

11/12/09
REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)
PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO ☒ YES

(2) OF INTEREST TO OTHER JUDGES: YES/NO ☒ YES

(3) REVISED.

2009/12/11
DATE

MM Le...
SIGNATURE

Case no. 36423/07

In the matter between:

ZURITA HAYMAN

Plaintiff

and

RMB PROPERTIES (PTY)LTD

Defendant

JUDGMENT

Judgment Reserved: 02/12/2009
Judgment Handed down: 11/12/2009

LEGODI J

1. This is an action proceedings based on delictual claim, arising from the alleged negligence of the plaintiff. At the start of the hearing of this matter, I was told that the parties had already settled the matter on merits. The agreement being that the plaintiff was 20% negligent, whilst the defendant was 80% negligent. This has the effect that the plaintiff would be entitled to 80% of her proven damages.

2. The matter therefore proceeded before me to assess the damages that could have been suffered by the plaintiff due to the defendant's negligence.

3. Two witnesses testified. These were the plaintiff and her son. On the 24 January 2005 at or near Lynnridge Mall and on a property owned by the defendant, the plaintiff tripped on a pavement like-wall which was on the ground in a parking area. Having tripped on the pavement, the plaintiff fell and injured herself.

4. Her injuries are described in paragraph 4 the particulars of claim as follows:

- “4.1.1 ‘n ligte hoofbesering met ‘n laserasie van die linker wenkbrou,
- 4.1.2 ‘n besering van die regter skouer;
- 4.1.3 ‘n skaafwond van haar linker handpalm ; en
- 4.1.4 ‘n besering van die linker knie met ‘n skaafwond van die knie.”

5. Based on the injuries, the plaintiff in paragraphs 8 of her particulars of claim, claimed damages as follows:

“8.1	gelede mediese uitgawes	R5 000.00
8.2	toekomstige mediese uitgawes	R40 000.00
8.3	algemene skade	R120 000.00”

6. The amount of R40 000 for future medical expenses was based on the medico legal report by Dr Heymans. The report is annexed to the plaintiff's particulars of claim. The correctness of the report was not placed in issue by the defendant.

7. I must immediately indicate that according to the vouchers or accounts that formed part of the proceedings, the total amount for past medical expenses are calculated as R2425-17 . This did not appear to be an issue.
8. Contentious issues revolved around the amount for general damages and the amount for future medical expenses. For this purpose, I was asked to have regard to the evidence of the plaintiff, her son and the reports by Drs Heymans and Engelbrecht. Both these doctors did not testify. However, their reports and findings were not placed in issue. I may mention that Dr Engelbrecht, Orthopaedic Surgeon, prepared the report on the instruction of the defendant. He would have testified on behalf of the defendant. However, seeing that the plaintiff admitted the report, I was informed that his viva voce evidence was not necessary. By agreement the report forms part of these proceedings without oral evidence. The contents and the correctness of the report were admitted by the plaintiff. Based on this agreement, the defendant closed its case without leading any evidence.
9. In the report by Dr Engelbrecht, the plaintiff needed to undergo surgical procedure to deal with the repair of the right shoulder rotator calf tear as well as decompression of the right shoulder. If this was to happen, she will incur the costs of the Orthopaedic Surgeon, assistant as well as I that of the anaesthetist. For this purpose a total amount of about R58 000 would be needed.
10. The plaintiff however, in her evidence indicated that she was not prepared to undergo any such a procedure due to her advanced age and due to the fear of undergoing such a procedure. Secondly, that she could not be given a guarantee that it would be successful and

that there would be no complications. Based on all of these, I find that the plaintiff cannot be entitled to future medical expenses regarding surgical procedure which she does not intend to undergo.

11. However, Dr Engelbrecht in her report also deals with a treatment which she refers to as “conservative”. This procedure will entail the costs of about R20 000. According to Dr Engelbrecht, the plaintiff will benefit from infiltration of the sub-acromial space right shoulder with cortisone as well as local anaesthetic. However, this is said to only provide temporary relief.
12. The defendant was not prepared to concede to the plaintiff's entitlement of R20 000 for future medical expenses based on the accident that had occurred on the 24 January 2005. The contention as I understood it, was that, both Drs Heymans and Engelbrecht in their respective reports confirmed a “congenital variant”.
13. Dr Heymans' evaluation was on 14 February 2006. Mention is made of changes indicative of a rotator calf syndrome with calcification. Also the type of acromion is indicated as type III. This type of acromion is hooked shaped and is known to cause rotator calf impingement syndrome as well as rotator calf tears. This is a congenital variant i.e. the patient was born with this type of acromion.
14. If find it necessary to state in full what is further said by Dr Engelbrecht in his report dealing with a paragraph titled: DISCUSSION IN RESPECT OF PRE-EXISTING DISCUSSION. Continuing from pages 16 to 18 of the report, it is stated as follows:

