

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 34481 /2018

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

SIGNATURE DATE: 18 March 2022

JUSTINE PHIRI

Applicant

And

ROAD ACCIDENT FUND

Respondent

Coram: Nichols AJ

Heard: 15 March 2022 – The ‘virtual hearing’ by the Court was conducted as a videoconference on *Microsoft Teams*.

Delivered: 18 March 2022 – This judgment was handed down electronically by circulation to the parties’ representatives *via* email, by being uploaded to *Caselines* and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 18 March 2022.

JUDGMENT (LEAVE TO APPEAL)

NICHOLS AJ:

Introduction

[1] This is an application for leave to appeal by the plaintiff (in the main action), against the judgement and order dated 23 December 2021 (the judgment). Leave is sought to a Full Bench of this division, alternatively to the Supreme Court of Appeal. The application is unopposed and the respondent, the Road Accident Fund (RAF), was not represented at the hearing of this application for leave to appeal.

[2] Coupled with this application for leave to appeal is an application for condonation for the late filing of the application for leave to appeal. This application for condonation was moved from the bar by plaintiff's counsel, Ms Molohe-Madondo.

[3] For the sake of convenience, I shall refer to the parties as they are cited in the judgment.

[4] The matter came before me as a default judgment trial in which the plaintiff sought judgment against the RAF for general damages and loss of earnings. The issue of liability had previously been settled on 5 February 2018 at 80% in favour of the plaintiff. The plaintiff did not pursue a claim for past medical and hospital expenses and he was provided with an undertaking certificate in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act), limited to 80% of his proven damages, in respect of his future medical and hospital expenses.

[5] After hearing and considering the *viva voca* evidence of the plaintiff and his expert witnesses, I made the following order:

- 1 *'The plaintiff's claim in respect of general damages is postponed sine die.*
- 2 *The plaintiff's request for judgment by default in respect of past loss of earnings and future loss of earnings is dismissed.*
- 3 *The plaintiff shall bear his own costs in respect of the trial.'*

[6] The facts of the case are comprehensively set out in the judgment and full reasons have been provided for the judgment. These will not be repeated.

[7] Subsequent to the delivery of the judgment, the plaintiff delivered his notice of application for leave to appeal setting out the grounds of appeal. This notice is dated 23 February 2022. It was served on the RAF on 28 February 2022 and filed at court on

1 March 2022. Ms Molohe-Madondo submitted that the plaintiff's attorneys only became aware of the judgment on 17 January 2022 when they returned to the office after the Christmas break. She contended that the *dies* for the lodgement of the appeal should only be calculated from this date. On this argument, the application for leave to appeal should have been delivered on or before 7 February 2022. No explanation was, however provided for the plaintiff's failure to deliver the application for leave to appeal by this date or his failure to provide a proper written motivated application for condonation for the late delivery of the application for leave to appeal.

[8] It is trite that condonation is not for the mere asking and it is incumbent upon an applicant seeking condonation to establish that he did not wilfully disregard the timeframes provided for in the Uniform Rules of Court and that there are reasonable prospects of success on appeal. In *Melane v Southern Insurance Co Ltd*,¹ the following is stated about the factors that will be taken into account when considering a condonation application:

'In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

The test in an application for leave to appeal

[9] It is trite that leave to appeal must be sought in terms of s 16 and s 17(1) of the Superior Courts Act.² Section 17(1) reads as follows:

'Section 17

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

¹ *Melane v Southern Insurance Co Ltd* 1962 (4) SA 531 (AD) at page 532B-E.

² Superior Courts Act 10 of 2013.

- (a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) ...'

[10] This test is much higher than the previous requirement for leave to appeal which required that there should be reasonable prospects that another court may come to a different conclusion. As stated by Bertelsmann J in the matter of *The Mont Chevaux Trust v Tina Goosen & 18 Others*:

*'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'*⁴

[11] The plaintiff is therefore required to satisfy this Court that he has reasonable prospects of success on appeal and that based on the facts and the law another court will arrive at a conclusion different to that reached by this Court.⁵ As Plasket AJA stated in *S v Smith*:

*'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'*⁶

[12] The plaintiff's notice of application for leave to appeal is premised upon s 17(1)(a). Accordingly, the plaintiff is required to satisfy this Court that he has reasonable prospects

³ *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDT 2325 (LCC).

⁴ *The Mont Chevaux Trust* ibid para 6.

