

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

CASE NO: 36936/2016

15/2/2018

Not Reportable

Not of interest to other judges

In the matter between:

OUMA ELSIE SEBOTHOMA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PETERSEN AJ

[1] The plaintiff instituted action against the defendant for damages in terms of the provisions of the Road Accident Fund Act, Act 56 of 1996 as a result of bodily injuries she sustained as a passenger in a motor vehicle collision that occurred on the 4th of November 2014 at 23h20pm at or near R568 Road, Klipfont and Kammeelport, Kwa-Mhlanga involving a motor vehicle with registration number [...] driven by the insured driver.

[2] The issue of liability (merits) has been resolved in favour of the plaintiff with the defendant undertaking to pay 100% of plaintiff's proven or agreed damages. The defendant has further given a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the future medical and related expenses of the plaintiff. The issue of loss of earnings and general damages remains in dispute.

[3] I turn to the issue of general damages and the impasse between the plaintiff and defendant which manifested itself at the proverbial steps of the courthouse when the defendant instructed counsel that the RAF 4 form was now rejected by the Fund. Mr Kehrhahn for the plaintiff submits that the court should find that the defendant is bound by the Pre-Trial minutes of 7 February 2018 where it is alleged the defendant accepted the RAF 4 form. This submission was changed slightly when the pre-trial minutes were availed to the court in the following terms, that although the defendant neither accepted the RAF 4 form nor rejected same it should be held to account for the general damages or in the alternative that the court should show its displeasure at the defendant's behaviour with a punitive cost order if the issue of general damages is postponed. In support of these submissions reliance was placed on the unreported decisions of *Van Heerden v Road Accident Fund* (6644/2011) [2014] ZAGPPHC 958 (8 December 2014) and *Jacobs v RAF* 2013 JDR 2276 GNP. In *Van Heerden* Strauss AJ found at para [16]:

"...the defendants are prevented and precluded based on the pre-trial admission, to now reject the RAF 4 of Dr Heymans, and they cannot be blowing hot and cold *on their admissions in the pre-trial*, this was factually an acceptance of the RAF 4, qualifying the plaintiff for general damages." (my emphasis) and In *Jacobs* Kollapen J noted at paragraph 5 that:

"The defendant did not (until the 24 July 2013) communicate its decision with regard to the acceptance or rejection of the RAF 4 form. However in a pre-trial conference held on the 16th July 2013, the status of this report was considered and in *response to a question whether the defendant admitted the contents of various medico-legal reports including of Dr Engelbrecht, the answer was in the affirmative.*" (emphasis)

[4] The paragraphs referred to in *Van Heerden* and *Jacobs* are distinguishable from the present matter, when regard is had to the context of the question and answer dealing with this aspect in the pre-trial minutes:

"38. Does the Defendant agree that none of the issues needs to be referred by the parties to mediation, arbitration or a decision by a third party?

Answer: Agree. The Defendant reserve (sic) its rights to refer general damages to the HPCSA."

The word *Agree* was typed in the pre-trial minute but qualified with the handwritten answer that was initialled by the legal representatives. I cannot find that the pre-trial minutes attest to an acceptance of the RAF 4 form by the defendant.

[5] On the alternative argument, the Fund has 90 days from the date on which the serious assessment report (RAF 4 form) was sent or delivered to them, to reject or accept the serious injury assessment report. The RAF 4 form was completed on 11 June 2016 and duly submitted to the defendant. By rejecting the RAF 4 form only on the date of trial (12 February 2018), the defendant has clearly failed to comply with the peremptory 90 day period provided for in the regulations. The Regulations, however, do not indicate what the consequences would be if the Fund failed to comply with the peremptory 90 day period. In *Road Accident Fund v Duma and Three Similar Cases* 2013 (6) SA 9 (SCA), the failure to comply with the 90 day statutory period was considered:

"[9] One of the problems identified in *Duma* is that where the Fund does not reject or accept the SIA report within a reasonable period, the plaintiff is compelled to ask for an order of court reviewing the Fund's inaction, and in that process the court is required to determine what a reasonable period is. That is a fact-based enquiry. To avoid a plaintiff having to approach a court to determine whether the period is in fact reasonable, an amendment to the regulations was introduced requiring the Fund to assess the SIA report within 90 days.

