

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

Date: 12/10/17

Case number: 74582/14

In the matter between:

ADVOCATE P NEL obo MOASI, KJ

Plaintiff

(In his capacity as duly appointed Curator ad litem)

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRAND AJ

[1] The Plaintiff claims damages in delict from the Defendant for injuries sustained as pedestrian in a motor vehicle accident on 1 December 2011.

[2] The merits have been settled 80% / 20% in favour of the Plaintiff. The Defendant has agreed to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 1996 (Act 56 of 1996) with respect to future medical expenses. General damages were referred to the Health Professions Council for determination. The HPC determined that the Plaintiffs injuries were not serious. The Plaintiff intends taking this decision on review and the parties have agreed to postpone the issue of general damages sine die pending resolution of this review application. Accordingly I am left with only the issue of past and future loss of earnings to decide. No witnesses were called and counsel addressed me on the papers.

[3] The Plaintiff's position was that there was significant past and future loss of earnings

and submitted an actuarial report in which the relevant amounts were subjected to contingencies of 20% (past loss) and 30% (future loss), resulting in a total amount of R924 147.00.

[4] The Defendant in response submitted that there is no past or future loss of earnings; but that, should I find that there are, contingencies to be applied are 35% (past) and 40% (future) respectively.

[5] On what was submitted to me by both counsel there seems no doubt that the Plaintiff is entitled to a sum for past and future loss of earnings. Mr Van den Berg for the Plaintiff referred me in this respect to a joint minute between the expert industrial psychologists for the Plaintiff (Mr Wessels) and Defendant (Mr Pulles) in which they agree both on the appropriate salary level (Median) and projected career path of the Plaintiff, and the fact that the Plaintiff's permanent impairment will mean that he cannot compete on the open labour market.

[6] To deny past and future loss of income, Mr Mtshweu for the Defendant relied simply on the fact that the HPC had determined the Plaintiff's injuries to be not serious and the findings of the Plaintiff's orthopaedic expert (Dr SC East) that the Plaintiff suffers only a low level of impairment due to his orthopaedic injuries. Both these, Mr Van den Berg correctly pointed out are relevant only to the issue of general damages and have no bearing on loss of income. In addition, when pressed on this, Mr Mtshweu conceded that the Defendant had no intention to repudiate the opinion of its industrial psychologist as expressed in the joint minute, so that the conclusions in the joint minute must stand.

[7] This leaves the question of contingencies. Mr van den Berg pointed out that the contingencies applied for both past and future loss of income in the Plaintiff's actuarial report far exceed the norm already (20% instead of the normal 5% for past loss; 30% instead of the normal 15% for future). This, he submitted reflects the industrial psychologists opinion that the Plaintiff was liable to undergo periods of unemployment in

future even absent the accident. In response Mr Mtshweu could place no reasons before this court why the contingencies should be further raised as submitted on behalf of the Defendant.

[8] In this light I have no hesitation in accepting the contingencies proposed by the Plaintiff and the amount of R924 147.00 calculated on that basis (to be reduced to reflect the apportionment of liability).

[9] The parties handed up a draft order reflecting the status of this matter in various respects. The draft order in particular reflects the parties' agreement that a trust be created in which any award on for the Plaintiff can be placed and managed on his behalf by a trustee. Mr Nel, the curator ad litem appointed on behalf of the Plaintiff addressed me on this and expressed his agreement with the creation of such a trust, the terms of the draft trust deed appended to the draft order and the appointment of the proposed trustee, Mr Wilsenach. Mr Nel also expressed his agreement with the 80% / 20% apportionment on the merits, in favour of the Plaintiff.

[10] I have inserted. in the space left for that purpose in the draft order the amount of R924 147.00 reduced by 20%, which amounts to R739 317.60.

[11] I have also inserted, as paragraph 10 of the draft order, an order reflecting the parties' agreement that determination of the issue of general damages be postponed sine die, with costs reserved.

[12] The draft order, marked "C" and appended to this judgment, is hereby made an order of court.

JPD Brand

Acting Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

HELD AT PRETORIA ON THIS THE 11th DAY OF OCTOBER 2017 AT COURT BEFORE
THE HONOURABLE JUSTICE BRAND (AJ)

CASE NO: 2014/74582

DATE: 12/10/2017

In the matter between:

ADVOCATE NEL, obo KJ MOAISI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and the Defendant and by agreement
between the parties.

THE COURT GRANTS JUDGMENT in favour of the Plaintiff against the Defendant in the
following terms:

1. The Defendant shall pay the sum of

R R 739 317.

60

(Seven hundred and thirty nine thousand rand and sixty

cent)

to the Plaintiff's attorneys, Adams & Adams, in settlement of the Plaintiff's claim,
which amount shall be payable by direct transfer into their trust account, details of
which are as follows:

Nedbank

Account number : [...]

