more vulnerable state than pre-morbid. Mr Roper pointed out that although H[...] presented an intact self-esteem, consistent negative feedback resulted in increased levels of irritability and aggressive behaviour and could over the long term negatively impact upon her self-esteem and interpersonal

functioning.

[18] Mr Roper concluded that all the aforementioned factors would in the work place require more effort on the part of H[...] that would inevitably result in fatigue and hence affect motivation if constantly exposed thereto.

[19] None of the aforesaid evidence by Mr Roper was challenged. However, during cross-examination it was put to Mr Roper that in the reports it was stated that pre-morbid, H[...] suffered psychological disability and vulnerability due to her mother being deaf. Mr Roper testified, that being correct, the *sequelae* of the accident would have exacerbated those disabilities.

[20] The next witness called by the plaintiff was Dr Wilms, an Industrial Psychologist. Dr Wilms assessed H[...] during October 2014, approximately 4 years after the accident and prepared a report. She confirmed her report and elaborated thereon. Dr Wilms testified that she had personally conducted the assessment interview founding the report and had co-signed the report together with a Kobus Prinsloo. The assessment was conducted specifically with a view to determine the extent and impact of the accident and the resulting *sequelae* on H[...]’s future earning capacity in respect of pre-morbid and post-morbid employability and earning capacity, bearing in mind that H[...] is still a scholar and not yet employed.

[21] Although Dr Wilms’s report refers to two scenarios, a first scenario that is a probable one and a second scenario that is a possible one, the plaintiff relies specifically on the first scenario only, i.e. the one indicated by Dr Wilms as the more probable one.

[22] Dr Wilms referred to the report by Ms Mills, an Educational Therapist and agreed that both pre-morbid and post-morbid H[...] was still able to progress at school satisfactorily and obtain a Grade 12 Certificate with exemption for further studies. Dr Wilms further testified that although H[...], pre-morbid and post-morbid, could obtain an NQF 7 level qualification the more probable scenario would be that H[...], pre-morbid and post-morbid, could obtain an NQF 6 level qualification.

[23] Due to the accident *sequelae*, Dr Wilms testified that H[...] would suffer some diminished personal productivity that can negatively impact on her scholastic and future career performance. These would translate into H[...] having to make an extra effort to compete with her peers resulting in greater fatigue and thus affecting motivation. Dr Wilms testified that the latter having a direct influence on the possible promotion that would require travelling in a motor vehicle.

[24] As a consequence, Dr Wilms proposed that a contingency that is “higher” than the normal pre-morbid contingency deduction be applied in order to account for the several difficulties H[...] may face in reaching her full potential. Accordingly, Dr Wilms was of the view that any loss in future earning capacity on the part

of H[...] should be addressed by way of a higher post-morbid contingency.

[25] In cross-examination Dr Wilms was referred to paragraphs 10.2.1 and 10.2.2 of her report. These paragraphs read as follows:

“10.1.1 Past Loss of Earnings

- *None. H[...] was a scholar at the time of the accident.*

10.2.2 Future Loss of Earnings

- *None. Any future loss of earnings suffered by H[...] as a result of the accident in question should be addressed by way of a higher post morbid contingency deduction (see point 9.3.2)”*

[26] It was put by defendant’s counsel to Dr Wilms that the word “none” in paragraph 10.2.2 was an acknowledgement that H[...] suffered no future loss of earnings and hence no loss of future earning capacity. Dr Wilms explained that in context, the first sentence related to a direct loss, whilst the second sentence related to a loss in the future earning capacity and in that context there is a loss in the future earning capacity.

[27] In respect of the latter, it is trite that such was a separate and distinct rubric to found a claim separate from that of “general damages”. See in this regard the unreported judgment of *Botha v Road Accident Fund 2014 JDR 2357* (GJ).

[28] Counsel for the plaintiff submitted that the fair percentage value in determining the loss in future earning capacity would amount to five percent based upon the reports by Dr van den Bout who suggested between 2% to 10 % and Mr Roper who suggested a 5%.

[29] In response thereto, counsel for the defendant submitted that H[...] had suffered no loss in future earning capacity with reference to paragraph 10.2.2 of the report of Dr Wilms, and hence that the plaintiff has failed to discharge the onus in respect of the issue in dispute.

