

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

Case Number: 41150/13

5/1/2016

**NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED**

In the matter between:

NTOMBODUMO MAZIBUKWANA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] The plaintiff in this matter is, Nontumbodumo Mazibukwana, who was involved in a collision on 4 September 2010 at or near Baden Powell Drive, Stellenbosch, Cape Province.

[2] At the time of the collision the plaintiff was a passenger in an Isuzu bakkie. She had just alighted from the bakkie the vehicle with registration numbers and letters CF[...] collided with her. The driver of the vehicle which collided with the plaintiff was S J Makunzi (the insured driver).

[3] The plaintiff alleges that the insured driver was negligent in one or more of the following respects:

- (a) He failed to heed the presence of the bakkie on the road adequately and timeously;
- (b) He crossed over onto the incorrect side of the roadway when it was not safe and in opportune to do so;
- (c) He failed to alert the driver of the bakkie of his intentions by hooting or lights of the insured vehicle adequately or timeously;
- (d) He drove at an excessive speed and did not keep the vehicle under his control;
- (e) He did not keep a proper lookout, brake timeously, swerve or take evasive action;
- (f) He failed to maintain his vehicle and avoid the collision by the exercise of reasonable care.

[4] The plaintiff sustained serious bodily injuries as a result of the collision. She had a left through knee amputation; serious degloving injuries of the right lower limb and a fracture of the pubic rami on the right side of the pelvis.

[5] The dispute in respect of merits is that the defendant raises the defences of contributory negligence's on the part of the plaintiff. The defendant submits that I should find that the plaintiff contributed at least 30% to the occurrence collision. Obviously the plaintiff submits that the defendant is 100% liable for the collision.

[6] The vehicle in which the plaintiff had been a passenger experienced some mechanical problems and as such was being pushed off the road towards the emergency lane by the driver. The plaintiff was then a front seat passenger in the bakkie.

[7] The plaintiff testified that whilst she was in the vehicle as a front seat passenger she

observed a vehicle approach from the opposite direction. The road is flat with two lanes in either direction and an emergency lane on either side. The area where the collision took place is flat, has no street lights and is not in a built-up area.

[8] The bakkie she was in had no lights on as it had experienced mechanical failure and the only lighting came from the approaching vehicle. This approaching vehicle was driven by the insured driver and as alighted from the bakkie, next thing she sees is that the vehicle is now traveling on the side of the road that the bakkie was on.

[9] The bakkie's door was hit by the insured driver's vehicle as the plaintiff stood between the frame and door of the bakkie. Thereafter the plaintiff only remembers seeing the vehicle tail light traveling away from her.

[10] The plaintiff was cross-examined on the statement of the attending police officer Constable Jonker. He stated that when he attended the scene he noted that both vehicles were in the middle of the road facing in opposite directions. The bakkie was on the 'right side lane' and the plaintiff was found lying in the middle of the right side lane.

[11] Jonker further states that the insured driver told him that he was coming from the direction of Stellenbosch to Kayalitsha and he, *'didn't see the people that was busy pushing the vehicle in the road. After colliding with the vehicle he then had to turn around to see what he had collided with'*. Jonker also said that as he spoke to the insured driver he smelt alcohol on his breath and was told by the insured driver that he had had plus minus 6 Heineken beers to drink.

[12] The plaintiff was the only witness called to give evidence on the occurrence of the collision, no other evidence was led but for the plaintiff's testimony and the statement of Jonker.

[13] From the plaintiff's version it is well established that she had completed alighting from the vehicle and was between the body of the bakkie and the front passenger door when she was struck by the insured driver's vehicle. She thus was a pedestrian at the time of the collision and not a passenger as the plaintiff's counsel would like me to believe.

[14] In the circumstance of the fact above it is evident to me that the bakkie was, according to Jonker, on the right side lane of the road. If one takes this in relation to the insured driver's direction version of his direction of travel, the vehicles would have been traveling in opposite directions. This also indicates that bakkie was on its correct path of travel.

[15] This being the case it stands to reason that the insured driver says he did not see the people pushing the vehicle and that he had to turn around to see what he had collided into, this is indicative of the insured driver not keeping a proper lookout, not heeding the presenc of other road users in this instance the bakkie and failing to take evasive action in the circumstances. On these facts alone the insured driver was negligent in coursing the collision.

