IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

4/3/2016

DATE SIGNATURE

4/3/2016

Case Number: 23635/2015

In the matter between:

HAPPY MATIDZA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

POTTERILL J

[1] This matter tells a tale of woes. It tells a sad true life story of a 22 year old plaintiff who on 9 August 2014 was a passenger in a taxi involved in a collision resulting in him losing his right leg from above the knee. It tells the story of incompetence, a lack of responsibility towards the public purse, entitlement to abuse court rules, and ignorance of our constitutional principles.

[2] As a direct consequence of the collision the plaintiff sustained the following injuries:

2.1 A fracture of the left femur resulting in the insertion of an intramedullary pin;

2.2 A fracture of the right knee and right lower leg resulting in a traumatic above knee amputation of the right leg;

2.3 A head injury;

2.4 Multiple abrasions, bruises and scarring over the body.

[3] The plaintiff had obtained a matric, although he had a history of repeating different school years. He had just obtained employment as a dagga mixer and was doing this physical work for only four days when the accident occurred.

[4] On the day of the trial the matter was allocated only 15 minutes. The reason for this was that the general damages and the future loss of income were to be settled. The only issue in dispute was whether the refit of the prosthesis and a spare prosthesis

was necessary. A further issue was whether these two items should be categorised as falling under past medical expenses or should fall under the undertaking in terms of section 17 of the Road Accident Fund Act, 56 of 1956 ("the Act"). The plaintiff's mobility expert witness was in court and ready to testify.

[5] At around 12:00 on the day of the trial the plaintiff was informed that the claims handler had at that stage instructed the attorneys on behalf of the defendant that nothing is to be settled. The plaintiff would not finish the experts in less than a day and was thus now forced into a position to ask for a postponement, whereas the matter could have been finalised.

[6] I then instructed counsel for the defendant to call the claims handler to court. The claims handler testified that she worked with the file since its inception. The file was however out of her hands when it was with "block settlements". The file was again out of her hands when the file was sent to the relevant section checking the past medical expenses. She accepted that these two facts constituted no excuse for only looking at the file the morning of the trial. She knew she could be held accountable by having to pay the costs of a postponement, but she submitted that she did not act intentionally. She was in fact quite blasé about the prospect.

[7] Immediately after her evidence the court was then informed that all the plaintiff's reports were admitted with no evidence to the contrary; except for the plaintiff's

industrial psychologist's report. The plaintiff could have this expert there within 15 minutes and the defendant now had a report from their industrial psychologist. The plaintiff's reports from the neurosurgeon and the industrial psychologists were also only filed and served on the 24th of February 2016, a day before the trial.

[8] I let the matter stand down to the next day for the evidence of the industrial psychologists. I was however informed that the matter must stand down because they are awaiting a joint minute from the defendant's industrial psychologist. At 12:00 I was informed that a joint minute was not forthcoming from the defendant's industrial psychologist. I was further informed that the defendant had now filed and served a special plea and that therefore the matter should be postponed.

[9] The special plea entailed that the plaintiff does not have the *locus standi* to bring the action in his personal capacity as he lacks the mental capacity to appreciate the nature and consequences of this action. The grounds for this was that the clinical psychologist, Ms. Moodley, submitted in her report that the plaintiff is undergoing an *"acute major depression that is categorised by agitation and erratic qualities"*. She also stated *"that the plaintiff is withdrawn, anxious, depressed and aloof ... also appears to be in a constant state of grieving and mourning."* The plaintiff's behaviour matches diagnoses of bipolar disorder, an anxiety disorder, post-traumatic stress disorder. She drew the conclusion that a lack of PTSD treatment has resulted in this severe anxiety and depression. A further ground is that Dr. Birrell,

the plaintiff's orthopaedic surgeon, who consulted with the plaintiff, concluded *"there is a higher incidence of alcoholism and drug addiction (sic)"*.

[10] The plaintiff's counsel was prepared to argue the special plea.

[11] Not in one of the eight expert reports of the plaintiff is there an inkling that the plaintiff does not have the mental capacity to understand the legal proceedings. In the plaintiff's clinical psychologist's report the expert concludes as follows:

> *"The assessor is of the opinion that should funds be available to him, Mr. Matidza is deemed competent to manage his own finances."*

In the defendant's industrial psychologist's report she finds under the heading "Discussion" as follows:

> *"Mr. Matidza's pre and post morbid levels of general intellectual functioning are deemed the same".*

In reply counsel for the defendant argued, on instructions of his attorney, that in one report of the plaintiff a *curator bonis* is recommended. When confronted with what statement he is referring to, there is a lot of head shaking and a three minute pause before it is conceded that there is no such recommendation in any of the reports. It

is also conceded that Dr. Birrell as quoted in the special plea as referring to a *"drug"* addiction is incorrect and it should be a *"use of tobacco"*.