"I have managed to obtain the Radiologist' report (Dr Baker) i.r.o. the patient's right shoulders; X-rays were performed on 24/01/2005. Mention is made of degenerative changes, which should be seen as pre-existing. However, the subacromial space is reported as normal. The X-ray report of 14/02/2006 indicates "The supra-spinatus exit is significantly narrowed" In my opinion this indicates accelerated degeneration of the right shoulder and fits in with a rotator cuff tear at the time of the accident.

For the purpose of this report the following is stated:

- 1. The patient most probably taking her shape of acromion into account has some pathology pre-existing to her right shoulder prior to the accident, although asymptomatic.*
- 2. The fall that she had, although minor, most probably caused the rotator cuff tear due to the shape of her acromion and the impact on an already weakened rotator cuff which is more often than not the case in patients of her age with the shape of acromion that she has.*
- 3. Had the accident not happened, it is possible that she would have gradually developed right shoulder symptoms, and not necessarily a tear. It is almost impossible however to put a time frame to this statement and this should be seen as a generalised statement.*
- 4. Although difficult to apportion, for the purposes of this report it is recommended that 75% of the above costs be seen as due to the accident and 25% as due to the patient's advanced age at the time of the accident as well as pre-existing pathology at the time of the accident, although asymptomatic. This apportionment should be also*

be applied to her whole person impairment as already discussed in this report.

5. *Lastly, I am of the opinion that the patient will not readily consent to surgery to her shoulder, due to the risks involved.*
15. This quotation has a bearing, not only with regard to the R20 000 further medical expenses, but also for general damages. Dealing with future medical expenses for now, the suggestion by counsel on behalf of the defendant was that, future medical expenses for the plaintiff should be put at R15 000. This seems to have been based on what was stated in paragraph 4 of the report stated above. That is, 75% of the costs should be seen as due to the accident and 25% as due to the patient's advanced age at the time of the accident as well as pre-existing pathology at the time of the accident.
16. Remember, Dr Engelbrecht states that the patient, that is, the plaintiff, indicated that her right shoulder was normal prior to the accident. The plaintiff confirmed this during her evidence. She had no problem with her shoulder prior to the incident. She had not been undergoing any treatment for the shoulder prior to the fall. This evidence should be seen in the light of what is stated in paragraph 3 of Dr Engelbrecht's report as quoted above. At the risk of repeating myself it reads as follows:
 - “3. *Had the accident not happened, it is possible that she would have gradually developed right shoulder symptoms, and not necessarily a tear. It is almost impossible however to put a time frame to this statement and this should be seen as a generalised statement*”

17. Clear from the statement, it is uncertain whether the plaintiff would have to undergo conservative treatment had it not been for the incident. The fact that the plaintiff is having the type of acromion before the 24 January 2005 as described by the Doctors, in my view, is no proof that she would in any event have incurred the medical expenses to deal with conservative treatment. As I said, she experienced no problem previously, despite her advanced age. Having been born on the 15 May 1925, she was almost 80 years old at the time she sustained the injuries on the 24 January 2005. Despite her age, she had no problem with her shoulder and she was still active in life until 24 January 2005. To want to scale down the R20 000 on the basis of the 25% as suggested by Dr Engelbrecht, would be speculative. Speculative in the sense that according to the report no certainty could be put forward that the plaintiff was in any event going to incur some medical expenses to deal with the treatment of the shoulder even if she was not injured on the 24 January 2005. This finding should be seen to have a bearing on the submission which was made regarding the assessment of general damages.

18. During argument the plaintiff's counsel suggested between R80 000 and R120 000 as a reasonable figures for general damages having regard to the evidence tendered by the plaintiff. If I understood the submission, this was not only for the loss of amenities of life, but also for the pain and suffering. On the other hand counsel for defendant suggested that anything between R60 000 and R70 000 would be reasonable assessment of the plaintiff's quantum on general damages. The contention by the defendant's counsel in proposing such an assessment argued that pre-existing acromion condition was not something to ignore. Again I was urged to have regard to the 75 % and 25% as recommended by Dr Engelbrecht. I have already dealt with this aspect. I am not satisfied that for the

purpose of assessment of general damages, this is an appropriate case to take into account, something which the plaintiff did not experience before, even at such an advanced age.

