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

Case number: 2017/52294

Date of hearing: 31 July 2024

Date delivered: 30 September 2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

DATE: 30/9/24

SIGNATURE:

In the application of:

FRED CRISTIAN STEVEN DE BOD

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 September 2024.

JUDGMENT

SWANEPOEL J:

[1] The plaintiff seeks damages pursuant to a collision that occurred on 14 July 2014 when the plaintiff was 46 years of age. The summons was duly served on the defendant on 31 July 2017. The defendant delivered a plea on 23 August 2017, but has, as is most often now the case, otherwise failed to further participate in the proceedings. The matter is therefore before me on an unopposed basis.

[2] The plaintiff had previously accepted a settlement that had been proposed by the defendant, for payment of the sum of R 9 500.00 in full and final settlement. The plaintiff pleads that an oral contract was entered into between the parties in terms of which the defendant was obliged to ensure that the plaintiff was properly compensated for his damages, and in the alternative, that the defendant had been under a duty of care to properly compensate the plaintiff for his damages. The plaintiff further says that his damages exceed by far the amount settled upon, and that he should be compensated for the difference. There is nothing to gainsay the plaintiff's averment on either ground, and I accept same.

[3] The plaintiff has brought application in terms of rule 38 (2), to produce evidence on affidavit of the plaintiff as well as of the various expert witnesses. I shall grant that application.

[4] The plaintiff says that he was stationary at a traffic light-controlled intersection, when the insured driver collided with his vehicle from behind. There is no evidence that the plaintiff contributed to the collision. In any event, the defendant conceded liability for 100% of the plaintiff's damages in the section 17 (4) undertaking dated 30 October 2015. The defendant is, consequently, liable for 100% of the plaintiff's proven damages.

[5] The plaintiff seeks payment for general damages and for loss of earning capacity. He has already been provided with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996 ("the Act") for future medical expenses. He has abandoned a claim for past medical expenses. As far as general damages are concerned, a Court is rendered without jurisdiction where the

defendant has not accepted that the injury suffered is serious.¹ The plaintiff has pleaded that the defendant has not considered the seriousness of the injury, and whether he qualifies for general damages. The defendant has denied that the plaintiff qualifies for general damages, and this question has not yet been assessed by the Health Professions Council of South Africa. I am therefore without jurisdiction to consider general damages, and I propose to postpone general damages for later determination.

[6] The only remaining aspect is that of loss of earning capacity. In substantiation of this claim, the plaintiff has delivered various expert reports that I will refer to where relevant. Dr. Senske, an orthopaedic surgeon, reports that the plaintiff suffered a soft tissue injury of the cervical and lumbar spine. He visited a hospital a week after the accident. Having been prescribed analgesics, he received no further treatment. He suffered acute pain for five days after the accident. At the time of the examination in November 2017 the plaintiff complained about pain in his lower back, headaches, a restricted range of movement, numbness in his arms and pain in both arms. He was unable to walk for any distance, to stand or sit for long periods, nor to drive long distances. Dr. Senske opined that the injuries would improve with conservative treatment.

[7] Dr. Pillay, a neurologist, reported that the plaintiff did not lose consciousness after the accident. He attended at a hospital some days after the accident. He was not admitted, receiving conservative treatment only. He was of the view that the plaintiff did not suffer a significant head injury and that he has no objective cognitive, neuropsychiatric or physical neurological deficits. Dr. Pillay reported that the plaintiff had a pre-existing cervical and lumbar disk space narrowing as a result of degenerative spine disease.

[8] Ms. Ingrid Kleynhans, an occupational therapist, reported that she has had sight of an RAF 1 form that was been completed by one Dr. D Scheppers. The form indicated that the plaintiff was suffering from a pre-existing condition, namely C5-C6

¹ Section 17 (1), read with section 17 (1A), 26 (1A) of the Act and Regulation 3 of the Road Accident Fund Regulations; *Mphahla v RAF* [2017] ZASCA 79; *Knoetze v RAF* [2022] ZAGPPHV 819 (2 November 2022)

disk space narrowing, C6-C7 disk space narrowing, and L4-S1 disk space narrowing. The plaintiff was taking approximately 6 Spasmed tablets and 1 to 2 Grandpa tablets per week for pain. In addition, he smoked marijuana.

