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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Date of hearing: 7 March 2017

Date of judgment: 23 March 2017

Case number: 91771/2015

In the matter between:

PH INASHAKA MISHACK RATSH IKOMBO

Plaintiff

and

ROAD ACCIDENT FUN D

Defendant

JUDGMENT

BRENNER, AJ:

1. In this action for damages for personal injuries, I granted judgment on 10 March 2017 in terms of the order attached hereto marked "X".
2. These are the reasons for the order.
3. Both merits and quantum were in dispute.
4. On 4 November 2013, the plaintiff, Phinashaka Mishack Ratshikombo ("Ratshikombo"), (born on [...] 1984), was involved in a motor vehicle collision along the N1 highway near the old Johannesburg off ramp, between a vehicle driven by him, and an unidentified truck.

5. Rathshikombo's claim comprised four components, namely, payment of:

- a. general damages;
- b. past loss of income;
- c. future loss of income;
- d. future medical and hospital expenses by way of a section 17(4)(a) undertaking.

6. A pretrial conference was held on 2 March 2017 between the parties and the minute duly signed on the same date. It merits mention that, in every instance in which the RAF intimated at the pretrial that it would revert by 3 March 2017, it failed to do so. The consequences was that the RAF was deemed to have admitted the admission called for by Ratshikombo's lawyers.

7. The following admissions were made by the RAF therein, namely that:

- a. on 4 November 2013 on the N1 North, past the old Johannesburg onramp (this should read "offramp"), an accident occurred between the vehicle driven by Ratshikombo and an unknown truck driven by an unknown insured driver;
- b. Ratshikombo sustained the injuries, received the treatment, and suffered the sequelae as stated in the medicolegal reports filed by him;
- c. the expertise of the parties' expert witnesses;
- d. the educational history of Ratshikombo as stated in the medicolegal reports filed by him;
- e. the work history, collateral evidence and income derived from work, his present income as stated in the report of his industrial psychologist, coupled with her qualifications;

- f. the basis of the calculations contained in Ratshikombo's actuarial report, save for the issue concerning contingencies;
- g. the factual allegations/findings, opinions and basis/evidence in the reports of Ratshikombo's experts.

8. In the final analysis, the RAF agreed to the introduction into evidence of all of Ratshikombo's expert reports. There were no joint minutes of experts, as the RAF did not file any expert reports.

9. The only witness who testified on the merits was the plaintiff himself, Thinashaka Meshack Ratshikombo. He was employed at the time as a driver, carpenter and installer of wooden flooring.

10. At about 12h00 on the afternoon of 4 November 2013, he was travelling in a northerly direction along the N1 highway in an Isuzu bakkie owned by his employer, Uniteak Wooden Flooring ("Uniteak"), on his way to deliver goods to Centurion. The N1 highway had four lanes on each side of the road, for traffic proceeding in opposite directions. He was driving at a speed of between 90 and 100 kilometres per hour, proceeding straight, in the far left lane. A large truck, which could have been a "Superlink" with two or three trailers, suddenly approached from his right speeding at a fast rate. Its direction indicated to him that the truck intended to drive onto the Old Johannesburg offramp, which Ratshikombo was passing on his left at the time. He tried to avoid a collision by braking. The next thing he could remember was waking up in hospital.

11. In cross-examination, he said he first saw the truck when its last trailer was near his line of vision because the truck was speeding so fast. The truck did not appear to be trying to overtake him. Instead, it appeared to be veering suddenly in front of him to take the offramp to his left. He could take no other evasive action. He could not say for sure

whether his bakkie collided with the truck.

12. Counsel for the RAF applied for absolution from the instance at the close of Ratshikombo's case on the merits. It was argued that he should have seen the truck indicating to overtake him and that he did not keep a proper lookout as a vigilant driver should. He should have seen the truck much earlier than when he did, which was when he saw its last trailer. He should have made use of his rearview mirrors, which would have shown him that the truck was overtaking him. The application was opposed, primarily on the premise that the RAF's counsel had misinterpreted Ratshikombo's evidence that the truck appeared not to be overtaking but rather to be driving directly across his path to turn onto the offramp to the left of the N1 highway. This was a case of sudden emergency and under such circumstances there was no way of avoiding the collision. The fact that Ratshikombo could not recall whether a physical collision occurred did not derogate from his right to claim under the RAF Act.

