IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 15/29274

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

...6/09/2019
.. ..
DATE SIGNATURE

In the matter between:

D: P OBO D L Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MILTZ AJ:

INTRODUCTION

1. The above matter was allocated to me for hearing on Thursday 8 August 2019. No witnesses were called. Counsel for the parties informed me that the only matters that required decision were the amounts to be awarded for future loss of earnings and for general damages.

2. I was informed that the defendant had not provided its attorney with instructions but that the parties' counsel were in agreement on the critical issue concerning the future loss of earnings that will be referred to below.

3. I was also referred to the judgment in BEE v RAF 2018 (4) SA 366 (SCA) in which the Court held amongst other things that where experts in the same field reach agreement unless the trial court is dissatisfied with the agreement and alerts the parties to the need to adduce evidence on the agreed material the trial court would be bound and entitled at least to accept the matters agreed by the experts (at 386 A to D).

4. I was enjoined by counsel to consider the contents of the plaintiff's experts' joint minute bundle which provided sufficient agreement between the experts on the outstanding issues to enable me to determine the quantum thereof.

FUTURE LOSS OF EARNINGS

5. In the pre-trial minute of the meeting between the industrial psychologists N. Kotze, J.F. Bush and B. Dodds it was agreed that due to the extent of the sequelae of the injuries sustained, especially the neuro cognitive and neuro psychological difficulties, and the effect of same on L's future employability as related in the minute a substantially higher post-morbid contingency deduction should be applied. Relying on their agreement the correct contingency to be applied to the post-morbid income should be 35%.

6. Having considered the contents of the expert minutes after the hearing on 8 August 2019 I communicated with counsel for the parties informing them that I was unable to resolve the differences in opinion embodied in the joint minute of the educational psychologists Ms Scott and Ms Mantsena. I informed them that the differences concern the facts on which Ms Scott relied in opining that L's educational ceiling was likely to be the NQF3 level and those on which Ms Mantsena relies in opining that L is likely to achieve the NQF4 level. I pointed out that

the determination of the issue or difference was central to the amount of the award for future loss of earnings.

7. I later received written responses from the defendant's counsel confirming that counsel were agreed that the NQF3 level would be the appropriate level on a post-morbid scenario. Therefore the defendant submitted that there was no real dispute between the parties in regard to the difference of opinion between the educational psychologists.

8. However the plaintiff's counsel submitted a revised minute of the educational psychologists in which Ms Scott and Ms Mantsena agreed that the likely post-morbid scenario should be determined on the basis that L's ceiling would be the NQF4 level. No reasons were given for Ms Scott's change of opinion when signing the revised minute.

9. Affidavits submitted with the Contingency Fee Agreement between the plaintiff and her attorneys purported to comply with the provisions of section 4 of the Contingency Fees Act 66 of 1997. This section applies where an offer of settlement is received by a party to a contingency fee agreement. However no settlement offer had been received. A draft order also submitted by the plaintiff's counsel was prepared on the basis that L's educational ceiling would be the NQF3 level and not the NQF4 level more recently agreed to by the experts.

10. In the circumstances I called the parties to a further hearing on Friday 30 August 2019.

11. In the course of the hearing I was informed that there still was no agreement between the parties on the outstanding issues. It was explained to me by counsel that despite the experts' original disagreement on the attainable level of education for L I could rely on the considerable experience and knowledge of counsel to make a determination of the matters in disagreement. I was urged to do so on the basis of what counsel consider to be the most realistic postulated scenario. I was informed of the considerable contribution that can be made by counsel in matters such as this in which there is no settlement often because instructions cannot be obtained.

12. These propositions are startling. If there was merit in them then there would be no point in my having been referred to the judgment in BEE v RAF (supra). The Court's reliance on the agreement of the experts is entirely different to the situation that arises where there is no agreement.

13. In determining matters that are in issue for which expert opinion evidence is required a Court relies on the opinions and reasoning of the experts and not on the views of counsel regardless of how experienced they may be in the field of road accident fund litigation. Where the experts cannot agree on any material issue then the Court with the

assistance of counsel experienced and adept at interrogating forensically the reasoning of expert witnesses will consider what they have to say and make a decision based on what the Court considers to be the correct thesis.

14. A Court may not delegate to counsel, however experienced they may be, the task of determining the preferred thesis and outcome of the matter in dispute regardless of how narrow the divergent views of the experts may be.

15. Fortunately the debate became academic as Ms Scott then was called by the plaintiff and testified that she was persuaded to concede that the NQF4 academic level will probably be achieved by L. Her reasoning was that she had learnt recently that the school syllabus at TBE level is not the same as that of a normal academic matric, that is, that scholars are pushed through the system and that a matric pass in Mathematics is not a requirement for a TBE matric qualification.

16. Therefore although Ms Scott was critical of the state of the system of education in the country she was satisfied that L will achieve the NQF4 level. This was after Ms Scott had preferred the NQF3 scenario originally because NQF4 required the learner to pass matric English and Mathematics. Ms Scott opined that L would not be able to do so.

17. The parties are agreed that on any scenario the pre-morbid amount of prospective earnings would be R4 426 707. A contingency of 35% applied to R1 619 475 being the post-morbid actual amount based on the NQF4 scenario according to the actuarial report renders the amount to be awarded for loss of future earnings as R2 267 371.50.

GENERAL DAMAGES

18. It was suggested that an amount of R400 000 is a fair and reasonable amount for general damages. In this regard there was some debate amongst the experts as to whether the head injury suffered by L was a minor injury or more severe than a minor injury. However all the experts agreed that L had sustained at least a mild traumatic brain injury.