[12] The special plea was accordingly dismissed with costs.

[13] The court is then informed that the general damages is now settled. The plaintiff is also prepared to argue on the defendant's industrial psychologist's report and the defendant's calculations in order to finalise the matter. This is agreed to.

[14] The only issue thus further requiring evidence is that of the mobility expert for the court to find whether the refit of the prosthesis and the spare prosthesis is necessary and should be funded by the defendant as past medical expenses.

[15] The expertise and qualifications of Mr. Pretorius was admitted. The reason why a refit of the prosthesis was necessary and why a spare prosthesis is not "nice to have", but a necessity was accepted by the defendant; no questions were put to this witness pertaining to these issues. The only question by the defendant was whether this witness had incurred costs, which he had, and whether there had been a financial transaction. To this the witness answered "No". Counsel for the defendant informed the court that there were no vouchers submitted for these costs. Once again this was a blatant lie as it is clear from the letter to the defendant dated 2 October 2015 that these vouchers were submitted. These are expenses already

incurred, the mere fact that no financial transaction took place does not negate the necessity for payment of these vouchers as past medical expenses.

Loss of income

[16] The defendant's industrial psychologist, Ms. M. Kheswa, noted the following from the plaintiff's admitted reports:

16.1 The plaintiff's educational therapist:

"The accident occurred in August 2014 after he matriculated. Pre morbid academic difficulties were noted as he failed four times before completing grade 12. According to the grade 12 academic record obtained he failed Economics and performed poorly in Agricultural Science (34 %) and Maths Lit (39 %). He passed with endorsement to study a higher certificate. Despite the fact that he obtained a bursary from ETDP/SETA to study a degree in HR Management at Unisa in 2014, he never registered at Unisa during the course of 2013 or 2014."

16.2 Dr. T. Birrell, orthopaedic surgeon:

"He is 100 % permanently disabled. It is doubtful whether he would find any suitable light duty employment. If he does manage this he would have a loss of work capacity of 30 % and would require extra sick leave etc. if he were to find suitable light duty employment he would not be able to work past age 55."

16.3 Ms. M. Doran, occupational therapist:

"It is thus concluded that Mr. Matidza is not suited for his pre-accident occupation as a dagga boy post-accident. It is further accepted that he will never regain physical capacity to venture into such occupation even with an appropriate fitting prosthesis.

It is accepted that Mr. Matidza has suffered devastating injuries, impacting on his ability to earn a viable income, especially tasks of an unskilled to semi-skilled nature, which he held prior to the accident in question.

It is accepted that he probably needs to be allowed some form of entrepreneurial training/skills training to allow for a higher suitability to altered physical capacity. He indicated a desire to study further in the human resource field.

It is thus accepted that unless he is able to secure a significantly higher level of qualification, enabling him to qualify for occupation of a sedentary to light physical nature, he probably will find it difficult if not impossible to secure occupation, with regular periods of unemployment, especially competing against other healthy individuals and functional unemployability will then become a reality for him."

16.4 Ms. Tsineng, occupation therapist:

"The claimant is ideally suited for sedentary and light work where he can mainly work while seated or at least alternate equally between seating and standing and where he doesn't have to lift heavy objects. His ability to secure sedentary jobs is however limited due to the lack of experience in such jobs.

He is expected to battle to re-enter the open labour market due to the difficulties associated with the accident."

16.5 She also refers to Ms. Van den Heever, educational psychologist which remarks that if the plaintiff secures a higher certificate he would be able to apply for a sedentary light physical occupation. He will not be an equal competitor in the open labour market which will result in limited job opportunities. Long term psychotherapy and recommended interventions by relevant experts in all likelihood will improve his overall functioning and it is impossible that he may pursue a higher certificate course depending on funding and motivation. Without the latter his current profile suggests that he probably would not complete further studies and therefore would be left with a grade 12 certificate.