13.1 dismissed the application indicating that my reasons would appear in my judgment in due course. The test for absolution was enunciated in **Claude Neon Lights (SA) Ltd v Daniel 1 976C4) SA 403 (A) at 409G-H:** (my emphasis included)

"When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might, (not should, nor ought to), find for the plaintiff."

14. Based on the evidence adduced by Ratshikombo, there was evidence upon which a court, applying its mind reasonably, could find for the plaintiff. Ratshikombo had made out a prima facie case which the RAF was obliged to meet. I will elaborate further on this

aspect when I analyse the merits below.

15. The RAF closed its case without calling evidence on the merits.

16. It is trite that an adverse inference may be drawn from the mere conduct of a vehicle driving in an unanticipated and unexpected fashion, creating a sudden emergency for the driver of another car, as occurred in casu.

17. A vehicle which is driven properly and without negligence does not normally suddenly and at great speed veer in front of another vehicle's path of traffic, so as to drive onto an offramp which it had previously missed. It was established by the evidence that this was precisely what the movement of the truck indicated to Ratshikombo, whose evidence was credible and reliable in all material respects. His credibility was not seriously challenged. The principle of *res ipsa loquitur* finds application. See **Durban City Council v SA Board Mills Ltd 1 961(31 SA 397 AD.**

18. In the light of the absence of evidence from the RAF, and in the light of proof of a sudden and unexpected emergency, an inference of negligent driving on the part of the driver of the unidentified truck arises. There was nothing to disturb this inference of negligence. The RAF did not discharge the onus of proving contributory negligence on the part of Ratshikombo. See **RAF v Mehlomakulu 2009(5) SA 390 (ECO) at 397-398 and Van Staden v May 1 940 WLD 1 98 at 201.**

19. The collision occurred solely as a result of the negligent driving of the driver of the unidentified truck. It is settled law that an actual physical collision need not be proved.

20. Ratshikombo produced the expert reports of Orthopaedic surgeon Dr DA Birrell, plastic and reconstructive surgeon Dr JPM Pienaar, neurosurgeon Dr JH Kruger, clinical psychologist N Prinsloo, occupational therapist M Hales, industrial psychologist JJ

Prinsloo and actuary G Jacobson. No expert reports from the RAF were produced to controvert the veracity of the opinions made and conclusions drawn in the reports.

Moreover, I have taken cognizance of the admissions made by the RAF at the pretrial on 2 March 2017.

21. The following injuries were sustained by Ratshikombo:

- a. A severe traumatic brain injury;
- b. A skull fracture to the frontal bone, with an extradural haemorrhage;
- c. A fracture of the left femur;
- d. A fracture of the left tibia and fibula;
- e. A dislocated left knee;
- f. An extradural haematoma, head abrasions near the parieto occipital area, a right wrist abrasion.

22 He underwent a craniotomy of the extradural haemotoma the following day, and an anterior fossa repair. The next day he had an internal fixation of the left femur and tibia. He used crutches for about nine months. The CT scan reveals extradural bleeding to the brain. Future medical treatment includes total knee replacement, revision knee replacement, arthroplasty and revision arthroplasty, physiotherapy and scar revision surgery. He continues to suffer from headaches, dizziness and fatigue, is forgetful and finds walking painful, walking with a limp. He has been subjected to social rejection and has become socially withdrawn.

23 He cannot learn new information without some difficulty, is mentally slower and forgetful. His neurocognitive functioning has deteriorated significantly since the accident. He suffers from PTSD. He is at greater risk of suffering from depression and anxiety and has a

greater chance of attempting suicide. PTSD correlates with conditions such as diabetes, obesity, heart problems, respiratory problems and sexual dysfunction.