⁵ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

⁶ *Smith* ibid para 7.

of success on appeal or that there are compelling reasons why the appeal should be heard.

General damages

[13] The plaintiff contends that this Court erred in law by finding that it was precluded from determining the quantum of his general damages claim until the RAF or an appeal tribunal of the Health Professions Council of South Africa (HPCSA) determined that he had suffered a serious injury that justifies the award of general damages.

[14] It is further contended that this Court erred by finding that the RAF still had a role to play in the adjudication of general damages after its defense had been struck off and it took no further part in the legal proceedings before this Court.

[15] The grounds that are advanced for these contentions are the following:

(a) The plaintiff argues that his matter is distinguishable from the SCA authorities referred to in the judgment that emphasised the administrative nature of the determination of a serious injury in terms of the Act. It is contended that the critical and distinguishing feature of the plaintiff's matter is the fact that his matter proceeded on the default judgment trial roll as an unopposed default trial after the RAF's defence had been struck out.

(b) Ms Molohe-Madondo argued that in this scenario the onus is upon the plaintiff to establish his entitlement to general damages by default. In doing so, he is entitled to disregard the provisions of the Act and its constraints regarding the administrative requirements for the acceptance of a serious injury determination by the RAF. Provided the plaintiff, by default, establishes that his RAF4 form was completed correctly and is supported by medical evidence then that should be sufficient to discharge his onus.

(c) Ms Molohe-Madondo referred to a few decisions from this division in support of this argument. These cases are referenced in the application for leave to appeal. They are submitted as authority for the proposition that a court may determine whether a plaintiff has suffered a serious injury in order to determine whether he is entitled to general damages and the quantum of the general damages, contrary to established authority, *stare decisis* and legislation, when such decision is to be determined by default after the RAFs defense has been struck out.

(d) It was contended that the SCA authorities referred to in the judgment are not binding, or applicable and are distinguishable because the RAF was represented in those matters. This contention was advanced and maintained, notwithstanding that what was applied was the *ratio decidendi* from these authorities not the facts.

(e) As an alternative, Ms Molohe-Madondo conceded that the local division decisions that the plaintiff relies on may indicate an inconsistent application of the established principles regarding the adjudication of general damages in matters where the RAF is unrepresented on the default judgment trial roll.

Loss of earnings

[16] The plaintiff contends that this court erred by dismissing his claim for loss of earnings in totality.

[17] The grounds for this contention are the following:

(a) Higher than normal contingencies should and could have been applied to address this Court's difficulties with the plaintiff's evidence.

(b) This Court could and should have applied the general earning scales in relation to people employed in the informal sector. These have been widely applied by the courts in RAF matters where plaintiffs have no formal employment.

(c) The court erred by failing to consider, at a minimum, the plaintiff's potential future loss of earnings in the circumstances where the court was not satisfied that the plaintiff had established and proved any pre-accident employment. It was argued that the plaintiff has indubitably suffered a future loss of earnings.

(d) This Court should have made a discretionary finding and award for the plaintiff's potential future loss of earnings because the Industrial Psychologist clearly indicated that he suffered a reduced earning capacity because of his post-accident sequelae.

(e) As authority for these propositions, reference was made to *Southern Insurance Association v Bailey N.O*⁷ where Nicholson JA held:

⁷ *Southern Insurance Association v Bailey N.O* 1984 (1) SA 98 (A) at 116G to 117A.

'Where the method of actuarial computation is adopted, it does not mean that the trial judge is "tide down by inexorable actuarial calculations." He has a "large discretion to award what he considers right" (per Holmes JA in Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A) at 611 F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or to general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 (A) at 114-115. The rate of the discount cannot of course be assessed on any logical basis — the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case.'

[18] In the premises, the plaintiff is of the view that another court will reach a different conclusion and he should be granted leave to appeal.

[19] In considering whether another court 'would' come to a different conclusion, I have taken into account the application for leave to appeal, the oral submissions on behalf of the plaintiff and the novelty of the issues raised.

[20] The law regarding general damages in the context of RAF claims is settled and uncontroversial. Ms Molope-Madondo was informed at the commencement of the trial of my concern that the RAF had failed to accept or reject the plaintiff's serious injury assessment report or directed him to submit to a further assessment. The plaintiff elected to pursue his claim for general damages and to contend that this Court would not be exceeding its authority by determining whether the nature of his injury was serious in order to further determine that he was entitled to a claim for general damages and the quantum of such general damages.

