IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A76/19
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
NOT REVISED
Date: 19 July 2021

In the matter between:

ADVOCATE ALIZA VILJOEN N.O. **APPELLANT**
In her representative capacity as *curatrix*
***ad litem* to SKYE HEUER**

and

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

Van der Schyff J (Mabuse J *et* R Matthys AJ concurring)

Introduction

[1] The appellant appeals the judgment and order of Nkosi AJ dated 6 September 2018. The appeal follows with the consent of the court *a quo*. It exclusively concerns the quantification of the damages suffered by the patient, who is represented by the *curatrix ad litem.* The parties are referred to as in the court *a quo.*

Parties' submissions

[2] The plaintiff avers that although the court *a quo* correctly held that the injuries suffered by the patient caused a reduction in her patrimony, the court erred in awarding a lump-sum in respect of loss of earnings. According to the plaintiff, the

court *a quo* materially misdirected itself and awarded an amount strikingly different to what should be ordered on appeal. The court disregarded certain relevant proven facts and applied an over-conservative approach to quantification. The court awarded loss of earnings and earning capacity by means of a lump-sum while the proven and cogent facts and opinions directed that an actuarially quantified award was probable, fair, and reasonable. The court *a quo* correctly held in the judgment that 'it naturally flows that the trial court is bound by the actuarial calculations' and 'the court is bound to consider the actuarial calculations very carefully: this would entail the pre-morbid and post-morbid scenarios which is already on record and has been considered as presented', but then awarded a lump-sum after holding that 'the court is to weigh and determine a fair and reasonable quantum having regard to comparable previous court decisions as guidelines.' The plaintiff submits that the court *a quo* paid lip service to the agreed-on or proven facts and the expert opinions which provided for the following:

i. Before the collision, the patient would probably have obtained at least a four-year degree or an LLB. She would probably have joined the labour market in 2015 at the median of the Patterson B4/C1 total package income and progressed to Patterson D1 total package (during) 2035 by means of real linear increases. Her income would have progressed from this level of income by means of further inflationary increases up to retirement at the age of 65. The contingencies should not be increased due to parental divorce or maternal cancer.
ii. Post-collision, the patient suffers from serious primary diffuse and secondary focal injuries with permanent uncontrollable neuropsychiatric deficits and lack of insight, the inability to accept responsibility for tasks of basic living and employment, requiring assistance in all spheres of living and employment, impaired speech, and language commensurate with the severity of the brain injury, and a static and curtailed career path of no more than ten years.

[3] As a result of the above submissions, the plaintiff argues for a substitution of the R2 500 000 awarded by the court *a quo* with an amount of R 6 896 252 before consideration of the interim payment of R420 000 made by the defendant in terms of a court order dated 6 March 2013.

[4] The defendant disputes the plaintiff's argument and seeks that the appeal be dismissed. The defendant urges the court to assess the damages based on all the evidence and not just the plaintiff's experts and compare it to that of the court *a quo*. The defendant submits that the amount suggested by the plaintiff is excessively high in the circumstances and is not supported by the evidence of the educational psychologists. The defendant argues that the Industrial Psychologist's report on whose basis the actuary made its calculations is inconsistent with the findings by the educational psychologist and that the IP's assumptions and postulations are not informed by the crucial evidence pointing to a lesser serious head injury than assumed, plus pre-existing difficulties. The defendant avers that the court *a quo* misdirected itself when it concluded that the diagnosis of a severe primary diffuse brain injury and a secondary focal brain injury was the correct one. The court should have considered that the patient managed, post-collision, to pass her matric with some distinctions. The court *a quo* also misdirected itself in disregarding the effect that the pre-existing psychological conditions and traumas had on the patient. Despite these misgivings, the defendant did not lodge a cross-appeal.

Legal principles – interference by a court of appeal

[5] In a delictual context, general damage is usually that damage presumed to flow from an unlawful act. In the case of delictual liability for bodily injuries, all non-patrimonial loss and all future loss are classified as general damages. All pecuniary loss suffered before the trial qualifies as special damages.[1] The relevance of this distinction relates to the assessment of the damage. A direct correlation exists between special damages suffered and the award made by the court. The quantification of general damages, inclusive of prospective loss, entails to a lesser or greater degree depending on the heads of damages concerned, a speculative process that requires the exercise of a discretion. Where the amount of damages is capable of accurate calculation, as is the case with special damages, a court of appeal will interfere if it differs with the trial court on the exact amount of the award.[2]

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[1] *JM Potgieter, L Steynberg and TB Floyd* Visser & Potgieter Law of Damages, 3rd ed. 2012, JUTA, 23.

[2] See, eg, *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) at 289.

