

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

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

Case number: 52212/2016

Date: 17/5/2018

In the matter between:

M TOPPER

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PRETORIUS J.

- (1) This is a claim for damages suffered as a result of injuries sustained by the Plaintiff, aged 31 years at the time of the accident, which injuries were sustained in a motor vehicle collision which took place on 9 May 2015.

THE PARTIES:

- (2) The plaintiff is an adult female, currently 34 years old, residing in Pretoria.
- (3) The defendant is the Road Accident Fund ("RAF"), a juristic person

established by virtue of section 2(1) of the **Road Accident Fund Act**¹, as amended, with its principal place of business at 38 Ida Street, Menlo Park, Pretoria.

ISSUES:

- (4) At the start of the trial both merits and quantum were still in dispute. The court was informed that the question of quantum would be argued on the plaintiff's expert reports, as the defendant had not appointed any experts.
- (5) Ms Topper, the plaintiff, started to give evidence, when counsel for the defendant indicated that the defendant conceded merits. The defendant accepted 100% liability for all the plaintiff's proven damages suffered as a result of the injuries sustained in the collision on 9 May 2015 and Ms Topper's evidence was no longer necessary.
- (6) The court was then requested to deal with the quantum portion of the claim. The court was informed that the defendant had indicated prior to the matter being allocated, that it would admit all the plaintiffs expert reports. At that stage there was no exclusion. The defendant indicated, for the first time, in chambers, that the RAF4 form was rejected.
- (7) There were no written reasons given timeously, or at all for the rejection. The plaintiff had no indication that the RAF4 form would be rejected at trial, even more so where all the expert reports of the plaintiff were admitted prior to the matter being allocated.
- (8) I find that there was no formal rejection of the RAF4 form at any stage according to the Regulations. The defendant did not provide any proof that the RAF4 form had been rejected. Therefor the trial had to proceed.
- (9) The heads of damages the court had to adjudicate were general damages, loss of income and past medical expenses. It was agreed that past medical expenses were to be postponed and that the defendant would provide an undertaking for future medical treatment.
- (10) Dr Mennen, an orthopaedic surgeon, set out in his report that according to the hospital records, the plaintiff "was *complaining of headache, neck pain,*

¹ Act 56 of 1996

right shoulder pain and lower backache. A hematoma was present over the anterior aspect of the right knee. She had pain in the left leg and left ankle. A CT scan revealed a Grade 1, atlanto axial rotation subluxation. Rotation of the atlas on the axis towards the left hand side was noted on the CT scan. The anterior atlanto dental distance was maintained with a localized facet subluxation present."

- (11) He further noted that, according to the hospital records, she was admitted to the intensive care unit, after the collision on 9 May 2015. A hard neck brace was fitted, which she wore for 6 weeks and thereafter she wore a soft neck brace. She was prescribed Voltaren and Norflex for the pain. She is presently still using Norflex.
- (12) At present she is complaining of pain in her right shoulder, the posterior aspect of her neck, a numb feeling from her shoulder to her wrist, lower backache, headaches and she suffers regularly from neck spasms. Dr Mennen recommended physiotherapy for her cervical spine and lower lumbar spine. He further found that an injury to a cervical disc could not be excluded, which may require single level decompression and fusion in future. He did not regard her injuries as serious.
- (13) According to Dr J du Plessis, the neurosurgeon, the plaintiff *"had moderate pain and suffering for a few weeks after the accident. She had another episode of pain and discomfort in October 2015 when she presented with pain on the right side of her back that radiated into her right leg that lasted for approximately 4 weeks. This was probably caused by the disc herniations that were demonstrated on the lumbar MR scan. She still struggles with chronic intermittent low grade headache, neck pain and lumbar backache."*
- (14) In regards to general damages he found: *"but she qualifies due to the lumbar disc herniations based on par 5.1 of the narrative test with a 70% apportionment in favour of the accident"*. He came to the conclusion that her combined loss of earning capacity, due to injuries to her spinal column is approximately 9%.
- (15) The industrial psychologist, Dr Prinsloo, had regard to all the other expert

reports. He came to the following conclusion: *"It is evident that Ms Topper's competitiveness in the open labour market has been affected. She will, during her career lifespan, also be at risk with regard to her occupational functioning. In addition, Ms Topper will need to exert more effort, vigour, motivation and persistence in order to sustain her personal productivity outputs. The collective impact of the aforementioned risks and the additional effort to overcome her hardship need to be addressed by means of:*

- *Compensation for general damages - qualifies under Narrative Test with 70% apportionment in favour of the accident.*
- *Applying a contingency that is higher than the pre-morbid contingency on her post-morbid occupational functioning."*

This will, however, have no impact on her retirement age at 65 years.