[10] The high court rejected the appellant's argument that the introduction of the 90-day period gave rise to a deemed acceptance of the SIA report. The foundation for the argument was that the amendment sought to avoid the

mischief that *Duma* identified - the Fund's inaction - and that simply requiring the Fund to respond within 90 days would not achieve that end. The plaintiff would still have to apply, after the 90-day period, for a review of the Fund's inaction in terms of s 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This was costly and time consuming and would prejudice the plaintiff, especially one who was impoverished or did not have ready access to legal services. Thus one had to read into regulation 3(3)(dA) a proviso, the effect of which is that inaction on the part of the Fund for a period of 90 days would constitute a deemed acceptance of the injury as serious.

[12] ...In terms of s 6(2)(g), read with s 6(3)(b), of PAJA if the Fund unreasonably delays in taking a decision in circumstances where there is a period prescribed for that decision, an application can be brought for judicial review of the failure to take the decision.

[13] Moreover, the clear language of regulation 3(3)(dA) enjoins the Fund to decide within 90 days from the date on which the report was sent or delivered by hand to (a) accept the SIA report; (b) to reject it; or (c) to refer the third party for a further assessment. It was correctly argued for the Fund that regulation 3(3)(dA) was enacted to stipulate the time period within which the Fund must make a decision as to whether or not the third party has suffered serious injuries.

[14] ...It is always open to the Fund to reject the SIA report when it is not satisfied that the injury has been correctly assessed in terms of regulation 3(3)(dA). This regulation does no more than prescribe a period within which the Fund can reject or accept the report. It would be an anomaly if, in terms of regulation 3(3)(dA), where the Fund has failed to make a decision within the prescribed period, an otherwise not serious injury would by default become serious because of the delay. By including the prescribed period the legislature sought to ameliorate the hardship experienced by claimants prior to and after the *Duma* case. The intention was to bring legal certainty and to compel the Fund to act promptly and timeously, not to create a presumption in favour of a claimant that the injury in question is a serious one.

[17] The new regulation seeks to define the rights of the claimants in unambiguous terms and afford them an opportunity after 90 days to apply for a mandamus in terms of PAJA to compel the Fund to make a decision. It was

specifically enacted to deal with the mischief identified by this court in *Duma* relating to the phrase 'within a reasonable time' which caused uncertainty to claimants. It is unfortunate that the Fund continues to be tardy, but one cannot reformulate the regulation in order to avoid that consequence."

[6] The plaintiff's remedy clearly lies in section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA.) It is therefore clear that inasmuch as the tardiness of the defendant in the present matter in rejecting the RAF 4 form on the date of trial has occasioned an understandable sense of frustration on the part of the plaintiff, the plaintiff in the peculiar circumstances of this matter is not entitled to a punitive cost order.

[7] I turn to the issue of loss of earning capacity. The plaintiff filed several medico-legal reports of various experts whilst the defendant has filed none. The defendant conceded at the hearing of this matter that the plaintiffs expert reports could not be disputed. The only submission of any significance is that the loss of earnings be subjected to higher contingencies of 10% pre-morbid and 25% post-morbid premised on the fact that the plaintiff is still employed and remains in such employment 3 years post-accident. In this regard the parties are in agreement.

[8] The following reports were handed in by consent:

- 1.1 Dr Tshepo Meja (Specialist Neurosurgeon)
- 1.2 Dr Matthews Katjene (Clinical Psychologist)
- 1.3 Dr GM Tshukudu (Plastic Surgeon)
- 1.4 Adelaide Phasha (Occupational Therapist)
- 1.5 Sipiwe Katjene (Industrial Psychologist)
- 1.6 Munro's Actuaries (Actuary)

[9] The plaintiff was 30 years old at the time of the accident. She completed Grade 12 in 2003 and a 1 year Traffic Safety Certificate at the Tshwane University of Technology in 2004. During the period 2011 to the date of accident she worked at several restaurants and at Spar, with most of her employment history being as a cashier. Her income ranged from R1800 per month to R3000

per month at the time of the accident. After the accident she continued working for Spar as a cashier earning a net salary of R2433.94 per month and remains in the employ of Spar to date.