Where the quantification of the damages is, however, a matter of estimation rather than calculation, the court has a wide discretion to award what it considered in the particular circumstances to be fair and adequate compensation.[3] In such circumstances, an appeal court is generally slow to interfere with the award by the trial court. A court of appeal cannot simply substitute its own award for that of the trial court.[4] The Supreme Court of Appeal referred with approval to Erasmus and Gauntlet's exposition of the proper approach of an appeal court in appeals against awards of damages:[5]

'The appeal court will interfere with the award of the trial court:

(i) where there has been an irregularity or misdirection (for example, the court considered irrelevant facts or ignored relevant ones; the court was too generous in making a contingency allowance; the decision was based on totally inadequate facts).

(ii) where the appeal court is of the opinion that no sound basis exists for the award made by the trial court.

(iii) where there is a substantial variation or a striking disparity between the award made by the trial court and the award that the appeal court considers ought to have been made. To determine whether the award is excessive or inadequate, the appeal court must make its own assessment of the damages. If, upon comparison with the award made by the trial court there appears to be a ‘'substantial variation'' or a 'striking disparity', the appeal court will interfere.'

[6] It is trite that once it has been concluded that interference is justified in terms of the principles set out above, a court of appeal is obliged to interfere. Considering the grounds of appeal raised by the plaintiff, the plaintiff contends that there exists no sound basis for the award made by the court *a quo* and that there is a substantial variation or striking disparity between the award made by the trial court and the award that an appeal court would consider ought to have been made.

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[3] See, eg, *Commercial union Ass Co of SA v Stanley* 1973 (1) SA 699 (A) at 703. In this case the court of appeal was of the view that the award by the trial court was too high, but it nevertheless declined to interfere. See also, *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114G-115D, and *RAF v Delport* 2006 (3) SA 172 (SCA).

[4] *RAF v Guedes* 2006 (5) SA 583 (SCA).

[5] *Guedes (supra)* at 587D-H.

Analysis of the court *a quo*'s judgment

[7] The plaintiff does not take issue with the factual findings made by the court *a quo*. Although not filing a cross-appeal, the defendant took issue with some of the factual findings made by the learned acting judge during argument. The general principle is that parties are bound to the confines of a case as set out on paper. Where no cross-appeal was filed to which the plaintiff could adequately answer, alleged grounds of cross-appeal cannot be raised in argument. Therefore, this court accepts that the court *a quo*'s factual findings are not disputed, and that the plaintiff only takes issue with the quantification of the patient's claim. The actual injuries are, in any case, only relevant in conjunction with the *sequelae* thereof.

[8] The learned acting judge meticulously evaluated the evidence presented by the respective expert witnesses and indicated why he accepted some experts' evidence and some not. He explained that he did not consider the impact of the patient's parent's divorce and the mother's cancer on the patient. The defendant had not shown how or where the same would have impacted the loss of earnings or earning capacity. He found that the patient, who was 16 when the accident occurred, would have obtained a four-year degree pre-accident. Post-collision, the patient will only be able to obtain an NQF level 4 qualification. He also found that the *sequelae* of the patient's injuries caused a severe and substantial curtailment and reduction in her potential career prospects and earnings and that she would not be able to sustain her employment in the long term.

[9] The following utterances of the learned acting judge are relevant to indicate how he went about quantifying the patient's damage:

i. He correctly stated that damages for loss of earning capacity are speculative. It involves a prediction about the future, '[i]t naturally flows that the trial court is bound by the actuarial calculations.
ii. He then indicated that in the exercise of judicial discretion in assessing the quantum, the court must discount certain contingencies or the "vicissitudes of life".
iii. Later in the judgment, the learned acting judge again reiterated that –

'Having regard to the opinions of all experts who testified either for or against the seriousness of the brain injury and the *sequelae* and subject to the appropriate contingencies the court is bound to consider the actuarial calculations very carefully this would entail the pre-morbid and post-morbid scenarios which are already on record and been considered presented.

The court is to weigh and determine a fair and reasonable quantum having regard to comparable previous court decisions as guidelines. There is no evidence that the Plaintiff has lost her job because of the *sequelae* following the collision except for the permutation of possibilities.'

iv. He held – '[a]n apportionment of 85 15 should be applied to the total damages considering or minus the R420 000-00 already paid to the Plaintiff".

v. The learned acting judge then ordered that an amount of R2 500 000-00 be paid in respect of the loss of earning capacity.'

[10] It is unfortunate, but the judgment as it pertains to the quantification of the damages is unclear. It is not evident how the court approached assessing the patient's claim relating to the loss of income potential. While referring to contingencies, it is not evident that the learned acting judge exercised his discretion by utilizing the figures provided by the actuary as the basis for the calculation and then discounted contingencies or awarded a lump-sum. The fact that the learned acting judge referred to an "apportionment of 85 15" does not assist, the calculations do not add up.

