



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

20/2/2015

CASE NO: 19534/12

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

20 February 2015

[Signature]

In the matter between:

QONDO, S.S

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

MUDAU AJ,

- [1] The plaintiff, a 40 year male, instituted a damages action against the defendant as a result of certain bodily injuries he sustained in a motor vehicle collision on 13 December 2007. The accident occurred between the motor vehicle with registration number FHG 191 NW (in which the plaintiff was a passenger) and a motor vehicle with registration number DZK 406 NW (the insured motor vehicle).

[2] In the particulars of claim at paras 6 to 7 the plaintiff alleges as follows:

“ 6.

the collision was caused solely as a result of the negligence of the insured driver, who was negligent in one more or all of the following respects:

- 6.1 he failed to keep a proper lookout;
- 6.2 he travelled at a speed which was excessive in the circumstances;
- 6.3 he failed to apply the brakes of the motor vehicle he was driving timeously, alternatively adequately, alternatively properly, alternatively at all;
- 6.4 he entered an intersection against a red traffic light and when it was inopportune and dangerous to do so;
- 6.5 he failed to take cognizance of the presence and/or the movements of the motor vehicle with registration number FHJ 191 NW;
- 6.6 he failed to avoid a collision, when by the exercise of reasonable care he could and should have done so.

7.

in and as a result of the collision, the plaintiff suffered the following injuries:

7.1 and abdominal injury;

7.2 an injury to his spleen; and

7.3 fractured ribs.”

In its plea the defendant essentially denied the allegations and placed the plaintiff to the proof thereof.

[3] At the commencement of the trial the issue of liability had already been settled between the parties. As a result thereof, the only issue for determination in this trial was the plaintiff's damages for past and future loss of earnings and earning capacity as well as general damages. The parties further agreed that no oral evidence was to be led, and that the issues in dispute were to be determined by the court solely on the contents of the various experts' reports. In the matter of *Southern Insurance Association Ltd v Bailey N.O. (1984(1) SA 98 (A)* at 113G – 114B, the Court stated the following in this regard: -

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.a

It has open to it two possible approaches.

One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent..... There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages”.

In *S v Gouws* 1967 (4) SA 527 (EC) at 528D Kotze J (as he then was) said with regard to an expert: -

“the prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialized field. His own decision should not, however, displace that of the tribunal which has to determine the issue of be trial”

Against this background, it is to the relevant evidence that I turn to deal with below.

- [4] Dr D A Birrell, an orthopaedic surgeon, interviewed the plaintiff on 31 July 2014, and filed a report in respect of the plaintiff. The report and hospital records indicate that the plaintiff was admitted to the Anncron clinic from 13 December 2007 to 15 December 2007. The following injuries were noted:

4.1 abdominal injury with a ruptured spleen;

4.2 bilateral rib fractures;

4.3 soft tissue neck injury;

4.4 soft tissue back injury.

As a result of his injuries, sonar was performed of his abdomen and x-rays were taken of his neck and back .He was given intravenous infusion and referred for specialist care. A urinary catheter was inserted. He had to use a neck collar for 2 to 3 days. After his discharge, he had to return to the outpatients department for follow-up review. During the examination by Dr Birrell, plaintiff complained of lower back pain that he had not experienced before the accident, particularly when doing strenuous physical activities like picking up objects. These symptoms worsened by inclement weather conditions. He had since gained weight as a result of physical inactivity or less activity.

- [5] The plaintiff also reported according to the occupational therapist, Ms T Holshausen, decreased endurance since the accident as compared to his pre-accident level of stamina. He reported being able to sustain about an hour of sitting .However, he tends to shift his position from 30 to 40 minutes. He is able to manage about 30 minutes of standing in a static position. He walks somewhat slower than before. He relies on medication to be able to jog. His driving has since been affected as he is able to manage about 1 hour 20 minutes when travelling long distances. He experiences difficulty in bending to the floor.

