

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4299/2009

In the matter between:

LINDIE WESSELS

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT:

LEKALE, J

HEARD ON:

11 OKTOBER 2012

DELIVERED ON:

1 NOVEMBER 2012

INTRODUCTION AND BACKGROUND

[1] On the 6 May 2008 the plaintiff sustained serious personal injuries when a motor vehicle which she was driving was involved in a collision with an motor vehicle in respect of which the defendant was liable for compensation in terms of the Road Accident Fund Act, No 56 of 1996 ("the Act").

[2] She, thereafter, instituted an action for payment of special and

general damages against the defendant after complying with the provisions of the Act.

[3] The defendant resisted the claim but, on the 10 May 2011, the parties reached agreement on and secured a court order in respect of the defendant's liability for payment of all of the plaintiff's proven or agreed damages.

[4] The parties could, however, not agree on the extent of the plaintiff's damages and the matter now serves before me for determination of the quantum of the claim.

ISSUES IN DISPUTE

[5] The parties are in agreement on plaintiff's injuries and the sequelae of the same.

[6] They are, however, effectively at variance over the plaintiff's earning capacity as at the date of the accident with the defendant maintaining that, although her agreement with her employer at the time entitled her to receive commission, she

never received the same for a period of 24 months prior to the accident despite having earned it.

- [7] The parties are, further, in dispute over whether or not the defendant is liable for the costs relating to the report of Dr Rosman in so far as the latter expert did not testify before the court.

PLAINTIFF'S CASE

- [8] Defendant closed its case without tendering oral evidence. In support of the plaintiff's claim five expert witnesses testified to, *inter alia*, the effect that the plaintiff has permanently lost control of her bladder and experiences difficulties with bowel function as a result of the accident. She has reduced motor function and altered sensation in both legs as a result of injuries to her back and neck. The plaintiff now walks with crutches and will continue to experience a degree of chronic back pain despite any surgical and/or medical intervention which may take place. She has a urinary catheter implanted as a result of her permanent urinary incontinence. The use of a catheter is a

source of embarrassment and emotional depression for the plaintiff. She is now only suitable for a half day administrative work with a sympathetic employer and chances of securing such employment are between 5% and 10%.

[9] The plaintiff testified that her oral contract of employment as at the date of the accident provided for a salary of R6 500,00 per month inclusive of petrol allowance together with 10% commission on sales. Her monthly sales ranged from R2 000,00 to R3 000,00 per month.

[10] She, further, pointed out that although her monthly sales were recorded and she was entitled to commission thereon of between R2 000,00 and R3 000,00 she never received the commission because the business was still growing and she was aware that the price of sunflower was not favourable at the time.

CONTENTIONS FOR THE PLAINTIFF

[11] Mr Zietsman, for the plaintiff, submits that an award of R4 571

415,00 is fair and reasonable as global compensation for both general and special damages and relies, *inter alia*, on the actuarial report of Munro Consulting Actuaries which was admitted by agreement between the parties as exhibit "G" with regard to loss of income.

[12] He contends, further, that R450 000,00 is fair and reasonable as quantum for general damages regard being had to the injuries sustained by the plaintiff and the findings of the experts on the extent of her injuries as well as case law.

[13] Mr Zietsman concludes that what matters is the plaintiff's earning capacity as at the date of the accident and not whether or not she actually received the commission as per her employment agreement.

[14] The costs attendant on the report of Dr Rosman, the neurologist, are payable by the defendant even though he did not testify because his report was relevant in so far as Ms Van Jaarsveld, the industrial psychologist, used it to prepare her

report.

CONTENTIONS FOR THE DEFENDANT

[15] Mr Steenkamp, for the defendant, submits that an award of between R400 000,00 and R450 000,00 is fair and reasonable in respect of general damages regard being had to case law.

[16] He contends, further, that a high negative contingency of 25% should be applied in order to arrive at a realistic award for loss of income regard being had to the fact that the actuarial reports viz exhibits "G" and "H" are based on the wrong assumption that the plaintiff earned R6 500,00 plus R2 000,00 to R3 000,00 commission per month when she, in fact, only received R6 500,00 per month as at the date of the accident.

[17] In his view a global amount may be awarded because the court does not have to be precise in its calculations.

[18] Dr Rosman did not testify and the issue of costs relating to his report should be left for assessment by the taxing master.

GENERAL DAMAGES

[19] As correctly pointed out by Mr Zietsman, the parties are in agreement as to the bracket within which general damages should be located in so far as the plaintiff claims R450 000,00 therefor while the respondent grudgingly accepts that an award of between R400 000,00 and R450 000,00 is fair and reasonable.