[16] Did the plaintiff contribute in anyway?

The uncontested evidence of the plaintiff is that she was between the body frame of the vehicle and the front passenger door when the bakkie was struck by the insured driver's vehicle. That being the case this would place the plaintiff on the far left of the insured driver's vehicle and the right hand side of the bakkie, if one takes into account the photographs used. This means that the insured driver would have had to leave his path of travel and travel in the lane of the bakkie in order to hit the front passenger door of the bakkie. That to my mind would not have been something that the plaintiff would have expected when she alighted from the vehicle. In this case she could not have avoided the insured driver's vehicle colliding with the front passenger door of the bakkie.

[17] I can see no failure on the part of the plaintiff to take reasonable precautionary measure prior to and after the collision in any way to minimise the harm that ensued. See Section 1 of the Apportionment of Damages Act 34 of 1956. In the circumstances no negligence can be attributed to the plaintiff as she could not have foreseen that the insured driver would act in the manner that he did in order for her to minimise or avoid the collision.

[18] In my view, the defendant had failed to prove that the plaintiff could have avoided

the collision in anyway and therefore the plaintiff is entitled to 100% of her proven damages.

[19] I now turn to deal with the quantum aspect of the plaintiff's claim.

[20] The defendant tendered an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. In addition the defendant did not dispute that the plaintiff is entitled to its past medical expenses which have been claimed by the plaintiff's suppliers to the turn of R241 328.40.

[21] Thus the only aspects for consideration by me are that of general damages and that of past and future loss of earnings/earning capacity.

[22] The defendant only filed one expert report, being that of Joan Andrews, an Occupational Therapist. The plaintiff on the other hand filed all the expert reports pertaining to the injuries sustained by the plaintiff. In the pre-trial held in August 2015 the plaintiff sought of the defendant an admission of the various reports however this was not forth coming.

[23] Of importance is the fact that the parties agreed that if a denial with reasons was not forth coming by a specific date in respect of the reports then it would be construed that the defendant in fact did indeed admit the reports. At Para 6 of the Pre-Trial minute dated 18 August 2015:

'6.2 The plaintiff request the defendant to indicate which of the plaintiffs expert reports (where no opposing experts has been appointed) it denies and to provide the reasons therefor before close of business on 26 August 2015, failure of which the expert reports of the plaintiff can be regarded as admitted. Defendant: Agreed.'

[24] In the circumstances as agreed the reports are so admitted. I do not propose to revisit the reports but save to highlight aspects therefrom when necessary.

[25] Dr Sagor, the orthopaedic surgeon, classifies the plaintiffs injuries as severe. The amputation came about because of the fact that she experienced a compound fracture

of the left tibia and fibula and a fracture of the left foot, there was also degloving of the lower limb that affected the supply of blood to the leg. Her right lower limb was also scarred and had blisters and she had a fracture of her pubic rami on her right side of her pelvis.

[26] The orthopaedics report read with the other reports paints a bleak picture for the plaintiff in respect of her injuries and worst still is the fact that she could not be amputated straight away and had to endure all that pain through various procedures before she was eventually amputated on, on 13 October 2010, nine day after the collision. In addition she was also hospitalised from the date of the collision until July 2011 when she was released.

[27] In the circumstance, the case in point for the award of general damages is that of *Msiza V RAF 2014 (7E2) QOD 1 (GNP)*. This case also dealt with an amputation above the left knee as a result of a fracture left femur. The amputation also only took place some 7-14 days later. Here the court awarded R700 000.00 which equates to **R743 000.00** in today's terms.

[28] In the circumstances the plaintiff is duly awarded an amount of R743 000.00 for general damages.

[29] As regards the issue of loss of earnings/earning capacity the plaintiff only concluded grade 11 and from then she worked as a full time live in domestic/carer for 10 months before she was involved in the collision. The both occupational therapist, Ms Andrews and Ms Bester, agree that she requires a prosthesis and aggressive rehabilitation. With this she has a residual earning capacity as she will be mobile. She would require assistance with some of the heavier household chores though.

[30] Ms Besselaar, the only Industrial Psychologist, instructed concluded that the plaintiff at 21 years of age has been severely compromised at the beginning of her working life. She does not have any residual earning capacity as foreseen in both the formal and informal labour market and thus she will remain unemployed as she has been from the date of the accident.