[30] In this regard, counsel for the defendant referred to the report by the Occupational Therapist, Ms Verhoef. The particular passage that was referred to, dealt with the report by Dr Engelbrecht and in particular his conclusion where it was stated that H[...] *“should be able to complete schooling and join the open market normally, work until normal retirement age. ”*

[31] Counsel for the defendant further relied upon the report by Dr Engelbrecht. The passage referred to by counsel in that report contained a similar statement to that of Dr Wilms.

[32] The defendant's counsel further relied upon Ms Verhoefs concluding summary in her report in respect of the rubric "Loss of Income" in support of his aforementioned submission. Counsel for the defendant omitted to refer to the last paragraph under this rubric which reads,

"Dr. L. Roper indicated that these symptoms could negatively impact on her interpersonal and scholastic functioning. The Writer defers to the relevant experts regarding the full impact of the above mentioned symptoms."

[33] It is trite that when interpreting a document, whether a statute, or a contract or other document as in this case a report, the contextual approach should be followed. See in this regard *Fundtrust (Pty) Ltd (In Liquidation)* 2003(1) SA 155 (SCA) at 157G.

[34] It follows that the aforesaid submission by counsel is wrong. Dr Engelbrecht dealt in the passages referred to with H[...]’s physical ability, taking into account her orthopaedic injuries, to complete her schooling and joining the open market. Dr Engelbrecht and by parity of reasoning, Ms Verhoef, was not in those passages commenting on the psychological ability of H[...] to compete with her peers in future taking into consideration the admitted *sequelae* of the accident. Dr Engelbrecht in fact, in respect of her psychological *sequelae*, deferred to other relevant experts. Furthermore, when Ms Verhoefs concluding paragraph is read in context of the whole paragraph under the rubric "Loss of Income", it is clear that the symptoms listed by Mr Roper could negatively impact on H[...]’s interpersonal and scholastic functioning.

[35] The reports by the various experts submitted by the plaintiff were admitted in their entirety without qualification and the defendant cannot isolate certain passages that suit it and rely thereupon out of context of the whole report.

[36] It is clear from the reports and the evidence of Mr Roper and Dr Wilms that H[...]’s future earning capacity has been compromised due to the accident.

[37] Counsel for defendant submitted that should the court find that the plaintiff had proven that H[...] suffered a future loss of earning capacity due to the *sequelae* of the accident, then the defendant's alternative defence was that a fair and reasonable percentage to be applied in respect of that contingency would be 2,5%.

[38] I am of the view that the 5% proposed by counsel for the plaintiff is closer to the mark. Accordingly, the damages suffered in respect of the future earning capacity of H[...] due to the accident amount to R256 995.00

[39] It follows that the plaintiff has proven that H[...] has, due to the accident and the consequent *sequelae* dealt with above, suffered a loss in her future earning capacity.

[40] Accordingly, I grant the following:

Plaintiffs claim in her personal capacity:

(a) An order in terms of the draft marked “ZFP” agreed upon and prepared by the parties;

Plaintiffs claim in respect of the minor child:

(b) An order in terms of the draft marked “ZFH” agreed upon and prepared by the parties and as completed in respect of the amount in paragraph 1 thereof.

C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

On behalf of Plaintiff: R C De Alcantara

Instructed by: Savage Jooste & Adams Inc

On behalf of Defendant: F Matika

Instructed by: Tau Phalane Inc.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 54766/2012

In the matter between:

Z.F[...] P[...] & obo J.H.

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DRAFT COURT ORDER

BY AGREEMENT between the parties in respect of Z.F[...]:

1. The Defendant is ordered to pay an amount of **R1 933.00 (ONE THOUSAND NINE HUNDRED & THIRTY THREE RAND)** which amount shall be paid within 14 days to the credit of the trust account of the Plaintiff's Attorneys of record, Savage Jooste & Adams Inc, Pretoria, whose trust account details are as follows:

Nedbank name: NEDCOR - ARCADIA

Account type: Trust account

Branch code: 16-33-45-07

Account no: [...]

REF: MR HAYES/RB478

2. The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, **limited to 70%**, to compensate Plaintiff for the cost of future

accommodation in a hospital or nursing home, or treatment of, or rendering of a service, or supplying of goods **(as per the expert reports listed in par 3.2 below)**, to Plaintiff resulting from injuries sustained by her as a result of an accident that occurred on the 2nd of September 2010;

3. 3.1 The Defendant further tenders, the Plaintiffs taxed or agreed party and party costs of the action, on the High Court scale, including costs up until and including 28 January 2015, and the costs of making this Order an Order of Court, including the reasonable costs of one consultation with Plaintiff to consider this offer, the costs incurred to accept this offer and to obtain payment of the amount.

