REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) NOT REVISED

CASE NO: 92470/15

14/9/2018

In the matter between:

B MEINTJIES Plaintiff

and

ROAD ACCIDENT FUND Defendant

Heard: 21 August 2018

Delivered: 14 September 2018

JUDGMENT

VAN DER SCHYFF. AJ

Introduction

[1] The parties settled the merits in favour of the plaintiff, and I was requested to separate the issue of general damages from the other heads of damages in terms of Rule 33(4) of the Uniform Rules of Court.

[2] Since it was convenient, and in view of the fact that the parties agreed that

the issue of general damages be postponed *sine die* pending referral to the HPCSA, I ordered the separation as requested.

[3] The defendant agreed to issue an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act (hereafter "the Act") to provide for all and any future medical and related expenses.

[4] I was requested to grant the amendment f the plaintiff's particulars of claim, since there was no objection the amendment was granted.

[5] The only issue that stands to be determined in this matter is the issue of loss of future earnings or earning capacity. The parties agreed that the plaintiff indeed suffered a loss of future income but that the dispute revolved around the contingencies that must be applied.

[6] The parties agreed *inter partes* that the actuarial report provided by the plaintiff should be used as the basis for any calculation pertaining to loss of earnings and earning capactiy, and that the only issue that remained for the court to decide was the contingencies.

[7] The parties additionally agreed that they will only argue the aspect of contingencies based on the joint minute of the Industrial Psychologists and the actuarial report.

[8] In view of the specific facts placed before the court (in the current matter that are set out below), an agreement of this nature creates a feeling of unease. I take cognisance of the judgment in *JJ Spamer v Road Accident Fund* decided on 20 April 2018 in this Division pertaining to admissions made during pre-trial conferences to which counsel for the plaintiff drew my attention. It should be noted that in the *Spamer* judgment the parties agreed that all the expert reports were admitted as evidence before the court, not only the joint minutes of the Industrial Psychologists and the actuarial reports as in the current matter. I take note however of the fact that plaintiff's counsel submits in his heads of argument (paragraph 26) that the evidence I must take into account also include the reports referred to in the Industrial Psychologist's joint minutes. In this regard cognisance should also be taken of *Mzwakhe v Road Accident Fund* (24460/2015) [2017) ZAGPJHC 342 (26 October 2017) where Weiner J held that even where the court is presented with a settlement agreement there is a duty

on the court to investigate the matter and ascertain whether or not the agreement is one which should be made an order of court. She stated in paragraph 6: "In being requested to make this an order of court the court is not merely a rubberstamp.... This is even more essential when the respondent is a public institution whose finances and the administration thereof are in the public interest". The learned judge elaborated in paragraphs [23] to [25]:

> "[23] Our courts are inundated with matters relating to the RAF and the Minister of Law and Order (in re unlawful arrest claims). The settlement agreements reached often bear no association to the damages actually suffered. The reasons for this are not apparent, although speculation is rife in regard to the motives behind such settlements. For these reasons, our courts have to be vigilant when dealing with State funds. The court can take judicial notice of the fact that the RAF claims that it is bankrupt. It is the court's duty to oversee the payment of public funds. The applicant must prove its claim with reliable evidence. The claim is for a substantial sum. The RAF, for reasons known only to it, has agreed to pay out this sum without any investigation into its validity. A court cannot allow that, when, on the face of it, the claim is based upon contradictory and flimsy evidence.
>
> [24] Our courts have a duty to ensure that it does not grant court orders that are *contra bonos mores.* Thus, a court will not enforce a contract that is against public policy. The agreement, which the parties seek to enforce, is a contract between them based upon a compromise. In *Fagan v Business Partners Limited*[1] the court held:
>
> *[19] A compromise, defined as a settlement of litigation or envisaged litigation, is a substantive contract that exists independently of the original cause. .... The defendant contends that the compromise is contra bonos mores, void and unenforceable.*
>
> *…..*
>
> *[26] Stipulations in a contract which are unconscionable, illegal or*

immoral will have the result that a court will refuse to give effect thereto. A contract or term of a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive. The criteria upon which a contract may be declared contrary to public policy is thus not sharply defined and changes with "the general sense of Justice of the community, the boni mores, manifested in public opinion' .... See Brisley v Drotsky [2002] ZASCA 35; 2002 4 SA 1 *(SCA) and Jug/al NO and Another v Shoprite Checkers (pty) Ltdt/a OK Franchise Division 2004(5) SA 248 (SCA) ':*

[23] *(sic)* The Court has had regard to the underlying facts upon which the agreement has been concluded. I am not satisfied that the Court should give effect to the agreement for the reasons stated above. The interests of the community, as a whole, demand that more scrutiny be involved in the disbursement of public funds."

I am of the view that this approach is even more applicable where the parties did not reach a formal settlement and the court must decide the issue of quantum within the parameters of any agreements reached between the parties.

[9] Since the parties, who are both represented by capable legal representatives agreed that the figures on which the actuary based the calculations should be accepted as evidence before the court, and since the plaintiff will be severely prejudiced if the court at this stage do not take the agreement between the parties that the actuarial report and the joint minutes of the Industrial Psychologists must be used as the basis for calculation of the claim into consideration, I will adjudicate the case on the basis that it is placed before me. In light of the submission made by plaintiff's counsel in his heads of argument that the reports referred to in

the Industrial Psychologists' joint minute also constitute evidence before the court, and the fact that the defendant will not be prejudiced if I take these reports into account, I also considered the reports referred to in the said joint minute.