[31] Ms Besselaar interviewed the plaintiff's employer and confirmed that the plaintiff had been her housekeeper and carer for her disabled daughter. The plaintiff had received training at a medical centre to perform certain medical procedures for the daughter. The employer wanted to send the plaintiff and her daughter to Damelin College to do an office administration diploma of 3 years. The value of her employment at the time was R3500.00-R4000.00 a month including salary, accommodation, transport and meals.

[32] I am not going to follow Ms Besselaar scenario of taking the plaintiff as an office worker or administrator. In my view she has not taken into account that the plaintiff would have had to first obtain grade 12 to be admitted to Damelin to do the diploma in office administration. The plaintiff in my view prior to the collision did not demonstrate that she even intended to complete at least grade 12. Even after the collision the plaintiff has not even attempted to complete grade 12 via distance learning, at the least. Therefore I am satisfied that at the time of the collision she was a domestic and I will take her as such until retirement. It is trite that one takes ones victim as one finds them.

[33] I therefore concur with the scenario 1 pre-accident and post-accident as set out in the actuarial calculation of NBC Holdings (Pty) Ltd dated 31August 2015. In my view there is no evidence before me to deviate from applying normal contingencies, of 5% pre-accident and 15% post-accident, as these cater for every eventuality. Consideration must be had that the plaintiff is the recipient of a disability grant.

[34] Calculation:

Pre - Accident Past loss R164 019
Less 5% R8200.95
= R155 818.05

Pre -Accident Future loss R 823 569
Less 5% R41 178.45
= R782 390.55

Post -Accident Future loss R 215 833
Less 15%
= R183 458.05

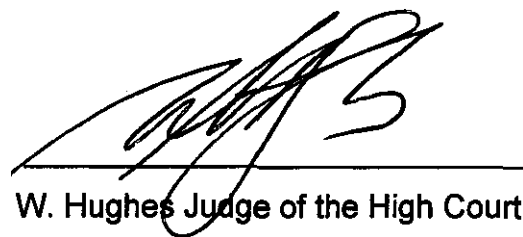
Subtotal of net loss	R155 818.05	R598 932.50
Loss	R754 750.55	
Less Disability Grant	R66 930	
TOTAL LOSS	R687 820.55	

[35] Thus the amount of R687 820.55 is awarded to the plaintiff in respect of future loss of earning/ earning capacity.

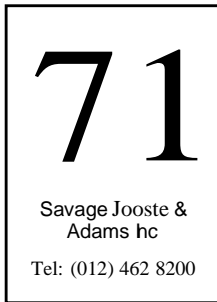
[36] The total amount **R1 430 820.55**, (being R743 000.00 for general damages and R687 820.55 for loss of earnings) is to be paid to the plaintiff by the defendant together with the undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

[37] The defendant is ordered to pay the plaintiff's costs on a party and party scale such costs to include the employment of senior counsel.

[38] Consequently the order made is attached marked "A".



W. Hughes Judge of the High Court



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

AT PRETORIA ON TUESDAY 1 JANUARY 2016
BEFORE THE HONOURABLE JUSTICE HUGHES

In the matter between:

Case no: **41150/2013**

NTOMBODUMO MAZIBUKWANA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

ORDER

HAVING HEARD COUNSEL ON TUESDAY 1 SEPTEMBER 2015, IN RESPECT OF THE PLAINTIFF'S CLAIM FOR DAMAGES, AS SET DOWN FOR HEARING IN RESPECT OF THE MERITS AND QUANTUM ON 1 SEPTEMBER 2015, IT IS ORDERED THAT:

THE UNDERTAKING

1. The Defendant shall provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the undertaking"), to compensate

the Plaintiff for the costs relating to 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 the Plaintiff after the costs have been incurred and on proof thereof and arising from the collision which occurred on 4 September 2010.

PAST HOSPITAL AND MEDICAL EXPENSES BY STATE SERVICE PROVIDERS

2. It is recorded that the Plaintiffs past medical/hospital expenses have been settled by way of a Supplier's claim.
3. The Defendant also indemnifies the Plaintiff and/or its Representatives against any future claims by suppliers, in respect hereof.