[10] The plaintiff sustained the following injuries in the accident, according to the RAF 4 form:

- a) Head laceration
- b) Abrasions on the face and arms
- c) Head Injury
- d) Multiple lacerations on the face and scalp

[11] The information supplied by the plaintiff to the experts is that post-accident she suffers from headaches, episodes of memory loss, anxiety attacks, neck, left knee, back and shoulder pain, and disfiguring facial scars. She presents with anger problems, fatigue, nightmares and making poor relationship choices. Dr Moja observed multiple disfiguring scars on her scalp, face and right distal forearm. Dr Tshukudu noted in particular that she has a 9cm linear scar with a 4cm scar below it on her face with a 2cm pigmented scar on the right cheek below the eyelid. Dr Moja in relation to the cervical spine, observed tenderness on the right side of her neck, although she had normal range of movement, but experienced pain on extension and rotation of her neck. There were, however no signs of root compression.

[12] According to Dr Katjene the plaintiff battled with following and processing of instructions throughout his evaluation. She was irritated by assigned tasks and requirements and exhibited poor endurance and concentration in her performance. Towards the end of the evaluation she appeared fatigued and sleepy. The plaintiff has a 10% Whole Person Impairment (WPI). She presents with challenges in interpersonal and heterosexual relationships due to emotional insecurities. She is experiencing moderate depressive and post-traumatic anxiety as a result of the accident.

[13] According to Ms Phasha the plaintiff has severe fallouts with regards to forward visual and auditory memory and sequencing, auditory recall/recognition,

simple multiple digit mathematical skills, safety and judgment, concrete moderate and complex problem solving as well as mental flexibility during problem solving and abstract reasoning. Ms Phasha then notes that the plaintiff's reasoning ability is lower than what is required of a cashier. She presented with lower mathematical skills needed to be a cashier as she was unable to add two digit numbers or to add, subtract, multiply and divide all units of measure. Dr Katjene notes that the plaintiff presents with evidence of marginal to significant neurocognitive deficits. Collateral information received from the plaintiff's supervisor attests to her poor interpersonal relationships with customers at times; and more importantly about her being prone to miscalculate and often not tallying on her till. Ms Greyling is of the opinion that the plaintiff would be able to cope with job demands that require constant working above head level, kneeling and climbing stairs. The plaintiff presented with a weak grip of the right hand expected to negatively impact on her ability to exert force and to hold onto objects. The plaintiff according to her would need to be alternated between positions and comply with spine hygiene and joint saving principles which will make her unequal competitor and ultimately make her a vulnerable employee impacting on her career advancement prospects.

[14] I am satisfied that the sequelae of the plaintiff's injuries as elaborated upon by the experts render her vulnerable and an unequal competitor in the open labour market. The actuarial calculations premised on the expert evidence and the *sequelae* occasioned by the injuries sustained by the plaintiff, renders the actuarial calculations both fair and reasonable. The proposed contingencies applied at 10% for pre-morbid loss of income and 25% for post-morbid loss of income on which counsel are in agreement, in my view are fair and reasonable.

[15] In the result, applying the 10% contingency deduction to the past loss as agreed and 25% to the future loss the net total amounts to R1 249 815.00.

[16] In the result the Amended Draft Order, marked " X " , which reads as follows, is made an order of Court:

1. The Defendant is ordered to pay 100% of the Plaintiff's proven or agreed damages.
2. The Defendant is ordered to pay to the Plaintiff the amount of R1

249815.00 (One Million, Two Hundred and Forty Nine Thousand, Eight Hundred and Fifteen Rand) in delictual damages in settlement of the Plaintiff's claim, which amount is payable by the Defendant within 14 days from the date of this order by depositing same into Plaintiff's attorney of record's trust account, the details of which are as follows:

ACCOUNT HOLDER : MPHELA & ASSOCIATES

BANK : STANDARD BANK

BRANCH CODE : 05-26-27

ACCOUNT NUMBER : [....]