3.2 The costs will include the costs of the following expert reports, addendum reports {if any) and joint minutes (if any), and the preparation fees (if any), as the Taxing Master may, upon taxation, determine the following:

3.2.1 Dr Liebenberg, Orthopaedic Surgeon, and Radiologist;

3.2.2 Susan Verhoef, Occupational Therapist;

3.2.3 Kobus Prinsloo, Industrial Psychologist;

3.2.4 Dr Naidoo, Psychiatrist;

3.2.5 Leon Roper, Clinical Psychologist;

3.2.6 Dr van den Bout, Orthopaedic Surgeon, and Radiologist (in respect of the RAF4).

3.3 The costs consequent upon the employment of counsel, including the costs of attending the pre-trial conference, excluding appearance fee.

3.4 The costs of attending the pre-trial conferences.

3.5 The reasonable travelling costs for the client to attend all medico-legal appointment.

4. No interest will be payable on the capital sum, provided that payment is made 14 days after the Court Order. Should payment not be made timeously, the Defendant will pay interest at the rate of 9% per annum from due date to date of payment.

5. The party and party costs are payable within 14 days of date of settlement/taxation, whereafter interest will be charged at 9% from the aforementioned date to date of payment.

6. Following agreement on or taxation of the costs, the Plaintiff shall allow the Defendant fourteen (14) Court

days after the allocator has been made available to the Defendant's Attorneys, to make payment of the taxed or agreed party and party costs, whereafter interest will be charged at 9% per annum from date of the stamped allocator to date of payment.

BY ORDER

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 54766/2012

In the matter between:

Z.F[...] P[...] & obo J.H.

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

DRAFT COURT ORDER

AFTER HAVING HEARD COUNSEL in respect of J.H. F[...]:

1. The Defendant is ordered to pay an amount of R 256 995.00 (Two Hundred and fifty six thousand on nine hundred and ninety five rand) the which amount shall be paid within 14 days to the credit of the trust account of the Plaintiff's Attorneys of record, Savage Jooste & Adams Inc, Pretoria, whose trust account details are as follows:

Nedbank name: NEDCOR - ARCADIA

Account type: Trust account

Branch code: 16-33-45-07

Account no: [...]

REF: MR HAYES/RB478

2. The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, to compensate Plaintiff for the cost of future accommodation in a hospital or nursing home, or treatment of, or rendering of a service, or supplying of goods (as per the expert reports listed in par 3.2 below), to Plaintiff resulting from injuries sustained by her as a result of an accident that occurred on the 2nd of September 2010;

3. 3.1 The Defendant is further ordered to pay, the Plaintiffs taxed or agreed party and party costs of the action, on the High Court scale, including costs up until and including 29 January 2015.

3.2 The costs will include the costs of the following expert reports, addendum reports (if any), joint minutes (if any), and the reservation fees (if any), as the Taxing Master may, upon taxation, determine the following:

3.2.1 Dr Engelbrecht, Orthopaedic Surgeon, and Radiologist;

3.2.2 Susan Verhoef, Occupational Therapist;

3.2.3 Kobus Prinsloo, Industrial Psychologist;

3.2.4 Madelien Mills, Educational Psychologist;

3.2.5 Leon Roper, Clinical Psychologist;

3.2.6 Dr van den Bout, Orthopaedic Surgeon, and Radiologist (in respect of the RAF4);

3.2.7 Human & Morris, Consulting Actuaries.

3.3 The costs consequent upon the employment of counsel, including the costs of attending the pre-trial conference and the costs of Counsel for 28 January 2015 and 29 January 2015.

3.4 The costs of attending the pre-trial conferences.

3.5 The reasonable travelling costs for the client to attend all medico-legal appointments.

3.6 The reasonable travelling costs for the client and attorney of record, Nico Brits, to attend court on the day of trial.

4. No interest will be payable on the capital sum, provided that payment is made 14 days after the Court Order. Should payment not be made timeously, the Defendant will pay interest at the rate of 9% per annum from due date to date of payment.

5. The party and party costs are payable within 14 days of date of settlement/taxation, whereafter interest will be charged at 9% from the aforementioned date to date of payment.

6. Following agreement on or taxation of the costs, the Plaintiff shall allow the Defendant fourteen (14) Court days after the allocator has been made available to the Defendant's Attorneys, to make payment of the taxed or agreed party and party costs, interest will be charged at 9% per annum from date of the stamped allocator to date of payment.

BY ORDER