[6] An x-ray report, dated 13 December 2007 by Dr Kritzing, noted a 10th rib fracture on the left and an 11th rib fracture on the right. X-rays were obtained on 31 July 2014, reported on by Dr. Hinovska, showed slight narrowing of the anterior aspect of C3/4, C4/5 associated with small osteophytes with evidence of early ex degeneration; mild spondylolisthesis at L5/S1 and a very mild right convex curvature of the lumbar spine. On perusal of the x-rays dated 31 July 2014, Dr Birrell reported that there is a mild “cog-wheeling” type of appearance of the lower lumbar spine. In the cervical spine there is loss of normal physiological lordosis with a slight disruption of the anterior vertebral body line at C5/5, in association with mild degenerative changes noted by the Radiologist. Dr Birrell expressed an opinion and noted the following future medical treatment:

1. a 3% or less chance of cervical spine surgery with two-month sick leave;
2. a 10% chance of lumbar spine surgery with 3 months sick leave; and
3. Conservative treatment.

[7] It is common cause that at the time of the accident the plaintiff was employed. His work history can be summarised essentially as follows: he first volunteered at the fire department in Ventersdorp from January 1996 until November 1996. He was permanently appointed with effect from 1 December 1996. He remained in the same position as a fire-fighter until November 2001. On 1 December 2001 he was appointed by the current employer, the Department of health at the North West provincial ambulance services as basic ambulance attendant. He remained in this position until 2009. Between 2007 and 2009 he completed a three-year diploma in EMT (Emergency Medical Technician). In April 2012 he was transferred to the training department of the North West EMRS EMC instructor. In 2013, he registered at

the University of Johannesburg for a bridging program towards a B -Tech degree Emergency Medical Care, but failed. Plaintiff is on an EMS (lecturer)-level Grade 1 with a top notch of R 157 557-00, a remuneration ceiling in his current position.

[8] The evidence by the industrial psychologist, Esme' Noble, deals primarily with the plaintiff's life history and his work record (as indicated above at para 7) and prospects of future progress in his field of employment. Ms Noble is of the opinion that disregarding the collision, i.e. without physical limitations and thus the ability to work operationally, plaintiff may have continued working as an operational emergency care technician (ECT), with the potential to progress to the position of the ECT grade 3. The implication hereof being that without the physical limitations referred to above, he would have received one notch increases on a yearly basis over and above the general increases until retirement age at 65. Having regards to the accident it is postulated that plaintiff will continue working in EMT at EMRS College, due to his physical limitations and without realistic prospects for graduating with a B-Tech degree. Consequently, plaintiff will henceforth only receive yearly general increases until normal retirement at the age of 65. Consideration being had to the pre-and post-accident scenarios, plaintiff will suffer a loss of income being the difference between the pre-and post-accident income as postulated here in.

[9] In the instant case, the plaintiff's loss of earnings since the collision and his future loss of earning capacity have been calculated by Dr G A Whittaker, from a consulting actuary of the firm Algorithm, during January 2015, with the validity date as at 1 April 2015. The basis of the calculation and the assumptions made were undisputed and not counter-attacked. According to the actuarial calculation, the plaintiff's pre- accident income amounts to R3, 979, 424, 00 whereas the post-accident income amounts to 3, 346 064, 00. If one was to consider a 10% contingency differential (spread) with a 15% contingency deduction on the pre-accident income and a 25% contingency

deduction on the post-accident income, the plaintiff's loss of income/earning capacity amounts to R872,962 ,00.

- [10] In an assessment of damages for loss of earnings, it is usually the practice for a deduction to be made for general contingencies for which no explicit allowances have been made in the actuarial calculation. General contingencies cover a wide range of considerations varying from case to case and may include: "*taxation, early death, safe travel costs, loss of employment, promotion prospects, divorce,*" et cetera. (Koch in the Quantum Yearbook 2013 page 106). It is trite that contingencies, "whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties" (Gwaxula v RAF (09/41896) [2013] ZAGPHC 240 (25 September 2013) at para 25).

The learned Judge also added that:

"There are also unforeseen contingencies based on factors such as errors in the estimation of future earnings and life expectancy, loss of earnings due to unemployment and sickness, retirement at an earlier age and hazards of life. The list can never be exhaustive."

That said, however, this contingency differential remains the prerogative of the Court.

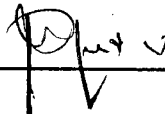
- [11] It is trite law that no two cases are similar. Past decided comparable cases, although often useful, merely serve as guidelines. The need to adjudicate each case on its own particular merits and facts is always present.

[12] In this matter, there are no opposing expert reports from the defendant. I did not understand counsel for the defendant to be arguing that the actuarial calculations were wrong, biased, and unfair or based on incorrect principles. To the contrary, counsel was constrained to concede that the award suggested is, under the circumstances, fair.