Branch number : 198765

Pretoria

Ref: JPR/JLR/P1256

2. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 80% of the costs of the future accommodation of the patient in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the patient, after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 1 December 2011.

3. The Defendant is liable for payment of 100% of the reasonable costs of the Trustee appointed in terms of paragraph 4 hereof, in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his fees in this regard, which shall be recoverable in terms of the Undertaking issued in terms of Section 17(4)(a), and which costs shall also include and be subject to the following:-

3.1 The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time, and shall include but not be limited to disbursements incurred and collection commission calculated at 6% on all amounts recovered from the Defendant in terms of the Section 17(4)(a) Undertaking;

3.2 The monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;

3.3 All the abovementioned costs shall be limited to payment of the reasonable costs which the Defendant would have had to pay regarding appointment, remuneration and disbursements had the Trustee been appointed as a curator

bonis;

3.4 The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed;

3.5 The appointment and reasonable costs of a case manager.

4. That the net proceeds of the payments referred to above as well as the Plaintiffs taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiff s attorney and own client legal costs (the "capital amount"), shall be payable to a Trust, to be established within six months of the date of this order, which Trust will:-

4.1 contain the provisions as more fully set out in the draft Trust Deed attached hereto marked Annexure "A";

4.2 have as its main objective to control and administer the capital amount on behalf of the patient;

4.3 CONSTANT WILSNACH will be the first trustee with powers and abilities as set out in the draft Trust Deed attached hereto marked Annexure "A";

4.4 The trustee(s) will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his/her obligations towards the trust.

5. Should the aforementioned Trust be established within the six month period, the Trustee thereof is authorised to pay the Plaintiff s attorney and own client costs out of the Trust funds in so far as any payments in that regard are still outstanding at that stage.

6. Should the aforementioned Trust not be established within the six month period after receipt of payment from the Defendant:-

6.1 The Plaintiff s attorneys are directed to approach the court within six months thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of the patient;

6.2 The Plaintiff's attorneys are authorised to invest the capital amount in an

interest bearing account in terms of Section 78(2A) of the Attorneys Act to the benefit of the patient with a registered banking institution pending the finalization of the directives referred to in paragraph 6.1 above;

6.3 The Plaintiff's attorneys are prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court, subject to the provisions contained in paragraphs 4 to 7 hereof.

7. Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of the trust deed, the Plaintiff's attorneys are authorised and ordered to pay from the capital amount:

7.1 Any reasonable payments to satisfy any of the patient's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim;

7.2 The attorney and own client costs of the Plaintiff's attorneys;

7.3 Such other amount(s) as may reasonably be indicated and/or required for the well being of the patient and/or in his interest which a diligent curator bonis would have paid had such curator been appointed

8. The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include the following:-

8.1 The fees of Senior-Junior Counsel on the High Court Scale, inclusive of his full day fee for 11 October 2017 and his fee for the preparation of Heads of Argument, if any;

8.2 The fees of the curator ad litem on the High Court Scale, inclusive of his full reasonable day fee for 11 October 2017, and the preparation of his curator ad litem's report;

8.3 The reasonable taxable costs of obtaining all expert, medico-legal, addendum medico-legal and actuarial reports from the Plaintiff's experts which were

furnished to the Defendant;

8.4 The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts:

8.4.1 Dr East (Orthopaedic Surgeon);

8.4.2 Dr M Mazabow (Clinical Neuropsychologist);

8.4.3 Dr Nel (Psychiatrist);

8.4.4 Ms Greeff (Occupational Therapist);

8.4.5 Mr Wessels (Industrial Psychologist);

8.4.6 Mr Whittaker (Actuary).

8.5 The costs of a consultation between the Plaintiff and his attorney to discuss the terms of this order;

8.6 The reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the patient in attending medico-legal consultations with the parties' experts, consultations with the legal representatives and the court proceedings, the quantum of which is subject to the discretion of the Taxing Master;

8.7 The above costs will also be paid into the aforementioned trust account.

8.8 It is recorded that the Plaintiff's instructing attorneys act in terms of a contingency fee agreement in this matter.

9. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

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

9.2 The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

9.3 Should payment not be effected timeously, Plaintiff will be entitled to

recover interest at applicable rate on the taxed or agreed costs from date of allocatur to date of final payment.

10. Determination of the issue of general damages is postponed sine die, with costs reserved.

BY ORDER OF THE COURT

ADAMS & ADAMS

JPR/JLR/P1256

COUNSEL FOR PLAINTIFF: ADV VAN DEN BERG - 082 466 4588

ADV P NEL (Curator ad litem) - 082 259 2260

COUNSEL

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