REPUBLIC OF SOUTH AFRICA

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

Case Number: 3160/2019

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

_____ _____
DATE SIGNATURE

In the matter between:

VAN SCHALKWYK, M A Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

SAINT AJ

Introduction

(1) What follows are the reasons for my judgement handed down on 6 February 2024.

(2) The matter served before me unopposed, the Defendant's defence having been struck on 24 February 2022. This notwithstanding, Mr Klaas from the

offices of the state attorney was permitted to make submissions on behalf of the Defendant.

(3) The matter proceeded on the pleadings and reports of the Plaintiff alone, with no testimony led by either the Plaintiff or Defendant.

(4) The Plaintiff is a 40 year old female born on 10 January 1984. The matter, previously, came before the Coppen J on 31 May 2023, where it was settled in part. By agreement between the parties, Coppen J ordered that -

" 1. The Defendant shall pay to the Plaintiff the amount of R4 250 000.00 (FOUR MILLION TWO HUNDRED AND FIFTY THOUSAND) made up as follows:

1.1. R1 250 000.00 in respect of the claim for General Damages;

1.2. R3 000 000.00 as an interim payment in respect of the claim for Loss of Earnings…"

An undertaking to cover the entire future medical costs in terms of the Road Accident Fund Act, 56 of 1996, along with costs was also provided for in the order of Coppen J.

The Evidence

(5) On 6 February 2024, following argument from counsel for the Plaintiff and submissions from that of the Defendant, I ordered and awarded the Plaintiff the following: –

a. Past Hospital and Medical Expenses in the amount of R 48 328,90;
b. Loss of Earnings, in the amount of R5 954 356,13;
c. The total sum of R6 002 685,03 was subject to the prior interim award in the sum of R3 000 000.00 ordered by Coppen J, in respect of loss of earnings;

(6) The sum of R5 954 356,13 in respect of loss of earnings was arrived at after I allowed for a further contingency deduction of 25% off the amount claimed by the Plaintiff.

(7) The amount argued for by the counsel for the Plaintiff in terms of an actuarial calculation was R7,939,141.50. It bears mentioning that in arriving at this amount, normal contingencies in relation to time, age and retirement were applied by the Plaintiff.

(8) Against the said amount a further 25% contingency deduction (R1,984,785.38) was applied by the court, bringing the net amount awarded for loss of earnings to R5 954 356,13.

(9) In applying a further contingency deduction to the claim for of loss of earnings, I was informed by a number of factors, dealt with herein.

(10) It was argued on behalf of the Plaintiff that the Plaintiff had no residual earning capacity. The Plaintiff‘s actuarial calculation, accordingly, makes no allowance for any post-accident earning potential on the part of the Plaintiff.

(11) The Court was not persuaded by the argument that the Plaintiff had no earning capacity post- morbidly. Based on this view, as well as a number of further factors dealt with herein, the Court arrived at the conclusion that a further contingency deduction off the amount claimed by the Plaintiff in respect of loss of earnings was justified, and necessary. The basis on which the estimated 25% contingency deduction was arrived at is set out herein below.

(12) According to the report of the neurosurgeon, Dr Kelly, the Plaintiff had been diagnosed with post-partum depression prior to the accident, which was controlled on medication. Since the accident she experienced a deterioration in her condition that required additional anti-depressants in order to control it.

(13) This pre-existing condition was not allowed for in the contingency deduction applied by the Plaintiff, and needed to be catered for.

(14) According to the neurologist Dr M Pillay -

“ the claimant has no cognitive impairment on screening by her. She has no disability preventing her from performing any actions”

(15) Further, according to the neurologist, the Plaintiff –

“ currently has subjective complaints of poor memory, irritability and post traumatic headaches”

(16) Insofar as the Plaintiff may be impaired in future employment on account of post-traumatic headaches, the neurologist is of the view that

“the headaches can be expected to resolve within a two – year period”

(17) According to the report of the neuropsychologist, the reported accident-related psychological difficulties experienced by the Plaintiff seem likely to be attributable to a combination of influences.