[9] Ms Kleynhans opines as follows:

“In terms of apportionment, relevant pre-accident pathology should be taken into consideration with overview of Mr De Bod’s function post-accident as it may have resulted in the emergence of presentation of symptoms/difficulties (irrespective of the accident in question). It is however, considered that Mr De Bod reported that spinal pain only became prominent since the accident. Although pre-existing conditions may therefore have required treatment and medical intervention at some point in time, irrespective of the accident, the accident however appears to have brought forward his symptoms and the need to timeously implement conservative treatment measures.”

[10] Ms. Kleynhans is of the view that the plaintiff is suited for medium capacity work. In a reassessment conducted in January 2024, Ms. Kleynhans reported that the plaintiff suffered headaches 2 to 3 times a week. He experiences pins and needles and numbness in his upper and lower limbs. At the time of the accident, he was employed as a general worker. When he returned to work, he collapsed and was later dismissed. At the time of the assessment the plaintiff was still unemployed. The plaintiff has recently suffered a stroke, from which he recovered well, and he does not present with any physical cognitive or neurological fallout. Nevertheless, the plaintiff’s physical capacity has decreased, which she ascribes to aging and a sedentary lifestyle, as may also be his new complaints of pain.

[11] Currently the plaintiff would only cope with employment of a sedentary nature, which he is unlikely to secure due to his limited education.

[12] Dr Raath is a pain specialist. He reports that the plaintiff suffers pain in the lumbar region, thoracic spine, neck and hips, and that he suffers headaches approximately every three days. A sonar scan indicated that the left and right occipital nerves were entrapped and required releasing, which would alleviate the

headaches. X-ray examination shows that the facet joints are normally aligned. However, Dr Raath opines that the whiplash injury resulted in inflammation in the facet joints, contributing to the headaches. This could be alleviated by Radio-Frequency treatment. He says that the plaintiff is not impaired physically, but rather by the pain that he suffers. In his opinion the plaintiff's complaints are authentic. I accept Dr. Raath's opinion that, although the injuries were on the face of it minor, the impact that the plaintiff suffers due to pain is profound.

[13] Ms. Lize van Glass interviewed the plaintiff in 2017, and rendered a report in 2018. She provided a history of the plaintiff's employment. The plaintiff allegedly was employed by approximately nine companies during the period 1985 to 2014. In numerous instances he could not remember why he left the company. One notable exception is that the plaintiff could recall being dismissed in 1991 for housebreaking. No evidence is forthcoming regarding the plaintiff's remuneration in this 29-year period. As far as his employment in 2014 is concerned, the plaintiff is reported as not having returned to work after the accident, for which he was dismissed. From an employment certificate it was ascertained that the plaintiff was paid R 2 500 per week plus overtime of R 62.50 per hour. Ms. Van Glass calculated the plaintiff's annual income at R 152 425.00 per annum. An employment certificate recorded that the plaintiff had been off work since 21 July 2014, and that he had never returned to work.

[14] Ms. van Glass opined that the plaintiff's employment record, and his incarceration, would likely have had a negative impact on his ability to obtain alternative employment once he was dismissed by his employer in 2014. She also formed the view that he would likely remain unemployed.

[15] The industrial psychologist, Barbara Grobbelaar reported in 2023 that the plaintiff achieved Grade 10 at the age of 17. None of his siblings completed Grade 12, and his 30-year-old son is still unemployed, having achieved Grade 11. Between 1985 (when he started his career) until 2013 the plaintiff worked as a semi-skilled fitter, but was only intermittently unemployed. There are no record of these periods of employment, and different versions regarding the plaintiff's employment were provided to different experts. He became employed formally in January 2014, but

was then involved in the accident on 14 July 2014. He reportedly earned R 2500 per week, although proof of income was not available. There is no explanation why collateral evidence regarding the plaintiff's alleged pre-accident earnings were not sought. In March 2015, having not returned to work, he was dismissed.

[16] It is likely that the plaintiff will not become employed again, although, in my view, not solely as a result of the accident. The main drivers of the plaintiff's unemployment seem to me to be his erratic employment history, his failure to return to work after the accident, and his limited education. The plaintiff says that he collapsed at work, whereafter he never returned. There is no evidence whatsoever whether the plaintiff went to a doctor to ascertain why he 'collapsed', nor that he was then unable to work. There is no evidence regarding what other steps he took to obtain other employment or to improve his educational lot so that he could obtain sedentary employment.