[21] A plaintiff is not without recourse when the RAF fails to accept or reject his RAF4 form. However, this recourse is administrative in nature and the plaintiff may enforce the remedies available to him in terms of the Promotion of Administrative Justice Act⁸ (PAJA).⁹

⁸ Promotion of Administrative Justice Act 3 of 2000.

⁹ *Mphala v Road Accident Fund* (698/16) [2017] ZASCA 76 (1 June 2017) para 12.

[22] I do however, take cognisance of the fact that the RAF is a public entity that has a constitutional obligation to provide social security and access to healthcare services and that it is the statutory defendant for claims arising out of driving a motor vehicle.¹⁰ It is now also well known that the RAF is in a precarious financial position.¹¹ Since June 2020, the RAF terminated the mandate and services of its panel attorneys nationwide.¹² This resulted in the situation prevalent at present, that a large number of actions with the RAF as defendant, are allocated to the default judgment trial roll to proceed on an unopposed basis. In this division, this usually occurs following from a court order striking out the RAF's defence that is preceded by the RAF's failure to comply with a compelling court order. The largest percentage of litigation in most courts nationwide is undertaken against the RAF.¹³ .

[23] It is against the backdrop set out in the preceding paragraph that the plaintiff's contentions may merit scrutiny by another court. Additionally, should the decisions referred to in the application for leave to appeal evince of conflicting decisions that may lead to legal uncertainty, then it is appropriate that these are resolved.

[24] There is no *numurus clausus* as to what constitutes a 'compelling reason' sufficient to justify leave to appeal being granted. However, the following are just a few reasons that have been accepted as compelling reasons by our courts. Conflicting judgments on the matter sought to be appealed; the proper interpretation of a section of legislation; that the case raises a discrete issue of public importance that will have an effect on future matters or that a point of law has been raised which will require resolution.¹⁴

[25] The submissions regarding the issue of general damages, constitute a 'compelling reason' sufficient to justify leave to appeal being granted. That there should be consistency in the application of general principles in default judgment trial court where the RAF is the unrepresented defendant is self-evident. Particularly since the funds disbursed by the RAF are public funds.

¹⁰ *RAF v LPC and Others* (58145/2020) [2021] ZAGPPHC 173; [2021] 2 ALL SA 886 (GP); 2021 (6) SA 230 (GP) (9 April 2021) para 19 and 21.

¹¹ *LPC* Ibid para 18.

¹² *MT v Road Accident Fund; HM v Road Accident Fund* (37986/2018) [2020] ZAGPJHC 286; [2021] 1 ALL SA 285 (GJ); 2021 (2) SA 618 (GJ) (16 November 2020) para 11.

¹³ *MT* Ibid para 14.

¹⁴ *Nova Property Group Holdings Ltd and Others v Cobbett and Another* [2016] 3 ALL SA 32 (SCA) paras 9, 10 and 11; *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and Others as Amici Curiae)* [2016] 2 ALL SA 365 (SCA) para 23.

[26] In order to adjudicate the issue of loss of earnings, I was required to determine whether the plaintiff had discharged the onus to prove his case on a balance of probabilities. It is trite that before any weight can be attached to an expert's opinion, the facts upon which the opinion is based must be found to exist since an opinion based on facts not in evidence has no value for the court.¹⁵

[27] The order dismissing the plaintiff's claim for loss of earnings was premised upon the totality of the discrepancies and inconsistencies evident from the plaintiff's pleadings and evidence. I determined that no reliance could be placed upon the Industrial Psychologist's report because it was based on incorrect facts and reflected incorrect assumptions.

[28] However, another court may decide that the plaintiff should be awarded a discretionary amount as compensation for future loss of earnings because of his post-accident sequelae and because he is employed in the informal sector.

Order

[29] In the result, I make the following order:

- (a) The late delivery of the application for leave to appeal is condoned.
- (b) The plaintiff is granted leave to appeal to a Full Bench of this Court.
- (c) The costs of the application for leave to appeal will be costs in the appeal.

T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

¹⁵ *HAL obo MML v MEC for Health, Free State* (1021/2019) [2021] ZASCA 149 (22 October 2021) para 208.

Appearances:

Counsel for the applicant: Adv Molohe-Madondo

Attorney for the applicant: Sepamla Attorneys
Johannesburg

Counsel for the respondent: Unrepresented