(18) The neuropsychologist’s view is that –

“depression is likely to be instrumental . In this regard, the available reports are suggestive of pre-existing vulnerability, but the accident is likely to have exerted a significant aggravating/exacerbating effect.”

(19) The neuropsychologist further recommends that the Plaintiff

“… Be referred for 60 sessions with a clinical psychologist.”

(20) The Court, accordingly, adopted the view that there is a prospect that the Plaintiff will benefit from clinical intervention, and in particular, sessions with a clinical psychologist.

(21) The neuropsychologist, adds further that-

“it is suggested that post this accident she (the Plaintiff) has experienced impairments related to psychological wellness and her ability to learn/study effectively. The degree to which she has been injured in the mentioned accident, has also exacerbated pre- accident vulnerabilities. Post – traumatic stress disorder is also indicated.”

(22) The educational psychologist’s recommendations and observations relating to intervention that may be helpful in assisting the Plaintiff to return to her pre- accident baseline level of functioning include the following -

- Her medical problems be deferred to the medical experts.
- The accident related psychological problems would probably require psychological interventions. The co-morbidities/ PTSD would be managed with psychotherapy as well as psychiatric interventions and medication.
- Her poor concentration and loss of memory in the academic domain make prognosis poor. This may partly improve based on her psychological problems improving.

(23) The educational psychologist recommends as follows -

“ 16. RECOMMENDATIONS

1. *Miranda will need to receive psychotherapy for the high levels of anxiety and emotional discomfort. This may need to be verified by a Clinical Psychologist as she also presents with PTSD-symptomology.*

2. *The services of an Educational Psychologist to enhance her learning with sessions on effective learning, studying strategies and motivational assistance are recommended.*
   (Cost: 20 sessions × R1000-00/session= R20,000-00).”

(24) Although the industrial psychologist is of the view (subject to the qualification that higher than normal contingencies need to be applied) that the Plaintiff *“can be classified as unemployable for the rest of her career life”*, the Court is of the view, based on the various expert opinions, that the Plaintiff will benefit from post-morbid intervention, and that such intervention, while probably insufficient to restore the Plaintiff’s prospects to what they were pre-morbidly, warrant a contingency deduction.

(25) It is to be noted that the pre-existing vulnerabilities of the Plaintiff, and the potential value of clinical intervention has not been allowed for in the calculation of the Plaintiff.

(26) A further factor in arriving at the contingency applied by the Court is that, in her report, the industrial psychologist of the Plaintiff, dealing with the Plaintiff's earning capacity pre-morbidly, cautions in respect of a number of uncertainties which justify the application of a higher than normal contingency allowance pre-morbidly.

(27) The Industrial Psychologist, holds the view in paragraph 12.4.6.2 of her report that –

"However, higher than normal pre-accident contingencies are strongly recommended to accommodate uncertainties regarding completion of an internship, opportunities for employment at a relatively advanced age, as well as progression to the indicated career ceiling"

(28) As stated, a normal contingency (12.75%) was applied by the in its claim for future loss of earnings. Higher than normal pre-accident contingencies, as strongly recommended by the Industrial Psychologist to accommodate uncertainties needed to be catered for.

(29) I am mindful that the contingencies applied by a court need to be applied judiciously and taking into account facts and expert opinion, as I have done.

(30) The cumulative contingency deduction applied by the Court incorporates an allowance for the number of factors alluded to.

(31) The combined effect of the post morbid interventions and their potential effect as well as the pre-existing condition of the Plaintiff, coupled with the reality that “capping” applied to the Plaintiff’s claim as calculated, was all taken into account in arriving at the cumulative contingency deduction.

Dated at Johannesburg on 20 May 2024

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SAINT AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing: 6 February 2024

Date of Judgement: 6 February 2024

Date of Reasons for Judgement: 20 May 2024

Counsel for the Plaintiff: G J Strydom SC

Instructed by Levin Tatanis Inc

Counsel for the Defendant: Mr Lutho Klaas

Instructed by the State Attorney