[17] A significant consideration is that the plaintiff had a pre-existing condition and that the accident might have hastened his symptoms. They may likely also have led to the hastening of his retirement age. All of the above considerations should result, in my view, in the application of substantial contingencies to the figures proposed by the actuary. The calculation by the actuary is as follows (without the application of contingencies):

Income if the accident did not occur:

Past: R 1 789 679 Future: R 1 470 349 Total: R 3 260 028

Income given accident occurred:

Past: R 80 358 Future: Nil Total R 80 358

Difference:

Past: R 1 709 321 Future: R 1 470 349 Total: R 3 179 670

[18] The plaintiff has submitted that I should apply contingencies of 5% to the past loss and 10% to the future loss. That would normally be appropriate. However, given the various factors that I have outlined above, that would likely have impacted on the

plaintiff's longevity in his employment, I propose to rather apply 5 % on the past loss, and 25% on future income. That calculates to a total loss of R 2 726 616.70.

[19] A final issue to be addressed is the contingency fee agreement entered into between the parties. I sought the plaintiff's submissions on the agreement, and I am grateful for the 104-page document. Clause 6.1 and 6.2 of the agreement reads as follows:

"6.1 Die partye kom ooreen dat indien die klient suksesvol of gedeeltelik suksesvol is soos bedoel in die ooreenkoms, sal die regspraktisyn, benewens" sy normale fooi ook geregtig wees op 'n suksesfooi (hoër fooi) onderhewig aan die bepalinge dat:

6.1.1 Enige sodanige fooie wat hoër is as die regspraktisyn se normale fooi (synde "suksesfooi"), sal nie die normale fooie met meer as 100% oorskry nie, en in eise van "klinkende munt", sal sodanige suksesfooi nie 25% van die klient se kapitale skikking wat uit die aksie voorspruit oorskry, welke bedrag nie koste of uitgawes insluit nie.

6.2 Die partye tot die ooreenkoms kom ooreen dat, indien die klient gedeeltelik suksesvol is soos bedoel in die ooreenkoms, sal die regspraktisyn, benewens sy normale fooi, ook geregtig wees op 'n suksesfooi (hoër fooi) onderhewig aan die volgende:

6.2.1 Enige sodanige fooie wat hoër is as die regspraktisyn se normale fooi (synde "suksesfooi"), sal nie die normale fooie met meer as 100% oorskry nie, en in eise van "klinkende munt", sal sodanige suksesfooi nie 25% van die klient se kapitale skikking wat uit die aksie voorspruit oorskry, welke bedrag nie koste of uitgawes insluit nie."

[20] The important word in the above paragraphs is the word "benewens" which I have highlighted, which means that, save for the normal fee, a further success fee is charged in addition to the normal fee. The agreement explains the method of calculation, which is the following: Firstly, the attorney's fees are calculated on the

attorney/client scale. Then the “success fee” is calculated as double the attorney/client fee, or 25% of the claim, whichever is the least. Finally, the attorney client fee and the “success fee” are added together to determine the total fee payable to the attorney. Finally, VAT is added to the total amount. The example used in the agreement explains that out of a hypothetical settlement of R 500 000, the client would be entitled to payment of R 272 000.00, slightly more than 50% of the claim, instead of 75% as the CF Act provides.

[21] Section 2 of the Contingencies Fees Act, 66 of 1997 (“the CF Act”) provides as follows:

“2 (1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed:

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her fees, if such client is successful in such proceedings to the extent set out in such agreement.

(2) Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned (herein referred to as the ‘success fee’), shall not exceed such fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purpose of calculating such excess, include any costs.”

[22] The manner in which this contingency fee agreement is framed allows the attorney to take his normal attorney/client fee. To this fee is then added a success fee, which in itself may be double the normal fee, but subject to the limitation that the success fee may not exceed 25% of the award. The limitation to 25% of the award is applied only to the so-called success fee, which is then charged in addition to the normal attorney/client fee. The plaintiff's submissions also confirm that this is the attorney's understanding of the CF Act, that the success fee is charged over and above the normal fee, and that the aggregate fee is not limited as provided for in section 2 (2) of the CF Act.

[23] Section 2 of the CF Act is intended to limit the total fee payable to an attorney to a maximum of 25% of the award. The CF Act provides that a person may enter into an agreement in terms of which the legal practitioner is owed nothing unless he attains success as defined by the agreement. Once success is attained, the attorney is entitled to increase his fee by not more than 100% of the attorney/client fee, but subject to a limitation of 25% of the award. That much is also clear from the pro forma agreement published by the Minister of Justice in terms of section 3 of the CF Act. Neither the CF Act, nor the pro-forma published by the Minister allows for the raising of an attorney/client fee, and an additional "success fee" of double the attorney/client fee, if the total exceeds 25%.