[11] Considering the above, it is justified for this court to quantify the damages suffered by the patient regarding loss of earning capacity.

Legal principles – quantification of damages for loss of earning capacity.

[12] Hartzenbeg J writing for the Full Court explained in *Road Accident Fund v Maasdorp*[6] that:

[6] (1552/1999) [2003] ZANCHC 49 (21 November 2003).

'The question of loss of earnings and loss of earning capacity is a vexed one and is often considered by our courts. Usually, the material available to the court is scant, and very often, the contentions are speculative. Nevertheless, if the court is satisfied that there was a loss of earnings and/or earning capacity, the court must formulate an award of damages. What damages the court will award will depend entirely on the material available to the court.'

[13] When a claimant's loss of earning capacity is assessed, courts essentially use one of two methods.[7] The first is establishing a reasonable and fair amount based on the proven facts and the prevailing circumstances. This entails the determination of a lump-sum that the court regards to be fair and just in the given circumstances. The second approach is to establish an amount by a mathematical calculation based on the proven facts of the case. Millard[8] opines that courts are likely to follow the first approach in circumstances where it is impossible to make a mathematical calculation, for example, where the claimant is a minor who has not yet embarked on a career path.

[14] This court must take into consideration the fact that the plaintiff did not testify in person. There was no direct evidence from her. Her evidence would have been valuable in assessing what the future might hold for her. This, however, does not mean that the court cannot consider the evidence of the expert witnesses. It does, however, impact on the quantification method that will be utilised. It is impossible to accurately determine the patient's post-morbid progression without evidence of how the claimant sees and experiences her future unfolding. In the claimant's absence, insufficient light was shed on the reason for her failing her first year and why she did not consider another study field. Due to the patient's failure to testify, a considerable measure of uncertainty prevails. This disregards the application of a purely mathematical model, even if higher than normal contingencies are applied. It is trite that in these circumstances, the court may decide to fix a lump sum as compensation, although it considers the actuarial calculations as one of the factors in determining the award.

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[7] *Southern Insurance Association v Bailey NO* 1984 (1) SA 98.

[8] D Millard, 'Loss of earning capacity: The difference between the sum-formula approach and the 'somehow-or-other' approach', *Law, Democracy & Development* 2007, vol 11:1.

[15] Even in determining a lump-sum, the court is guided by the evidence before it. The evidence establishes that although the claimant was a minor at the time when the accident occurred, she was 16 and in Gr 11 at the time of the accident. She was an able scholar and considered studying law. After the accident, she completed Gr 12 and passed Mathematical Literacy with distinction. She enrolled for a four-year degree at the university. She dropped out after failing her first year. The educational psychologist testified that she and her counterpart concluded that their test results showed a pattern of cognitive deficits, including memory and attention deficits. They also identified emotional factors that would complicate the learning process. These deficits and patterns were compatible with the results seen in learners' cognitive profiles after a significant head injury. The plaintiff's family history shows that her brother did not complete his tertiary studies, her mother and father matriculated, and her sister completed a two-year hospitality qualification. Post-accident the educational psychologist opined that the patient would be left with her matric qualification. The accident rendered her a candidate for sheltered employment. The plaintiff's speech and language pathologist testified that the patient's language and speech profile is consistent with a significant brain injury. The plaintiff's psychiatrist's evidence highlighted the ongoing impact of the accident on the patient, particularly on her inability to study or sustain employment in the long term. The updated actuary's report reflects the damages as calculated by the plaintiff as an amount between R 6 765 557-00 and R 6 819 201-00.

[16] After considering the evidence placed on record, we are of the view that it would be fair and reasonable to both parties if a lump-sum of R4 000 000-00 is awarded. This is also in the region acknowledged by counsel to be fair and reasonable.

Order

In the result, the following order is granted:

1. The appeal is upheld, with costs.

2. Paragraph [30].1 of the order granted on 6 September 2018 is set aside and substituted with the following:

"For loss of earning potential payment of R 4 000 000-00, less any interim payment previously made."

E van der Schyff
Judge of the High Court

PM Mabuse
Judge of the High Court

R Matthys
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on Case Lines. As a courtesy gesture, it will be sent to the parties/their legal representatives by e-mail. The date for hand-down is deemed to be 19 July 2021.

Appearances

Counsel for the appellant:	*Adv P Uys*
Instructed by:	*Yvonne Kruger Inc*
	c/o Scholtz Attorneys
Counsel for the respondent:	*Adv T Pillay*
Instructed by:	*Tsebane Molaba Inc*
Date of the hearing:	*21 April 2021*
Date of judgment:	*19 July 2021*