16.6 Ms. Moodley, clinical psychologist:

> "The loss of his leg and the traumatic experience that Mr. Matidza suffered seemed to have a devastating impact on him altering his physical, emotional, cognitive and social self."

[17] 17.1 She then finds that Mr. Matidza's scope of employment has been curtailed by the sequilae of the accident under review and he currently wouldn't be able to compete fairly for jobs in the open labour market for occupations that require increased mobility and heavy physical exertion. She however opined that Mr. Matidza has a matric qualification which is a requisite to enter sedentary occupations and having regard to the fact that he is still young he could gain clerical or administration experience on job training when he manages to secure employment of a sedentary nature. She relies on section 6 and 15(2)(c) of the Employment Equity Act from which the plaintiff could profit as he has a disability and would therefore fall within in a designated group and would therefore succeed in obtaining employment.

17.2 Pertaining to future loss of earnings she bases her opinion on the appointed experts' findings and views that the plaintiff has been rendered a vulnerable individual in the open labour market. Once again referring to Dr. Tony Birrell's report wherein it was stated that the plaintiff is in fact 100 %

permanently disabled leaving it doubtful whether he would find any suitable light duty employment. Despite this opinion she contradicts herself and then submitted that she does not find Mr. Matidza unemployable only that his employment has been curtailed and that he will be able to continue to work. She fails to say what type of work he would be able to do. The fact that she did not set out what type of work the plaintiff can do left Deloitte, the actuary on behalf of the defendant, with a problem as formulated in paragraph 2.2.2 of their report:

> *"The Moiponi Keshwa report does not provide post-accident career scenarios. Two scenarios were thus considered."*

The actuary thus postulated two scenarios although not in their field of expertise.

[18] The plaintiff relied on scenario 1B: matric and unemployable post-accident. It was argued that on all the reports this was the realistic and most reasonable scenario. The contingencies applied were uninjured past 5 %. Although it was high the plaintiff accepted this contingency of the defendant. The plaintiff argued that a 20% uninjured future contingency was reasonable, but added another 5 % because he was a matriculant and there would be periods of unemployment. The plaintiff thus submitted a 25 % future contingency was more than reasonable.

[19] To the contrary the defendant argued that scenario 1A: matric and secure sedentary employment post-accident must be applied as set out in the actuarial report. Contingencies of 10 % pre-accident and 20 % post-accident were to be applied.

[20] In view of the plaintiff's academic record, his depression and his financial situation it is highly improbable that the plaintiff would obtain a further tertiary qualification. Without any further tertiary education there are little to no prospects of him securing any employment. This is further exasperated by the fact that he has no experience in any administrative or clerical work. He had exactly four days of work experience in manual labour. His amputation renders him unfit to do any unskilled labourer work. I am satisfied that on the defendant's own industrial psychologist's report and the plaintiff's admitted reports scenario 1B is the correct scenario on which to base the calculations for future loss of income. The plaintiff is functionally unemployable. I am satisfied that the contingencies argued by the plaintiff are reasonable and sound. A 5 % pre and 25 % post must thus be applied.

[21] The costs of this matter must of course be carried by the defendant. The claims handler in this case was mandated to manage a big monetary claim, yet she only looked at the file on the morning of the trial. She had no excuses, let alone excuses of substance, as to why she had not paid attention to the file and why her instructions to her attorneys changed from settlement of general damages and loss

of future income to no settlement. To just again on the next day settle general damages and agree to all the reports except for the industrial psychologist's report. This is not an isolated case, case handlers of the Fund regularly have to come to court to explain their disinterest, or lack of instructions, or late instructions to their attorneys. This is an apt example of where a claims handler should carry the costs. In ***Bovungana v Road Accident Fund*** **2009 (4) SA 123 (E)** as well as ***Jwill v Road Accident Fund*** **2010 (5) SA 32 (GNP)** at 36G-39F costs orders against RAF and two of its officials were ordered to be paid jointly and severally on the scale as between attorney and client.

[22] The tale of woe however does not end here. The attorney relied heavily on the fact that the matter would not proceed if at 12:00 they do not settle and would force the plaintiff to postpone. Costs implications had little or no bearing because usually the defendant is ordered to pay the costs resulting in no harm to the attorney personally or to his firm. He then abused the process of court to file a special plea contrary to the facts of his own industrial psychologist's report. In the special plea Dr. Birrell was wrongly quoted, but this was only addressed when the court highlighted this untruth. A further untruth was put to the court that "a report recommended that the *curator bonis* be appointed". When confronted with what report recommended that, it was clear that there was no such report or such recommendation. An officer of the court intentionally put this untruth to the court.