REFERENCE NUMBER : TP 4321

3. The defendant will be liable for interest on the capital amount due to the plaintiff at a prescribed rate of 10.25% per annum as from date of this order to date of payment should the Defendant fail to make payment of the capital amount as provided for in paragraph 2 of this order.
4. The Defendant must furnish **OUMA ELSE SEBOTHOMA** (Born on 9 October 1984) with an Undertaking in terms of Section 17 (4) (a) of Act 56 of 1996, for 100% for the costs of her future accommodation in a hospital or nursing home or treating of or rendering of a service to her or supplying goods to her, unlimited to the expenses incurred thereunder, arising out of the injuries sustained by her in the motor vehicle collision that occurred on 4 November 2014.
5. The defendant is ordered to pay the plaintiffs taxed or agreed party and party costs on a High Court Scale, which costs will include, but not be limited to, the following:
 - 5.1 The reasonable taxable fees for consultation (including telephonic consultations) with the experts mentioned herein below, counsel and attorney, preparation for trial, qualifying and reservation fees (if any and on proof thereof) as well as the costs of the RAF 4 serious injury assessment reports, medico legal reports, addendum reports, actuarial/revised actuarial calculations and joint minutes of all the plaintiff's experts, which include, but will not be limited to, the

following experts;

5.1.1 Munro (Actuary)

5.1.2 Dr Tlakula (RAF 4)

5.1.3 Ms Phasha (Occupational Therapist)

5.1.4 Ms S Katjene (Industrial Psychologist)

5.1.5 Dr Meja (Neuro Surgeon)

5.1.6 Dr Katjene (Clinical Psychologist)

5.1.7 Dr Tshukudu (Plastic and Reconstructive Surgeon);

5.1.8 All other experts served on the Defendant.

5.2 The costs of Plaintiff's Counsel including, amongst others, reservation, settlement and/or professional/day fee, preparation for trial.

5.3 The costs for the preparation, travelling, travelling time and attendance of the respective pre-trial conferences by the plaintiffs' representative; s

5.4 The costs in respect of the preparation, drafting and copying of all the bundles of documents, including trial bundles and bundles for the experts, containing expert reports, pleadings and notices, all other documents and all indexes thereto, the travelling time, travelling costs and time spent travelling to deliver the bundles;

5.5 The costs attendant upon obtaining of payment of the amounts referred to in this Order, including the costs to obtain and administer the Section 17(4)(a) undertaking.

5.6 The reasonable travelling costs, travelling time, subsistence accommodation and transportation costs, if any, of the plaintiff to the medico legal examination(s) arranged by the plaintiff and defendant and for the attendance of the trial on the 1th February 2018.

6. Payment of the above costs by the defendant is subject to the following conditions:

- 6.1 The plaintiff is ordered to serve the notice of taxation of plaintiff's party and party bill of costs on defendant's attorneys of record.;
- 6.2 The defendant is ordered to pay the plaintiff's taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties.
- 6.3 Should the payment of the taxed costs not be effected timeously, the Plaintiff will be entitled to interest as a prescribed tariff, from date of allocator to date of payment.
7. The issue of general damages is postponed *sine die*.

BY ORDER

REGISTRAR

AH PETERSEN
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Appearances

For the plaintiff: Adv. FHH Kehrhahn

Instructed by: Mphela and Associates

For the defendant: Adv. D. Makhubele

Instructed by: Maluleke Msimang Attorneys

Date heard: 12 February 2018

Date of judgment: 15 February 2018

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

On the 15th day of February 2018 before the Honourable Judge **PETERSEN AJ**

CASE NO.: 36936/2016

In the matter between:-

OUMA ELSIE SEBOTHOMA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

ORDER

Having heard the parties it is ordered that:

