



**THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

D4052/2021

In the matter between:

WENDY SAMKELISIWE MKHIZE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Chetty J:

[1] This is an action in which the plaintiff was involved in a motor vehicle collision on 3 February 2019 in which she was a passenger. A claim was lodged on 26 June 2020 with the defendant, and after consideration of the plaintiff's claim, an offer was conveyed by the defendant accepting 100% liability.

[2] Subsequently, an action was instituted by the plaintiff only in respect of quantum. There was no appearance to defend filed by the defendant as contemplated by the Uniform rules. The matter therefore proceeded to be placed on the unopposed trial roll in accordance with the Practice Manual of this Division, amended as at 20 September 2021 ('the practice directives'). Despite having not taken any steps to defend the matter for almost a year, the defendant, through the office of the State Attorney, filed an appearance to defend. To make matters worse, the defendant took no further steps

to file any expert reports in relation to the quantum claimed. The plaintiff therefore prepared for the matter on the basis that there was not to be any opposition, despite notices of set down having been served on the offices of the defendant, by the sheriff.

[3] On the day the matter was called at the Unopposed RAF Roll in terms of practice directive 38A, the defendant was represented by counsel and indicated that they intended opposing the plaintiff's claim in respect of quantum. When the matter came before me I pointed out to Ms *Moodley*, who had appeared before me in a similar 'undefended' matter a week earlier, that it would defeat the objective of practice directive 38A for trials to become fully opposed at the last minute. It appears to me that the defendant is of the view that it may ignore compliance with the Uniform Rules and the practice directives, only to appear on the day of an unopposed trial, with a request to either adjourn the matter or 'make submissions'.

[4] The conduct of the defendant is prejudicial to both the plaintiff and the court. The plaintiff has no idea of the basis on which its claim is being opposed and effectively is 'ambushed' by the tactics being employed by the defendant. The court, instead of dealing with matters expeditiously where the defendant has not participated further in the proceedings, is now faced with a trial where the defendant has simply chosen to ignore the pre-trial procedures, has not filed any expert notices and essentially undermines the purpose of practice directive 38A. Such conduct by the defendant cannot be condoned, even if the purpose of counsel's appearance is to 'make submissions' on the quantum claimed by a plaintiff.

[5] Notwithstanding my views, which I conveyed in court to counsel for the defendant, I allowed the matter to proceed and to hear the defendant's submissions. Mr *Cele* for the plaintiff was obviously desirous to have the matter disposed of on the day and therefore had no objection to the defendant's late appearance and intervention in the matter. To exclude the defendant from the proceedings or to grant it an adjournment would not have been in the interests of justice as this would delay the finalisation of the matter, to the obvious prejudice of the plaintiff. At the same time the defendant should not assume that it is entitled to repeat its conduct in the future.

[6] The issue for determination was a claim for general damages by the plaintiff, for the sum of R600 000 for pain and suffering and for the loss of amenities of life. The plaintiff is currently 28 years' old. At the time of the accident she was a 26 year old student at the Coastal TVET College, studying towards Electrical Engineering: Heavy Current. Mr *Cele* brought to my attention that the plaintiff had been hospitalised for a period of two weeks following the accident and in light of her injuries, had to abandon her studies in 2019. She resumed studying a year later.

[7] Counsel for the plaintiff referred to various decisions where the plaintiffs had sustained lacerations to the head and soft tissue injuries to the spine, as well as fractured ribs. These are similar to the injuries sustained by the plaintiff in the present matter. In *V v Road Accident Fund* (2069/2016) [2017] ZAGPPHC 882 (31 March 2017) the plaintiff was awarded an amount of R500 000 for general damages in 2017, where as a result of the accident, the plaintiff was unable to walk for long periods of time, nor able to lift heavy objects. It was submitted by Mr *Cele* that the plaintiff will be inhibited in her future working career in as much as she would not be able to lift heavy objects while working in an electrical engineering environment. Obviously there is an element of uncertainty as to where and in what environment the plaintiff may secure employment. This is to be considered in relation to the loss of earnings claim of the plaintiff, and the contingency to be applied in that respect.

[8] The plaintiff relied on the report of an orthopaedic surgeon, Dr AA Osman, which indicated that the CT scan showed a fracture of her ribs. In hospital, the plaintiff complained of pain in the thoracic spine area which was treated conservatively. She also had a laceration on her forehead. In so far as the spinal injuries are concerned, it was recorded that the plaintiff would benefit from physiotherapy however it is anticipated that she would have limited rotation due to the spinal injury.