(16) Plaintiffs counsel argued that the normal contingency of 15% pre- morbid should be applied in this case and 35% post-morbid. Counsel for the defendant argued that a spread of 2.5% between pre- and post- morbid would be fair to all parties.

(17) At present the plaintiff is a 34 year old married female, with two children, and she resides in Pretoria with her family. It is common cause that the plaintiff completed grade 12 in 2002. Thereafter she completed several vocational training courses. In March 2010 she commenced an 18 month internship as a student phlebotomist. She started working in August 2003 as a data-capturer, where after she was employed in a number of administrative positions. She was unemployed for eight months due to retrenchment. She started at Lancet Laboratories as administrative assistant in March 2013. The plaintiff was still in training as a phlebotomist when the collision took place. She qualified as a phlebotomist in February 2016. The industrial psychologist is of the view, taking into consideration her family background and reference groups, as well as her career aspiration, that the plaintiff would have continued studying to obtain either

a higher certificate or a national diploma. He opines that her earnings growth would have been within the salary scale of medical technicians (Paterson 83/84) and she would have attained her earnings plateau at age 45 years.

- (18) After the collision the plaintiff recuperated for a month, where after she resumed her employment doing light duties. She did not lose any income as a result of the collision. She is still employed as a phlebotomist at Lancet Laboratories. The unit sister at Lancet Laboratories, Ms Vaster, was consulted regarding the plaintiff's post- morbid performance. Her work performance was rated as high and she is regarded as a good, dependable employee. The industrial psychologist's opinion, which the defendant cannot dispute as it has no expert opinion of its own, is that the plaintiff's employability rating is still good, although it declined to the lower end of the scale.
- (19) According to Mr Prinsloo, the industrial psychologist, the plaintiff has diminished personal productivity, taking into account Dr Mennen's opinion, who reported a 12% whole person impairment and Dr Pauw, indicating a 5% whole person impairment for mental and behavioural disorders.
- (20) Dr Prinsloo came to the conclusion that the plaintiff's competitiveness in the open labour market has been affected, after he had studied all the expert reports. He found that she would also be at risk with regard to her occupational functioning as she will have to use more effort, vigour and motivation in order to sustain the personal productivity prior to the accident. This needs to be addressed by means of general damages and applying a higher contingency for the post-morbid scenario.
- (21) I was referred to **Leigh Franck v Road Accident Fund**² In that matter a slightly higher post-morbid contingency applied. In that matter a contingency differential of 15% was found to be fair.

² Unreported judgment. case number 59228/2009 TPD

(22) In **Road Accident Fund v Guedes**³ a contingency differential of 20% was granted where the court found her work capacity had been severely compromised due to a neck injury.

(23) In **Southern Insurance Association v Bailey N.O.**⁴ Nicholas JA stated:

"In a case where a Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informal guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis."

(24) I have been furnished with several authorities, but I am aware that each case has to be considered on its own merits as set out in **Protea Assurance Co Ltd v Lamb**⁵ by Potgieter JA:

"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry to become a fetter upon the Court's general discretion in such matters."

(25) I have considered all the arguments, expert reports and actuarial calculations and came to the conclusion that 15% pre-morbid and 35% post-morbid contingencies should apply. The contingency differential spread is thus 20%.

(26) When the contingencies are applied a future loss of income in the amount of R762 749.00 is arrived at.

GENERAL DAMAGES:

(27) In **Sandler v Wholesale Coal Suppliers Ltd**⁶ Watermeyer JA held:

"The amount to be awarded as compensation can only be determined

³ 2006(5) SA 583 (SCA)

⁴ 1984(1) SA 98 AD at p114 C-O

⁵ 1971(1) SA 530 AD at p535 H - 536 A

by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case."

(28) In respect of general damages the plaintiffs counsel suggested an amount of R500 000, whilst the defendant's counsel suggested an amount of R200 000 would be adequate compensation.