1. The Defendant is ordered to pay 100% of the Plaintiffs proven or agreed damages.
2. The Defendant is ordered to pay to the Plaintiff the amount of R1 249 815.00 (One Million, Two Hundred and Forty Nine Thousand, Eight Hundred and Fifteen Rand) in delictual damages in settlement of the Plaintiffs claim, which amount is payable by the Defendant within 14 days from the date of this order by depositing same into Plaintiff's attorney of record's trust account, the details of which are as follows:

ACCOUNT HOLDER : MPHELA & ASSOCIATES

BANK : STANDARD BANK

BRANCH CODE : 05-26-27

ACCOUNT NUMBER : 23 00 27 00 8

REFERENCE NUMBER : TP 4321

3. The defendant will be liable for interest on the capital amount due to the plaintiff at a prescribed rate of 10.25% per annum as from date of this order to date of payment should the Defendant fail to make payment of the capital amount as provided for in paragraph 2 of this order.
4. The Defendant must furnish **OUMA ELSE SEBOTHOMA** (Born on 9 October 1984) with an Undertaking in terms of Section 17 (4) (a) of Act 56 of 1996, for 100% for the costs of her future accommodation in a hospital or nursing home or treating of or rendering of a service to her or supplying goods to her, unlimited to the expenses incurred thereunder, arising out of the injuries sustained by her in the motor vehicle collision that occurred on 4 November 2014.
5. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on a High Court Scale, which costs will include, but not be limited to, the following:
 - 5.1 The reasonable taxable fees for consultation (including telephonic consultations) with the experts mentioned herein below, counsel and attorney, preparation for trial, qualifying and reservation fees (if any and on proof thereof) as well as the costs of the RAF 4 serious injury assessment reports, medico legal reports, addendum reports, actuarial/revised actuarial calculations and joint minutes of all the plaintiff's experts, which include, but will not be limited to, the following experts;
 - 5.1.1 Munro (Actuary)
 - 5.1.2 Dr Tlakula (RAF 4)
 - 5.1.3 Ms Phasha (Occupational Therapist)
 - 5.1.4 Ms S Katjene (Industrial Psychologist)
 - 5.1.5 Dr Moja (Neuro Surgeon)

5.1.6 Dr Katjene (Clinical Psychologist)

5.1.7 Dr Tshukudu (Plastic and Reconstructive Surgeon);

5.1.8 All other experts served on the Defendant.

5.2 The costs of Plaintiff's Counsel including, amongst others, reservation, settlement and/or professional/day fee, preparaiton for trial.

5.3 The costs for the preparation, travelling, travelling time and attendance of the respective pre-trial conferences by the plaintiff's' representatives;

5.4 The costs in respect of the preparation, drafting and copying of all the bundles of documents, including trial bundles and bundles for the experts, containing expert reports, pleadings and notices, all other documents and all indexes thereto, the travelling time, travelling costs and time spent travelling to deliver the bundles;

5.5 The costs attendant upon obtaining of payment of the amounts referred to in this Order, including the costs to obtain and administer the Section 17(4)(a) undertaking.

5.6 The reasonable travelling costs, travelling time, subsistence, accommodation and transportation costs, if any, of the plaintiff to the medico legal examination(s) arranged by the plaintiff and defendant and for the attendance of the trial on the 12th February 2018.

6. Payment of the above costs by the defendant is subject to the following conditions:

6.1 The plaintiff is ordered to serve the notice of taxation of plaintiffs party and party bill of costs on defendant's attorneys of record.;

6.2 The defendant is ordered to pay the plaintiffs taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties.

- 6.3 Should the payment of the taxed costs not be effected timeously, the Plaintiff will be entitled to interest as a prescribed tariff, from date of allocator to date of payment.
7. The issue of general damages is postponed *sine die*.

BY ORDER
REGISTRAR

- 7.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;
- 7.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25% on the taxed or agreed costs from date of allocator to date of final payment.
8. No contingency fee agreement was concluded between the Plaintiff and her Attorney.

BY ORDER OF THE COURT

REGISTRAR

Adv. Danie Combrink for the Plaintiff (082 452 1299)

Adv. _____ for the Defendant