[9] Ms *Moodley* for the defendant submitted that the injuries which the plaintiff sustained were not so severe as to justify an award of general damages in the amount of R600 000. In this regard she pointed out that the orthopaedic surgeon noted that the laceration to the forehead was sutured and was healed, and had faded. It is not in dispute that the plaintiff was unable to continue with her studies in the year in which the accident occurred, but has since returned to her studies in electrical engineering.

In so far as the limitation of rotation arising from the thoracic spinal injury, it was pointed out that the plaintiff's expert concludes that she has a '*full range of motion when bending, on extension and flexion*'. She experiences restricted motion only on rotation to the right and left, with tenderness over the T12 region. No neurological deficits were noted. As set out earlier, all of the fractures were treated conservatively, as seen fit by the medical experts, and the X-Rays revealed no deficit of the spine, except of the general lateral curvature of the thoracic lumbar spine.

[10] It is trite that each case must be assessed on its merits and in regard to the particular circumstances and injuries affecting a particular claimant. Ms *Moodley* referred me to a number of authorities pointing to more conservative awards in the region of between R413 000 to R500 000 as being fair and reasonable in the circumstances.

[11] In light of the submissions and the authorities referred to me, and of the conclusions drawn by the plaintiff's orthopaedic surgeon, I am satisfied that an award for general damages for pain and suffering in the amount of R480 000 is fair and reasonable in the circumstances.

[12] Turning to the second part of the claim pertaining to the plaintiff's loss of earnings, counsel for the plaintiff referred me to the actuarial calculations based on the conclusions of the Occupational Psychologists and of the Industrial Psychologist recording that the plaintiff would not be able to work until her normal retirement age of 65 due to her injuries. Two scenarios were postulated – one based on retirement at age 60 (early retirement) and the other at the normal retirement age of 65. In light of the contention that the plaintiff would not work until her full retirement age, the plaintiff's counsel applied a 20 per cent contingency pre-morbidity, and 15 per cent post morbidity.

[13] As no dispute was raised with the contention that the plaintiff would not be able to work until her normal retirement age, attention was therefore focused on the first scenario of the plaintiff only working until the age of 60. Based on that scenario, the actuarial calculation conducted by Mr I Buchanan put her loss of earnings at R2 126 286. Counsel for the defendant however submitted that a higher contingency

should apply and suggested that the court consider a contingency of 15 per cent being made applicable to pre-morbidity and 15 per cent to post morbidity. In that scenario, and taking into account that the plaintiff would work until the age of 60 rather than 65, it was submitted that a fair award would be the amount of R1 758 516.05. In reply, counsel for the plaintiff submitted that a more equitable approach would be the application of 18 per cent contingency to pre-morbidity earnings. This equates to R1 905 623,71. I am in agreement with the plaintiff's counsel that such an award would be equitable and fair.

[14] In so far as future medical expenses are concerned, an amount of R300 000 was claimed by the plaintiff. The defendant however has made an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, in terms of which it will pay 100% of any expenses incurred by the plaintiff for future medical expenses. Counsel for the plaintiff confirmed that such an undertaking was acceptable to the plaintiff.

[15] In the result I am satisfied that an award of damages for general damages (pain and suffering) in the amount of R480 000 and for loss of earnings in the amount of R1 905 623.71 is fair and reasonable.

[16] In the result, the following order is made:

1. The defendant is ordered to pay to the plaintiff the amount of R2 385 623,71, care of Trust Account: VUMASE SS INC., FNB, A/C 6242 43 444 72, B/C 221126, REF: MKHIZEWS/RAF/19/2020, within 180 days of the date of this order.
2. In the event of the defendant failing to pay the said sum in (1) above within 180 days, it shall be liable for interest at the current legal interest rate from thereon until the date of final payment.
3. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for those costs related to future medical costs.
4. The defendant is to pay plaintiff's experts for consultation and production of medico-legal reports, including those of:
 - (a) Dr AA Osman - Orthopaedic Surgeon

- (b) Ms Z. Buthelezi - Occupational Therapist;
(c) Mr S Gumede - Industrial Psychologist and
(d) Edge Actuaries.
5. The defendant is to pay the agreed or taxed party and party costs of suit, including counsel's fees attendant on preparation for trial and appearance.
6. The plaintiff is directed to file a contingency fee affidavit within ten (10) days of the date of this order.



M R CHETTY

Appearances

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Date Judgment reserved: 17 October 2021
Date of Judgment: 14 December 2021