19. Having regard to the parameters and discretion of the Court when awarding general damages an award of R400 000 for general damages will adequately compensate for a mild head injury such as that suffered by L in which there was no neuro physical damage.

THE CONTINGENCY FEE AGREEMENT

20. I requested and was provided with the contingency fee agreement. Clause 6 of the contingency fee agreement provides that if the plaintiff is successful in the proceedings an amount shall be payable to her

attorneys that does not exceed the attorneys' normal fees by more than 100% and provided that the success fee shall not exceed 25% of the full enforceable value (inclusive of VAT) which amount shall not include costs.

21. In addition to the success fee clause 1 of the contingency fee agreement records that the attorney will not be entitled to recover any fees from the client unless the client is successful in the proceedings or the attorney becomes entitled to a fee in the event of partial success in the proceedings.

22. However the agreement also contains a recordal that the plaintiff *"will be liable to pay the attorney's disbursements and normal fees and/or the contingency fee (success fee) in the event of success or partial success…"*.

23. Section 2(1)(a) of the Contingency Fee Act provides that a legal practitioner may enter into a contingency fee agreement in which it is agreed that *"… the legal practitioner shall not be entitled to any fees for services rendered … unless such client is successful … to the extent set out in such agreement."*.

24. As was observed by Boruchowitz J in *Tjatji v RAF and 2 Similar Cases* 2013 (2) SA 632 (GSJ) in para [12] at p 636 C - E *"… the Act was intended to be exhaustive of the rights of legal practitioners to conclude*

contingency fee agreements with their clients. There is no room whatever for a legal practitioner to enter into a contingency fee agreement with a client outside the parameters of the Act or under the common law … Only two forms of contingency fee agreement are recognised in terms of the Act. A 'no win, no fees" agreement (s2(1)(a)); and an agreement in terms of which a legal practitioner is entitled to fees equal to or higher than his normal fees if the client is successful (s2(1)(b)).".

25. The agreement in question in the matter was entered into in January 2019 more than three years after the commencement of the action. This in itself might be too late for the proceedings to constitute compliance with the requirements of the Contingency Fee Act which requires a Contingency fee agreement to be entered as early as possible in proceedings.

26. The recordal in clause 2.3 of the agreement suggests that despite the recordal in clause 1 it is not a *"no win, no fees"* agreement as normal fees will be payable together with (and/or) the contingency fee if the plaintiff is successful.

27. The agreement defines the attorney's normal fees and the success fee separately. The success fee is restricted in that it is stipulated that it shall not exceed the normal fees by more than 100% nor shall it exceed 25% of the full enforceable value (presumably of the claim).

28. The agreement therefore is constructed in a manner that entitles the attorney even if only in the event of success or partial success to his normal fee plus a success fee that is not more than double the normal fee. The success fee itself is said to be limited to 25% of the full enforceable value of the claim.

29. The agreement therefore is not in accordance with section 2(1)(b) read with section 2(2) of the Act. These sections limit the attorneys' entitlement to fees that are higher than normal fees. They do not permit an attorney to be paid a normal fee plus a success fee calculated as stipulated in the agreement. On the contrary they limit the total remuneration of the attorney based on the contingency of success to double the normal fee up to 25% of the full enforceable value of the claim including VAT but excluding costs.

30. In the circumstances the contingency fee agreement is invalid for want of compliance with the requirements of the Act. Therefore there is no need to delve further into the issue of the time when the agreement was concluded.

ORDER

In the circumstances the following order is made:

1. the defendant shall pay the plaintiff the sum of R2 667 371.50;
2. the amount in 1 above is to be paid into the trust bank account of the plaintiff's attorneys the particulars of which are:

   Renè Fouche Inc.
   Standard Bank - Trust Account, Acc No. […], Branch Code - 004305, Ref. GPS/RG/D168;

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 100% of the costs of the future accommodation of L D 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 injury sustained by him in the motor vehicle collision which occurred on 18 April 2015, after such costs have been incurred and upon proof thereof;

4. the defendant shall pay the plaintiff's costs on the High Court scale either as taxed or agreed to date hereof, such costs to include the costs of counsel and of obtaining medico-legal reports and/or qualifying fees and their attendances at Court, of the following experts:

   Dr T. Bingle, Ms M. Scott, Dr C. Naude, Dr A.P.J. Botha, Dr J. van Niekerk, Professor L.A. Chait, Dr A. Pechè, Dr O. Guy, Dr J. Goosen, Ms A. Renals, Ms N. Kotze and Mr N. Lottering as well

as the costs of the actuarial reports of Mr G. Whittaker (Algorithm Consulting Actuaries);

5. the plaintiff shall allow the defendant seven court days to make payment of the taxed costs;

6. it is declared that the contingency fee agreement entered into between the plaintiff's attorney Renè Fouche Incorporated and the plaintiff is declared to be invalid;

7. the plaintiff's attorney accordingly shall only be entitled to recover from the plaintiff such fees as are taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to exceed 25% of the amount awarded to or recovered by the plaintiff.

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I. MILTZ
ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG

DATES OF HEARING:	8 AUGUST 2019 AND 30 AUGUST 2019
COUNSEL FOR THE PLAINTIFF:	MS M. LETZLER
INSTRUCTED BY ATTORNEYS:	RENè FOUCHE INCORPORATED
COUNSEL FOR THE DEFENDANT:	MR J. VAN ZYL
INSTRUCTED BY ATTORNEYS:	TWALA ATTORNEYS