24. It was Ratshikombo's evidence that he was discharged from hospital in December 2013 and returned to work in April/May 2014. He was allocated menial tasks such as sweeping and cleaning. Uniteak, where he had worked since 2010, closed down at the end of 2014. He tried to obtain employment in 2015 but was only able to perform piece-jobs once or twice a week for about two years with an enterprise called "Underfoot", supervising the installation of wooden floors. He secured this work through the help of his friends. He was eventually asked to leave, after he was told that he was "not alright". He had a matric certificate and a grade 10 driver's licence.

25. The report of industrial psychologist JJ Prinsloo indicates the following conclusions:

- a. Pre-accident, Ratshikombo would have worked in various semi skilled positions such as installer or driver or construction worker in the non-corporate labour market, comparable to a Paterson 82 job as ultimate career ceiling;
- b. Post-accident, Ratshikombo has been rendered unemployable in the open market.

26. I have had regard to the actuarial report of Jacobson. There was adequate proof of Rathsikombo's income. His assessment of the loss of income pre accident of R244 462,00 is consonant with the earnings of a semi-skilled worker, reaching the upper quartile at 45 and retiring at 65. A 5% contingency deduction is fair, the resultant figure, after income earned, being R221 858,00.

27. Post accident, a contingency deduction of 15% is fair, resulting in post accident loss of R1 945 451,00. I see no reason to interfere with the assumptions and reasoning of Mr

Jacobson, nor the extent of the contingency deductions, considering the consistencies between the evidence given and the assumptions relied upon in his calculations.

28. The determination of general damages is an inexact science and requires consideration of various factors. I have taken note of the severity and complexity of the injuries, the need for future treatment which needs to recur in the future, the unabated headaches, pain, mental health issues, the compromised mobility and unemployability of Ratshikombo.

29. The case of Nepgen v RAF 2012 (6A4) OOD 1 29 ECP is comparable in several material respects. The plaintiff in Nepgen suffered a severe brain injury, and fractures of the right tibia and fibula and left clavicle. He was left with cortical blindness and intellectual compromise, pain and backache. In 2017 terms, the value of the award equates to R1 193 000,00. In casu, with the multiple injuries suffered to a young working man of 29 at the time of the accident, including the severe brain injury, and the serious sequelae, which are of a continuous nature, the amount of R1 200 000,00 is a justifiable award for general damages.

30. In the result order outlined above was duly granted.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

22 March 2017

Appearances

Counsel for the Plaintiff: Advocate S G Maritz

Instructed by: N van der Walt Inc. Attorneys

Counsel for the Defendant: Advocate M L Modika

Instructed by: Marivate Attorneys

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Before her Honourable Judge Brenner (J) on the of 10th March 2017

Case no: 91771/2015

In the matter between:

PM RATSHIKOMBO

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

Having heard counsel for the Plaintiff and the Defendant the following order is made:

1. Defendant is to pay Plaintiff an amount of **R3 367 309, 00 comprising**

R1200 000,00 for general damages,

R221 858,00 for past loss earnings

R1 945 451,00 for future loss of earnings

on or before 30 April 2017, said amount to be paid into the following bank details:

N VD WALT INC NEDBANK EDENVALE

ACCOUNT NUMBER [.....]

TRUST ACCOUNT

BRANCH CODE: 128842

REF: PM RATSHIKOMBO / RAF

Failure to make payment by aforementioned date will result in interest calculated at 10.25% per annum being charged from date hereof to date of payment in full.

2. Defendant is to provide Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision that occurred on 4 November 2013 after such costs have been incurred and upon proof thereof.

3. The reasonable remuneration of and the reasonable costs incurred by the trustee of the trust to be informed in administering and managing the capital amount referred to in paragraph 1 above, which remuneration and costs shall not exceed the equivalent amount which a *curator bonis* would have been entitled in terms of and as determined by the **Administration of Estates Act, Nr 66 of 1965**, as amended, and the prescribed tariff applicable to *curators* as contained in the Government Gazette Notice R1602 of 1st of July 1991, and, more specifically, paragraphs 3(a) and 3(b) of the schedule thereto.

4. Defendant is to pay Plaintiff's taxed or agreed Party and Party costs on a High Court scale including the costs of Senior Junior Plaintiff's counsel.