19. Scars and disfigurement as described in the medico-legal report as a pigmented scar left of the eyebrow area. This is reported as noticeable. The scar was also displayed by the plaintiff during her evidence. However, whilst noticeable, I do not think that it is such that it would be of a great concern to the plaintiff. She did not say that she was worried about it. Secondly, the plaintiff at her advanced age, would not be greatly perturbed like a young lady having a scar.

20. Pain and suffering in the report is itemised in three. That is, acute pain that is said probably to have been present immediately after that accident lasting for one to two days, followed by moderate pain which would have lasted for seven to ten days. Just based on these facts, it does not look like she suffered serious pain.

21. She is however, said to be having chronic pain as well as functional impairment of her right shoulder. This is said to be due to a right shoulder rotator cuff tear. The plaintiff, also confirmed this. It is therefore an aspect to be taken into consideration.

22. The plaintiff in her evidence and also as argued by her counsel, laid a great emphasis on the loss of amenities of life. The report by the Dr is very brief on this aspect. That is, prior to the accident, the patient enjoyed taking some walks and that this is unchanged. However, the major part of the plaintiff's evidence revolved around loss of amenities of life.

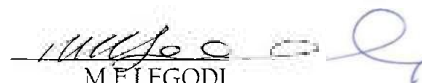
23. As argued by the counsel on her behalf, she could no longer drive around on her own. She is no longer self supportive. She used to do sewing all her life out. She can no longer do sewing as she used to. She liked cooking and baking not only for herself or family but also for other people and friends. She can no longer do all of these. She can no longer entertain people as she used to do. She can no longer use her right hand to comb with ease. She indicated in court how she struggles to comb herself. She can no longer easily dress up herself. She can no longer set up the bed with ease whilst she is presently at an old age village. If she wants to go somewhere she must either hire a taxi or ask someone to drive her around. She used to be an active old lady till up to the 24 January 2005. She misses the activities she used to do.
24. The plaintiff appeared to be a strong willed old lady. Clearly when she demonstrated how she struggles to comb herself, it became clear that she should be struggling to do things which she used to do on her own. However, somewhere along the way, age would have caught up with her irrespective of the injuries she sustained on the 24 January 2005. For example, because of her old age, her son testified that he could no longer allow her and feel safe if she had to drive herself to busy places. One cannot blame her son for this. For her own safety and for the safety of others it was necessary to do so. I do not think that she would for ever have been in a position to do everything which she used to do on her own.
25. An assessment of general damages is not an easy task. Having considered all relevant factors, one would have to come up with an amount that is fair, and reasonable. You always try to reach a middle road. Having considered all relevant factors and case laws I was

referred to regarding assessment of general damages, I am of the view that R75 000 would be appropriate.

26. This should then bring me to consider an issue of costs. I have been told that Dr Engelbrecht was put on stand by until Tuesday the 1 December 2009. The hearing of evidence in this matter started on the 2 December 2009, and only on this date did the plaintiff indicate that she would not go for an operation, that is, surgical procedure referred to in the report. The report by Dr Engelbrecht was admitted before the 1 December 2009. The suggestion during argument was that it was necessary to put Dr Engelbrecht on stand by on the 1 December 2009 because she was expected to give an opinion that the plaintiff will not readily consent to surgery to her shoulder due to the risk involved. This in my view, would have been unnecessary as it eventually appeared to have been so. The decision on the risk involved would have been or was only for the plaintiff to make. It was dependent entirely on the plaintiff. For example, if she had to say she wanted to undergo surgical procedure, nothing the doctor could have done about. Similarly, if she had decided not to go for such a procedure, nothing the doctor could have done about. She was briefed on the risk long before the 1 December 2009. I am therefore not satisfied that doctor Engelbrecht should be entitled to the costs as suggested.
27. Lastly, an issue was raised that any award falling within the magistrate's jurisdiction should disentitle the plaintiff to costs on the Supreme Court scale. I do not think that this was an easy matter. Choice of forum by the plaintiff in the circumstances of the case cannot be said to have been unreasonable.

28. Consequently, judgment is hereby granted in favour of the plaintiff as follows:

- (a) the defendant to pay R2425.17 being for past medical expenses,
- (b) the defendant to pay R20 000 being in respect of future medical expenses,
- (c) the defendant to pay R75 000 being in respect of general damages,
- (d) payments in (a) to (c) above are subject to the apportionment of 20% against the plaintiff,
- (e) the defendant to pay costs of the action on the Supreme Court party and party scale.


M F LEGODI
JUDGE OF THE HIGH COURT

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