IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

26/10/2022

DATE SIGNATURE

CASE NO: 64532/2017

In the matter between:

SHUSHU, T Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL (MEC) FOR HEALTH, GAUTENG PROVINCE Defendant

---

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an action for damages arising from the negligent medical treatment of the plaintiff and concerns the performance of an unnecessary and erroneous fusion on the T10 to T12 vertebrae of the plaintiff's back, in circumstances where the injuries the plaintiff sustained in a motor vehicle accident and for which she was hospitalised were in actual fact a compression fracture at the L1 to L2 level of her vertebrae and an injury to the knee.

FACTUAL MATRIX

[2] The plaintiff was admitted at the Chris Hani Hospital on 08 December 2012 following her injuries sustained in a motor vehicle accident on the same day. The injuries to the plaintiff consisted of a compression fracture at the L1 toL2 level of her vertebrae. The defendant, through the actions of medical doctors in its employ, negligently and performed an unnecessary fusion on the T10 to T12 vertebrae of the plaintiff's back on 11 December 2012, despite the injuries the plaintiff sustained being a compression fracture at the L1 to L2 of her vertebrae. As the employer, the defendant became vicariously liable for damages caused to the plaintiff.

[3] The plaintiff had not been aware of the negligence of the defendant.

RAF CLAIM

[4] The plaintiff instituted an action on 04 February 2016 claiming damages against the road accident fund in terms of section 17 of the Road Accident Fund Act 56 of 1996. The plaintiff had claimed as follows:

4.1 Past hospital and medical expenses

4.2 Future hospital and medical expenses

4.3 Loss of earnings and future income earning capacity

4.4 General damages

[5] The medico legal reports compiled by the medical experts of both parties were filed and, by agreement between the parties, constituted evidence of the injuries and sequelae of the injuries the plaintiff had sustained in the motor vehicle accident.

[6] It is particularly important to state that the medical experts had agreed that the fusion of the plaintiff's T10 to T12 had been unnecessary and erroneous. This became a consideration in the determination of the quantum of the plaintiff's claim, more so with the finding that the plaintiff's future employment would be shortened by up to five years as a result of her injuries and that her future employability was compromised to the extent of 20%.

INSTITUTION OF THE CLAIM FOR MEDICAL NEGLIGENCE

[7] The plaintiff instituted the claim for damages against the defendant on 20 September 2017 premised on medical negligence. For purposes of quantum, the parties agreed on the use of medico legal reports of experts that were considered in the settlement of the RAF claim, albeit updated, as evidence.

DEFENCES RAISED BY THE DEFENDANT

PRESCRIPTION

[8] The defendant raised a special plea that the plaintiff's claim has prescribed alleging that the summons were issued and served more than three after the cause of action had arisen and that;

"The plaintiff had knowledge of the identity of the debtor and of the facts from which the debt arose in 2012 already and or it is deemed that the Plaintiff had such knowledge if she could have acquired it by exercising reasonable care." (para 1.4 First Special Plea).

[9] The defendant raised a second special plea premised on non-compliance by the plaintiff with the provisions of section 3(1) read with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, alleging that the plaintiff has failed to give written notice of her intention to institute proceedings against the defendant, an organ of State, within six months from the date the cause of action arose as required by the Act, and/or that the defendant has not given written consent for the institution of the proceedings against it.

[10] The defendant pleaded that as a result of the non-compliance, the plaintiff is precluded in terms of section 3(4) of the Act from instituting the action.

[11] In her reply to the defendant's special pleas, the plaintiff alleged that she had only become aware of its claim against the defendant on 09 September 2016 when her legal representative obtained a report from Dr J J du Plessis that the fusion to her T10 to T12 vertebrae was unnecessary and performed at a wrong level. The plaintiff issued and served the summons within three years of gaining knowledge of its claim against the defendant.

[12] The defendant disputed the merits of the plaintiff's claim. However, the court on 05 February 2020 found that the defendant was liable for payment of the plaintiff's proven damages.

DOUBLE PAYMENT

COMPUTATION OF RAF CLAIM

[13] The issue for determination in this court is the quantum of the plaintiff's claim against the defendant. At the heart of the dispute in this regard is the common cause fact that the plaintiff was compensated by the RAF in her claim for damages arising from the injuries she sustained in the motor accident, which injuries resulted in her hospitalisation and the treatment of which gave rise to her claim against the defendant. The plaintiff's claim against the RAF was settled as follows;

(a) A lump sum payment of R980 000,00 was made which was inclusive of general damages and 20% future loss of income earning capacity;

(b) An Undertaking in terms of section 17(4) for future hospital and medical treatment was issued by the RAF.

THE DEFENDANT'S CONTENTION - (DOUBLE COMPENSATION)

APPLICABLE LEGAL PRINCIPLES

[14] It is trite that compensation for delictual damages a claimant is entitled to comprise of the difference between his/her patrimonial station before and after the commission of the delict. In *Erasmus Ferreira & Ackermann v Francis* 2010 (2) SA 228 (SCA) para 16, the court expressed the nature of a damages claim as follows:

> *"As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict. In determining a plaintiff's patrimony after the commission of the delict, advantageous consequences have to be taken into account. But it has to be recognised that there are exceptions to this rule."*

[15] *Visser and Potgieter*, in the book Law of Damages 4 at page 19 state that in a claim for damages various principles underlie the application of positive law in assessing the loss suffered and the quantification of the damages to be awarded. In quantifying a claim for damages the object of the award of damages must be realised, namely the fullest possible compensation of the loss suffered. The aim is to place the plaintiff in the financial position he have been in had the damage causing event not taken place. Therefore, the plaintiff should not be in a better position, but should also not be worse off.