THE CAPITAL

4. The Defendant is ordered to pay the Plaintiff the amount of **R1 430 820.55 (One million four hundred and thirty thousand eight hundred and twenty rands and fifty five cents only)** ("the capital") by way of a lump sum payment within 14 (fourteen) days from this Order, by way of electronic transfer to the trust account, details of which are set out hereunder ("the capital payment").

COSTS

5. The Defendant shall pay the Plaintiff's taxed or agreed High Court Scale party and party costs, including for the sake of clarity, but not limited, to the costs of the Plaintiff's instructing attorneys, Adendorff Incorporated in Cape Town and the correspondent attorneys, Savage Jooste and Adams in Pretoria, as well as the other costs set out hereunder.
6. The Plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the Defendant's attorney of record.
7. The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs.

GENERAL COSTS

8. Any taxed or agreed costs incurred after the date of this order in obtaining payment of any of the amounts referred to herein.
9. The Defendant will not be liable for interest on the outstanding amount.
10. Should the Defendant fail to make payment of the capital amount within 14 (fourteen) days from this Order, the Defendant will be liable for interest on the amount due to the Plaintiff at a rate of 9% per annum as from the date of this Order to date of final payment.

EXPERT WITNESSES

11. Regarding the expert witnesses listed hereinbelow ("the experts"), the taxed or agreed qualifying expenses and reservation fees of the experts listed in paragraph 7 below, the taxed or agreed costs attached to the procurement of the medico legal and other reports as well as joint expert minutes of the experts, including x-rays, MRI scans and Pathology reports, as well as home and work visits.
12. The experts are:
 - 12.1. Mr J Heydenrych (Merits Assessor);
 - 12.2. Dr Jason Sager (Orthopaedic Surgeon).
 - 12.3. Dr K Le Fevre (Psychiatrist).
 - 12.4. Mr E Rossouw (Orthotist and Prosthetist)
 - 12.5. Ms R De Wit (Neuro Psychologist).
 - 12.6. Ms M Bester (Occupational Therapist)
 - 12.7. Ms E Auret-Besselaar (Industrial Psychologist)
 - 12.8. Munro Consulting (Actuary)

TRAVELLING, ACCOMMODATION AND RELATED COSTS

13. The Defendant shall be liable to pay the reasonable travelling, accommodation and related costs incurred as follows:
 - 13.1. In respect of the Plaintiff to attend medico-legal examinations with expert witnesses for the Plaintiff.
 - 13.2. In respect of the Plaintiff to attend medico-legal examinations with expert witnesses for the Defendant.

- 13.3. In respect of the Plaintiff's legal representatives' travelling and accommodation, attending the Pre-Trial Meeting held on 14 August 2015.
- 13.4. In respect of the Plaintiff's legal representatives' travelling and accommodation, to conduct the hearing on 1 September 2015.
- 13.5. In respect of the Plaintiff's expert witness, Ms E Aurret-Bessel aar, travelling to attend the hearing on 1 September 2015.
- 13.6. In respect of the Plaintiff and her companion, travelling to attend the hearing on 1 September 2015.

COUNSEL'S FEES

14. The costs of counsel including the employment of senior counsel.

PAYMENT PROVISIONS

15. Payment of the capital amount as reflected above shall be effected within 14 days from this Order ("the capital due date") by way of electronic transfer into the Plaintiffs attorneys trust banking account, details of which are listed herein below.
16. Payment of the taxed or agreed costs reflected above shall be effected within fourteen (14) court days of agreement or taxation ("the costs due date") and shall likewise be effected by way of electronic transfer into the Plaintiff s attorneys trust banking account, details of which are listed herein below.
17. Should the capital and/or the costs not be paid by the relevant due date(s), the Defendant will be liable for interest thereon at the prescribed statutory rate.

CONTINGENCY FEE AGREEMENT:

18. It is recorded that the Plaintiff entered into a contingency fee agreement and that same complies with the Act.

TRUST BANKING DETAILS

19. The Plaintiff's attorneys' trust banking account details are as follows:

Bank: FIRST NATIONAL BANK

Account Name: ADENDORFF INC.

Branch Name: ADDERLEY STREET

Branch Code: 201-409

Account number: [...]

BY ORDER OF THE COURT

COURT REGISTRAR

Box 71: Savage Jooste& Adams

Ref no: M Haasbroek / sb / MHA103