5. The costs aforementioned will include, inter alia:

5.1 all the expert reports which are in the possession of the Defendant and of which Notice in terms of the Rules have been given, the preparation of all reports (including the costs of all x-rays and scans) and qualifying and reservation fees of the experts, addendum reports, joint minutes and preparation of RAF4 reports (if any), as the Taxing Master may, upon taxation, determine. These experts are:

5.1.1 Dr Birrell / Close;

5.1.2 Dr JPM Pienaar;

5.1.3 Dr JH Kruger;

5.1.4 N Prinsloo;

5.1.5 JJ Prinsloo;

5.1.6 G Jacobson.

5.2 The travelling and accommodation costs of the Plaintiff for attending the medico-legal appointments;

6. The payment of the costs referred to above is subject to the following:

6.1 The Plaintiff shall, in the event that costs are not agreed between the Defendant and the Plaintiff's attorney, serve the notice of taxation on the Defendant's attorney of record; and

6.2 Following agreement on or taxation of the party and party costs, the Plaintiff shall allow the Defendant 14 (FOURTEEN) court days after the allocator has been

made available to the Defendant, to make payment of the taxed or agreed party and party costs.

7. The award shall be protected by means of a trust.

8. The formation of a trust, of which the Plaintiff shall be the sole beneficiary is hereby authorised and Werner Botha of Uberrima Trust Pty Ltd shall be appointed as trustee. The appointment of the trustee is subject thereto that the trustee furnishes security to the satisfaction of the Master of the High Court. It is in the trustee's sole and absolute discretion to:

8.1 Acquire any shares, unit trusts, debentures, stocks, negotiable instruments, mortgage bonds, notarial bonds, securities, certificates and any moveable or immovable property or any incorporeal rights and to invest in such assets and to lend funds to any party or make a deposit or investment with any institution, such investment to be of such nature and on such terms and conditions as the trustee may deem fit;

8.2 Exchange, replace, re-invest, sell, let, insure, manage, modify, develop, improve, convert to cash or deal in any other manner with any asset which from time to time forms part of the trust funds;

8.3 Borrow money;

8.4 Pledge any trust assets, to encumber such assets with mortgage bonds or notarial bonds to utilise same as security in any manner whatsoever;

8.5 Institute or defend any legal proceedings or otherwise to take any other steps in any court of law or other tribunal and to subject controversies and disagreements to arbitration;

- 8.6 To call up and/or collect any amounts that may from time to time become due to the trust fund;
- 8.7 Settle or waive any claim in favour of the trust;
- 8.8 Exercise any option and to accept and exercise any rights;
- 8.9 Exercise any rights or to incur any obligation in connection with any shares, stocks, debentures, mortgage bonds or other securities or investments held by this trust;
- 8.10 Open accounts at any bank or other financial institution and to manage such accounts and if necessary to overdraw such account.
- 8.11 Draw any cheque or promissory note, to execute or endorse same;
- 8.12 Take advice from any attorney or advocate or any other expert for the account of the relevant trust account;
- 8.13 Lodge and proof claims against companies in liquidation or under judicial management and against insolvent or deceased estates;
- 8.14 Appoint professional or other persons on a temporary or permanent basis to conduct the whole or any portion of the business of the trust under supervision of the trustee or to manage the investment of part or the entirety of the funds of the trust and to remunerate such persons for their services out of the funds of the trust;
- 8.15 Form any company and to hold any interest in any company and to form any other trust to hold an interest in any other trust or partnership or undertaking for the purposes of this trust or in the interest of any beneficiary;
- 8.16 Amalgamate with any other trust with the same or similar aims as this trust;

8.17 Commence any business or continue such business or to acquire an interest therein and for such purpose to acquire assets or to incur expenses and to partake in the management, supervision and control of any business and to conclude any partnership or joint venture;

8.18 Accept any disposal in favour of this trust and to comply with any conditions regarding such disposal;

8.19 In general do all things and to sign all documents required to give effect to the aims of this trust.

BY ORDER

REGISTRAR