[20] The question is, therefore, whether or not R450 000,00 is fair and reasonable regard being had to, *inter alia*, the injuries sustained, shock, pain and suffering, discomfort and disfigurement as well as loss of amenities of life.

[21] It is not in dispute that the accident has had severe consequences on all aspects of the plaintiff's life. In her personal capacity she is in constant pain and experiences general humiliation and frustration. As a mother she is incapable of giving her daughter the necessary maternal support both at home and at school as well as socially. She

has been deprived of social life and no longer allows friends to visit her at home. She has no sex life. She is dependent on others to get by and is acutely aware of her limitations and incapacabilities which render her a burden to her daughter. She was 34 years of age at the time of the collision.

[22] It is axiomatic that no amount of money can ever make up for the loss and disfigurement involved in the instant matter. The exercise involved herein tries to ameliorate the situation with due regard to the realities and possibilities of life. The aim being an endeavour to adequately compensate the plaintiff for the changes to her person and the loss she has suffered by striking a healthy balance between her interests and those of the dependant. (See generally **NIDBLOCK-STUART v PROTEA ASSURANCE COMPANY LIMITED** 1973 CB (2) 323 (O) at 327.)

[23] I am persuaded by available evidence that the instant matter merits an award more in the region of R450 000,00.

LOSS OF INCOME

[24] The aim of an award for compensation for loss of income is to put the plaintiff, in so far as it is possible with money, into the same position she would have been had the wrongful occurrence not taken place.

“The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.”

(See **DIPPENAAR v SHIELD INSURANCE COMPANY LTD**
1979 (2) SA 904 (AD) at 917B.)

[25] As correctly submitted by Mr Zietsman, what has been damaged and needs to be compensated in this matter is the capacity to generate an income and not the earnings which the plaintiff was in actual receipt of at the time of the accident.

[26] In my view, the fact that the plaintiff earned commission but did not receive the same because of the employer’s inability to pay when it was due does not detract from her capacity to earn that

commission as at the date of the accident. The fact of the matter is that the plaintiff was capable to and did, in fact, earn that commission and was entitled, as of law, to payment in respect of the same.

[27] I am, thus, persuaded that the plaintiff's earning capacity has not been overstated in the actuarial reports.

COSTS

[28] It is apparent from the report of Ms Van Jaarsveld, as correctly submitted by Mr Zietsman, that the same is based on, *inter alia*, Dr Rosman's findings.

[29] Dr Rosman's report is, thus, relevant to the issue in so far as Ms Van Jaarsveld's report forms the basis of actuarial calculations.

ORDER

[30] In the result the following order is made in accordance with the draft order presented for the plaintiff:

30.1 Defendant is directed to pay the plaintiff an amount of R4 571 415,00 (four million five hundred and seventy one thousand four hundred and fifteen rands).

30.2 The said amount is to be paid directly into the account of the plaintiff's attorneys, the particulars of whom are as follows:

Honey Attorneys – Trust Account

Nedbank – Maitland Street Branch

Bloemfontein

Branch Code: 11023400

Account number: 1102475912

Ref: HLB/ec/J02410

30.3 Defendant shall provide plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 for the costs of her future accommodation in the hospital or nursing home or her treatment or the rendering of any service to her or supply of goods to her arising out of the injuries sustained by her in the motor vehicle accident on the 6 May 2008, after such costs have been incurred and upon proof thereof.

30.4 Defendant is liable for payment of the plaintiff's taxed or agreed party and party costs, which shall include the following:

30.4.1 The reasonable preparation/qualifying and reservation fees and expenses (if any) of:

30.4.1.1 Dr JJ Fourie;

30.4.1.2 Dr P Repko;

30.4.1.3 Dr K Rosman;

30.4.1.4 Dr P Cronje;

30.4.1.5 Dr S Walker;

30.4.1.6 Ms Susan van Jaarsveld;

30.4.1.6 Mr Alex Munro;

30.4.2 The costs attendant upon obtaining the payment of the amounts referred to above;

30.4.3 The plaintiff shall serve a notice of taxation on the defendant's attorney of record; and

30.4.4 The plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs.

L. J. LEKALE, J

On behalf of the plaintiff: Adv. P. Zietsman
Instructed by:
Honey Attorneys
BLOEMFONTEIN
(Ref: HLB/EC/JO2410)

On behalf of the defendant: Adv. Steenkamp
Instructed by:
Eversheds c/o Symington & De Kok
BLOEMFONTEIN

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