[24] The CF Act is intended to ensure that a client receives at least 75% of the amount awarded to the client.² In *Masango v Road Accident Fund*³ the Court said:

"Normal fees in litigation are fees which are recoverable by an attorney from his or her own client and which would be allowable on taxation of an attorney-and-client bill by the taxing master outside of any special arrangements. . . . 'Success fees' are contemplated and explained but are not defined in s 2 (2) of the CFA. They are increased fees which a legal practitioner will be entitled to recover in the event of being successful in the litigation to the extent as set out in the agreement concluded in terms of the CFA. The subsection requires

² Thulo v RAF 2011 (5) SA 446 (GSJ)

³ 2016 (6) SA 508 (GJ) at 516 D

the legal practitioner and the client to specify in the agreement what they will regard as success in the particular litigation. A success fee is a normal fee which has been increased by a pre-agreed percentage. There is no other way of increasing the normal fee to the increased or success fee than through a percentage. The normal fee may be increased by up to 100% to reach a success fee. A success fee may thus be and is often double the normal fee.”

[25] The “success fee” is consequently not a fee raised in addition to the normal fee, it is simply an increase of the normal fee by no more than 100% of the normal fee, to a maximum of 25% of the award, whichever is the lesser amount. This point was also made in *Van der Westhuizen v Road Accident Fund*⁴:

“Although the normal fee is used as the basis for calculating the higher fee, the success fee, the success fee is not charged over and above the normal fees.”

[26] It is, therefore, clear that the contingency fee agreement in this case does not comply with the CF Act. It must be declared to be invalid.⁵

[27] I make the following order:

[27.1] The Defendant is ordered to pay to the Plaintiff the amount of R 2 726 616.70 in respect of loss of earning capacity, (the “capital amount”), in one instalment, within 180 (ONE HUNDRED AND EIGHTY DAYS) days after granting of this order. Should payment not be effected timeously the Plaintiff will be entitled to recover interest on the unpaid capital amount at the prescribed rate *per annum* published from time to time in the national gazette, and calculated from the 15th day from service of this Court order.

[27.2] The Defendant is ordered to pay the Plaintiff’s taxed, *alternatively* agreed costs of the suit on High Court party-and-party scale as well as

⁴ [2024] ZAGPPHC 742 (29 July 2024) at para [22]

⁵ See Masango (*supra*) at 524 G

the cost incurred up to the date of the stamped court order confirming the settlement and which costs shall include, but not be limited, to the following:

[27.2.1] The costs of all medico-legal, radiological and RAF4, actuarial, addendums, re-calculations, and joint reports, if any, filed by the Plaintiff;

[27.2.2] The reasonable and taxable preparation, qualifying and reservation fees of the Plaintiff's experts, if any, in such amount as allowed by the Taxing Master, of the experts as in [27.2.1];

[27.2.3] The costs of and consequent to drafting and procuring affidavits from the expert witnesses in paragraph [27.2.1] with a view to applying for default judgment, as well as the expert witnesses' charges in respect thereof;

[27.2.4] The full fee ("day fee") on scale B in terms of Rule 69 as required in terms of section 67A(3)(a)) of Plaintiff's Counsel briefed for trial on 31 July 2024 as well as his reasonable preparation for trial, as well as preparing heads of argument and the filing thereof, the preparation of the joint submissions upon settlement of the matter as well as the taking of the order.

[27.3] The plaintiff shall pay the costs within 14 days of agreement being reached on costs, alternatively, the service of an allocator on the defendant. Should payment of the taxed costs not be effected timeously, the Plaintiff shall be entitled to recover interest on the taxed *alternatively* agreed costs at the prescribed interest rate *per annum* from the date of allocator or agreement to date of final payment.

[27.4] The amounts referred to in paragraphs 27.1 and 27.2 will be paid to the Plaintiff's attorneys, Gert Nel Incorporated, by direct transfer into their trust account, details of which are the following:

ABSA Bank

Account number: 4[...]

Branch code: 335545

REF.: DH OELOFSE/gn11254

[27.5] General damages are postponed *sine die*.

[27.6] The contingency fee agreement entered into by the parties on 10 February 2017 is invalid.

**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA**

Counsel for the applicant: Adv. J Van der Merwe

Instructed by: Gert Nel Inc.

Date heard: 30 July 2024

Date of judgment: 30 September 2024