[23] The attorney was afforded an opportunity to address the court as to why he should not be ordered to pay the costs *de bonis propriis*. He chose to make submissions to court. He submitted that he was not the attorney working on the file and was only handed the file the morning of the trial. But, in any event, it would be prejudicial to the plaintiff to make such an order because they will get nothing from him, as he has nothing.

[24] All of the above constitute material departure from the responsibility of office of an attorney. The facts prove litigation in a reckless manner; despite not knowing the facts of his case he gave instructions in court to counsel. This matter was stood down to the next day and still the attorney did not acquaint himself with the facts in his file. On the following day there were facts submitted in attempts to mislead the court. This conduct substantially and materially deviates from the standard expected of a legal practitioner – ***Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*** **and Others 2014 (3) SA 265 (GP)** at 289A-D.

[25] The frivolous and unreasonable manner in which the claims handler and the attorney dealt with this necessitate the scale of the costs to be punitive.

[26] Counsel for the defendant made submissions on instructions, while clearly not having any insight into the file. His conduct is also not above board and was in fact shocking.

[27] This matter shall be referred to the Law Society and the Bar Council. The registrar is instructed to transcribe the record and send the record and this judgment to the Law Society and the Bar Council.

[28] The draft order attached hereto marked "X" is made an order of court.

S. POTTERILL

JUDGE OF THE HIGH COURT

4/3/16

"X"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Before her Honourable Justice Mr Potterill (J) on 4 March 2016

CASE NO: 23635/15

In the matter between:

HAPPY MATIDZA Plaintiff

and

ROAD ACCIDENT FUND Defendant

DRAFT ORDER

Having heard counsel for the Plaintiff and the Defendant, and by agreement between the parties, the following order is made:

1. Defendant is to pay Plaintiff an amount of **R 5 051 017.13 (Five million fifty one thousand and seventeen Rand and thirteen cents),**

   which amounts are specified as follows:

   1.1 Past medical expenses: R1 259 369.13

   1.1.1 Agreed amount: R432,671.43

   1.1.2 Cost of refit: R98,127.51

   1.1.3 Cost of spare prosthetic: R594,335.27

4/3/16

1.1.4 Cost of Mediclinic: R134,234.92

1.2 Loss of income: R2,891,648.00

1.3 General damages: R900,000.00

on or before 28 March 2016, said amount to be paid into the bank account of Nothnagel Attorneys.

Failure to make payment by aforementioned date will result in interest calculated at 9.75% 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 9th August 2014 after such costs have been incurred and upon proof thereof.

3. The defendant, is to carry the costs of the plaintiff on an attorney and client scale including the costs of the plaintiff's counsel jointly and severally with:
The claims-handler, Ms. Baloyi, RAF Ref number 560/12207638/1070/4, is to personally carry the costs of the plaintiff on an attorney and client scale including the costs of the plaintiff's counsel jointly and severally with:
The attorney, Tankiso Lesofe, is to carry the costs of the plaintiff *de bonis propriis* on an attorney and client scale including the costs of the plaintiff's counsel, the one party paying the other to be absolved.

4/3/16

4. Following agreement on or taxation of the attorney and client 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 attorney and client costs.

5. The costs of 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 Dr DA Birrell (Orthopaedic Surgeon);

5.2 M Doran (Occupational Therapist);

5.3 Lucia van Vollentsee (Physiotherapist);

5.4 PDM Inc (Mobility Expert)

5.5 Sonet Vos (Industrial Psychologist);

5.6 Talitha Da Costa (Neuropsychologist);

5.7 Dr T Bingle (Neurosurgeon);

5.8 M Moodley (Clinical Psychologist);

5.9 Munro Forensic Actuaries (Actuary).

6. The travelling and accommodation costs of the Plaintiff for attending the medico-legal appointments.

BY ORDER

_____

REGISTRAR

4/3/16

CASE NO: 23635/15

HEARD ON: 25 and 26 February 2016

FOR THE PLAINTIFF: ADV. S. MARITZ

INSTRUCTED BY: Nothnagel Attorneys

FOR THE DEFENDANT: ADV. N. MHLONGO

INSTRUCTED BY: Morare Thobejane Incorporated

DATE OF JUDGMENT: 4 March 2016