(29) I find that the only case the plaintiffs counsel referred me to is not really applicable to the plaintiff's circumstances as the plaintiffs symptoms in that case was much more severe.

(30) In **Southern Insurance Association**⁷ Nicolas JA said the following regarding the way in which general damages should be determined:

"This Court has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached."

(31) It is thus clear that there is no uniform approach in the classification of damages awarded for damage arising from bodily injury. General damages refer only to non-patrimonial damages.

(32) In **De Jongh v Du Pisanie NO**⁸ Brand JA cautions:

"Die bedrag van sodanige kompensasie moet ook billik wees teenoor die verweerder. Dit is juis in 'n geval soos hierdie waar die Hof moet waak teen die menslike geneigdheid om the oorkompenseer."

(33) Having considered all the evidence, factors and circumstances relevant to the assessment of damages and having regard to past awards I am of the opinion that an amount of R300 000 (Three Hundred Thousand Rand) will be reasonable and fair to both the plaintiff and the defendant.

⁶ 1941 AD 194 at 199

⁷ *Supra* at page 119 F-H

⁸ 2005(5) SA 457 (AD) at page 4741 - 475 A

(34) In the result the following order is made:

1. The merits are settled on the basis that the Defendant shall pay 100% of the Plaintiffs proven or agreed damages;

2. The Defendant shall pay to the Plaintiff the sum of R1 062 749.00 (ONE MILLION SIXTY TWO THOUSAND SEVEN HUNDRED AND FOURTY NINE RAND) in respect of General Damages and future loss of earnings/earning capacity;

3. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10.25% per annum, calculated from the 15th calendar day after the date of this Order to date of payment.

4. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him resulting the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on 9 May 2015, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof.

5. The Defendant shall pay the Plaintiffs taxed or agreed party and party costs on the High Court scale, subject thereto that:

5.1 In the event that the costs are not agreed:

5.1.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

5.1.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) Court days from date of allocator to make payment of the taxed costs.

5.1.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.5% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

5.2 Such costs shall include but not be limited to:

5.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 2 and 5 above;

5.2.2 The costs of Counsel, including counsel's charges in respect of her full day fee for 4 May 2018, as well as reasonable preparation;

5.2.3 The costs of all medico-legal, radiological, actuarial, accident reconstruction, pathologist and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiffs bundles, including, but not limited to the following:

5.2.3.1 Dr E Mennen - Orthopaedic surgeon;

5.2.3.2 Dr JJ Du Plessis - Neuro Surgeon;

5.2.3.3 Dr Annalie Pauw - Clinical Psychologist;

5.2.3.4 Anneke Greeff - Occupational Therapist;

5.2.3.5 JJ Prinsloo & Associates - Industrial Psychologist;

5.2.3.6 Argen Actuarial Solutions - Actuary (present at court).

5.2.4 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the following experts:

5.2.4.1 Dr E Mennen - Orthopaedic surgeon;

5.2.4.2 Dr JJ Du Plessis - Neuro Surgeon;

5.2.4.3 Dr Annalie Pauw - Clinical Psychologist;

5.2.4.4 Anneke Greeff - Occupational Therapist;

5.2.4.5 JJ Prinsloo & Associates - Industrial Psychologist;

5.2.4.6 Argen Actuarial Solutions - Actuary (present at court).

5.2.5 The reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties.

5.2.6 The costs consequent to the Plaintiff's trial bundles and **witness** bundles;

5.2.7 The cost of holding all pre-trial conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;

5.2.8 The cost of and consequent to compiling all minutes in respect of pre-trial conferences;

5.2.9 The reasonable travelling costs of the Plaintiff, who is hereby declared a necessary witness.

6. The amounts referred to above will be paid to the Plaintiff's attorneys, Spruyt Incorporated, by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number: [....]

Branch code: Hatfield (01 15 45)

REF: SD 2358

7. There is no contingency fee agreement between the Plaintiff and Spruyt Incorporated Attorneys.

Judge C Pretorius

Case number : 52212/2016

Matter heard on : 4 May 2018

For the Plaintiff : Adv S Maritz

Instructed by : Spruyt Inc Attorneys

For the Defendant : Adv Maphellela

Instructed by : Brian Ramaboa Inc Attorneys

Date of Judgment : 17 May 2018