[13] Under the circumstances therefor, I am of the view that the actuarial contingency deduction calculated by the plaintiff's actuary cannot be faulted. I see no reason not to grant the amount as suggested.

[14] In the circumstances, the following order is made:-

1. The draft order as amended marked with an "X" and initialled by me is made an order of this court.



MUDAU TP
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 12 FEBRUARY 2015
DATE OF JUDGMENT: 20 FEBRUARY 2015

APPEARANCES:
FOR THE PLAINTIFF: ADV M VAN ANTWERPEN
INSTRUCTED BY: ADAMS AND ADAMS

FOR THE DEFENDANT: ADV J MAKUMBILA
INSTRUCTED BY: MALULEKE SERITI MAKUME MATLALA INC.

"X"
25/2/15

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

HELD AT PRETORIA ON THIS THE 12th DAY OF FEBRUARY 2015 AT
COURT 8B BEFORE THE HONOURABLE JUSTICE MADAU (J)

In the matter between:

Case no: 19554/12

QONDO, SS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and the Defendant:

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

1. The Defendant shall pay the total sum of **R 1,177,858.34** (ONE MILLION ONE HUNDRED AND SEVENTY SEVEN THOUSAND EIGHT HUNDRED AND FIFTY EIGHT RAND AND THIRTY FOUR CENTS) in settlement of the Plaintiff's claim, which amount is made up as follows:

Past medical expenses: R 4,896.34 (FOUR THOUSAND EIGHT HUNDRED AND NINETY SIX RAND AND THIRTY FOUR CENTS)

Past and future loss of earnings / earning capacity: R 872,962.00 (EIGHT HUNDRED AND SEVENTY TWO THOUSAND NINE HUNDRED AND SIXTY TWO RAND)

General Damages: R 300,000.00 (THREE HUNDRED THOUSAND RAND)

S.S

2. The aforementioned total sum of **R 1,177,858.34** (ONE MILLION ONE HUNDRED AND SEVENTY SEVEN THOUSAND EIGHT HUNDRED AND FIFTY EIGHT RAND AND THIRTY FOUR CENTS) shall be payable by direct transfer into the trust account of Adams & Adams Attorneys, details of which are as follows:

Nedbank

Account number : 160 431 8902

Branch number : **198765**

Pretoria

Ref: DBS/WW/LT176

3. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 13 December 2007.

4. The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include, but not be limited to the following:-

4.1 The fees of ~~Senior~~ - Junior Counsel on the High Court Scale, inclusive of Counsel's full reasonable day fee for 12 February 2015 and the reasonable costs of preparation of the Heads of Argument, if any;

- 4.2 The reasonable taxable costs of obtaining all expert, medico-legal, and actuarial reports from the Plaintiff's experts which were furnished to the Defendant;

- 4.3 The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts of whom notice has been given, being:-

- 4.3.1 Dr DA Birrell (Orthopaedic surgeon),
- 4.3.2 Ms T Holshausen (Occupational Therapist),
- 4.3.3 Dr F Greef (Surgeon),
- 4.3.4 Ms E Noble (Industrial Psychologist),
- 4.3.5 Mr GA Whittaker (Actuary).

- 4.4 The costs of a consultation between the Plaintiff and his attorney to discuss the terms of this order;
- 4.5 The reasonable costs of a consultation between the Plaintiff's counsel, the Plaintiff, and the Plaintiff's attorney in preparation for the hearing of this action;
- 4.6 The reasonable, taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the Plaintiff in attending medico-legal consultations with the parties' experts, consultations with the legal representatives and the court proceedings, subject to the discretion of the Taxing Master;
- 4.7 The reasonable, costs of all consultations between the Plaintiff's experts, counsel and attorney in preparation for the hearing of the action;
- 4.8 The above costs will also be paid into the aforementioned trust account.
- 4.9 It is recorded that the Plaintiff's Klerksdorp instructing attorneys shall not be entitled to debit the Plaintiff for services rendered in terms of a contingency fee agreement.
- 5. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-
 - 5.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

- 5.2 The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;
- 5.3 Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 9% per annum on the taxed or agreed costs from date of allocator/settlement to date of final payment.

BY ORDER OF THE COURT

DBS/WW/LT176