[10] It should be kept in mind that the current issue to be determined is not the quantification of an award for non-patrimonial loss but a claim for loss of future income. The latter should not be confused with the former.

[11] It is evident from the Industrial Psychologists' joint minute and the reports referred to therein that the plaintiff's income and thus her business has grown since the accident. This does however not mean that the accident did not have an impact on the plaintiff's future income. It is stated in the joint minute that the accident had a restrictive impact on the plaintiff's functioning and that her career options have been curtailed from a physical perspective. She has been rendered a vulnerable and unequal participant in the open labour labour market. I am of the **view** that the opinion that the plaintiff was rendered "a vulnerable and unequal participant in the open labour labour market" does not take the reality of the plaintiff's current position into account. She is clearly an established businesswoman whose business has prospered since the accident. There are no facts indicating any probability at all that a need to compete in the open labour market will arise in future.

[12] Based on the reports I find that there is evidence indicating that it is probable that the plaintiff will have to acquire the services of an additional teacher to fulfil the teaching responsibilities that she had fulfilled and that will impact negatively on the income that she will personally generate from the business and affect her patrimony in future. Unfortunately, no information has been placed before me to consider the financial impact thereof, but I account for this probability when determining the applicable contingencies. I also take into consideration that the plaintiff's physical condition might force her to retire at an earlier age. No conclusive evidence was placed before me in this regard and in their joint minutes the Industrial Psychologists defer this aspect to the experts to come to a consensus. No such consensus report was placed before me. It was

argued by plaintiff's counsel that I should consider that D. Oelofse is the orthopaedic surgeon and therefore the "true" exper.t Dr Mashaba is however also an expert in own right and I am not able, on the evidence before me, to find conclusively that the plaintiff will have to retire 10 years earlier than what would have been the position but for the accident. Along the same vein I also take into consideration that since the plaintiff is conducting a prosperous business it can be assumed that the plaintiff will not merely close the doors of her business but sell the business when she is not capable to proceed with the business due to the *sequelae* associated with the injuries sustained.

[13] In view of the above I am of the view that having regard to the accident a contingency deduction of 25% applicable to the "having regard of the accident" calculation is appropriate in the current circumstances (this amounts to a 10% spread). This would result in the plaintiff's loss of future income to be calculated at R1 091 804:

Capitalised value of future earnings capacity- R10 918 047

But for accident@ 15% contingency -	R9 280 340
Having regard @ 25% contingency -	R8 188 536
	R 1 091 804

ORDER

In view of the aforesaid it is ordered that:

[1] The proposed amendment to the plaintiff's particulars of claim is granted;

[2] The draft order marked EVDS as amended is made an order of court.

E VAN DER SCHYFF

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 21 August 2018

For the Plaintiff/Applicant:	ADV CPJ STRYDOM
Instructed by:	IZAK J CROUCAMP ATTORNEYS
For the Defendant/Respondent:	ADV K MHLANGA
Instructed by:	DIALE MOGASHOA ATTORNEYS
Date of Judgment:	14 September 2018

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

BEFORE THE: HONOURABLE MADAM JUSTICE VAN DER SCHYFF AJ ON THE_____OF SEPTEMBER 2018

Case No: 92470/2015

In the matter between:

BELINDA MEINTJIES **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

DRAFT ORDER

After hearing the parties and considering the evidence, the following is ordered:

1. That the general damages is hereby separated from the other heads of damages in terms of Rule 33 **(4);**
2. The general damages is postponed *sine die* pending the referral to the HPCSA;
3. The defendant shall pay to the plaintiff's attorney the sum of **R1 091 804.00 (One million ninety one thousand eight hundred and four rand)** in respect of final settlement of the plaintiff's claim for loss of earnings arising out of the motor vehicle collision on 10 December 2010 in which the plaintiff was injured. The plaintiff nominates as her account, into which this amount must be paid, the following trust account:

   IZAK J CROUKAMP ATTORNEYS INCORPORATED

   Account Number [….]

   ABSA Bank LTD

Branch, Branch code: Kolonnade
reference: **CB0305**

4. The defendant is ordered to furnish to the plaintiffs attorney an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by the plaintiff in the motor vehicle collision that occurred on 10 December 2010, in terms of which undertaking the Defendant will be obliged to compensate the Plaintiff in respect· of the said costs after the costs have been incurred and on proof thereof.

5. If the defendant defaults to pay the amount stipulated in paragraph one of this order interest will run on the outstanding amount to be calculated at the rate of 10% per annum from date of judgement to date of final payment.

6. The Defendant shall pay the plaintiff's party and party costs on the High Court scale either as taxed or agreed to date which costs will *inter alia* include but not be limited to:

    6.1. The cost of senior-junior counsel including the cost of the preparation and attendance of trial;
    6.2. The costs consequently in the preparation of and obtaining the medico legal and actuary reports and joint minutes/addendum reports that were provided to the defendant;
    6.3. The reasonable taxable preparation, qualifying and reservation fees, if any, of the plaintiffs experts for trial;
    6.4. The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the plaintiff for attending the medico legal examinations, if any.

7. The party and party costs on the High Court scale either as taxed or agreed shall include any costs attendant upon obtaining of payment referred to in . paragraph 1 above, subject to the following conditions:

7.1. the plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and

7.2. the plaintiff shall allow the defendant 14 (fourteen) days to make payment of the taxed costs.

8. It is recorded that there is no contingency fee agreement between the Plaintiff and her attorney.

BY ORDER

THE REGISTRAR

COUNSEL FOR PLAINTIFF : ADV CPJ SRYDOM 0824532926

COUNSEL FOR DEFENDANT: ADV K MHLANGA 0792356030