[16] In McKerron *Delict* 124 it is stated:

> *"The interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory measure than by allowing the wrongdoer to benefit by the fact that some other person has discharged his liability".*

[17] In Standard General Insurance Co Ltd v Dugmore 1997 1 SA 33 (A) 43 the court found that:

> *"...the wrongdoer or his insurance should not be relieved of liability on account of some fortuitous event such as the generosity of a third party".*

[18] The legal principle was aptly stated in *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) at 277H – 279C in the following words:

> *"The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the*

plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed...Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action."

[19] In the present matter, the defendant contends that, having been paid compensation for her injuries by the RAF, the plaintiff is not entitled to compensation by the defendant as that would amount to double compensation. I do not agree with this contention, particularly on the facts in this matter. Whether compensation payable by the defendant to the plaintiff will amount to a double compensation must depend on it being established, by the party seeking to raise a defence of double payment, that the initial payment made to the plaintiff by the RAF was in respect of the same injuries for which a second payment is sought against the defendant.

[20] There are three aspects in this case that refute the defendant's contention of a double compensation, namely;

20.1 It is not explicitly stated for which injuries the plaintiff was compensated by the RAF – The medico legal reports considered made reference to injuries sustained in both the motor vehicle accident and in the medical negligence case;

20.2 The defendant did not call a witness from the RAF to give clarity whether the compensation paid was in respect of all the injuries referred to in the medico legal reports or was in respect of the injuries sustained in the motor vehicle accident only;

20.3 The only reasonable source of clarity appears to be the section 17(4) Undertaking which explicitly states that the future medical treatment of the plaintiff will be in respect of injuries sustained by her in the motor vehicle accident of 08 December 2012. The plaintiff's cause of action against the defendant arose on 11 December 2012 and that would have been apparent from the hospital records of the plaintiff.

[21] It can therefore be concluded from the facts in 20.3 that the compensation the plaintiff received from the RAF was in respect of the injuries to the plaintiff 's L1 to L2 vertebrae and to her knee sustained in the motor vehicle accident.

COMPUTATION OF MEDICAL NEGLIGENCE CLAIM

[22] The aspects of general damages and future medical treatment of the plaintiff appear, in my view, to have been reasonably resolved above. What needs to be considered now is the 20% future loss income earning capacity the plaintiff will suffer. As a result of the objective impossibility to determine which injuries account

for what percentage of the plaintiff 's 20% incapacity, the proposition that a 50/50 split be applied between the RAF and the defendant is more appealing and reasonable.

[23] The lack of a breakdown of the amount that was paid by the RAF once again poses a problem in that it cannot be ascertained what amount was allocated to future loss of earnings of the plaintiff. Counsel for the plaintiff advised that the parties in these proceedings had earlier agreed that the total quantum of the plaintiff 's claim against the defendant is in the order of R2 600 000,00.

[24] Relying on the proposed 50/50 split referred to above, counsel for the plaintiff contended for the payment of R1 300 000,00 in settlement of the plaintiff 's claim against the defendant. I do not agree with this contention simply because the R2 600 000,00 is inclusive of all aspects of the plaintiff 's claim against the defendant. No assistance was forthcoming from the defendant's counsel in this regard as he insisted on the double payment contention.

ANALYSIS AND THE LAW

[25] Considering the severity of the plaintiff 's injuries, the trauma she still stands to endure as a result of the proposed surgery she will in future have to undergo, I would consider the R2 600 000 -00, which in my view is reasonable in the circumstances of this matter, as full compensation for the combined injuries sustained and subtract from it the R980 000 -00 already paid, leaving a balance of R1 720 000,00 payable by the defendant.

CONCLUSION

[26] Any other manner of calculating a reasonable amount of the plaintiff's damages in this case will not only be vaguely arrived at, but also disadvantageous to the

plaintiff. The principle in *Erasmus Ferreira & Ackermann v Francis* 2010 (2) SA 228 (SCA) para 16, is worth reiteration in this regard, namely that:

> "*As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict. In determining a plaintiff's patrimony after the commission of the delict, advantageous consequences have to be taken into account. But it has to be recognised that there are exceptions to this rule.*"

COSTS

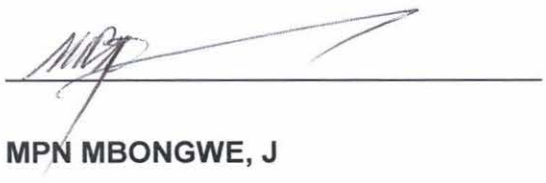
[27] While the defendant is to pay the costs in this matter, such costs should exclude the costs already paid by the Road Accidents Fund and listed in the court order dated 02 February 2018.

ORDER

[28] Resulting from this judgment, the following order is made:

1. The defendant is ordered to pay the plaintiff's damages in the amount of R1 720 000-00 (One million Seven Hundred and Twenty Thousand Rand).

2. The defendant is ordered to pay the defendant's costs which shall include the costs consequent upon the employment of two counsel.



MPN MBONGWE, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Plaintiff	:	ADV J O WILLIAMS SC
Instructed by	:	MARAIS BASSON ATTORNEYS MANDELA STREET AND DUNCAK STREET, WITBANK TEL: 013 690 3968/9 marinda@marisbasson.co.za
For the Defendant	:	ADV SEKWAKWENG
Instructed by	:	THE STATE ATTORNEYS, PRETORIA mmletsholo@justice.gov.za

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 27th OCTOBER 2022.