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47697/2009-M STEYN  
2011-04-29

iAfrica Transcriptions (PTY) Ltd

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 47697/2009

DATE: 2011-04-29

In the matter between

ABRAHAM MATHYS SMITH

1<sup>st</sup> Plaintiff

DUDUZILE NGOBENI

2<sup>nd</sup> Plaintiff

and

ROAD ACCIDENT FUND

Defendant

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J U D G M E N T

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C.J. CLAASSEN, J: This is an action for damages against the Road Accident Fund in terms of the Road Accident Fund Act 56 of 1996. The question of liability has been agreed. In terms of such agreement the defendant is liable for hundred percent of any damages which the plaintiff can prove. The future medical expenses will be covered by an undertaking in terms of Section 17(4)(a) of the Act. ~~There is some dispute~~ as to whether the past and future loss of earnings had been agreed leaving only the general damages to be resolved.

The defendant raises a legal point as a special plea. Although it

was not pleaded counsel for the plaintiff generously conceded to argue the matter as a pure legal point irrespective of the fact that it had not been pleaded. In short the defendant's argument is that this court has no jurisdiction to deal with the question of general damages in terms of the amendment to the Road Accident Fund Act as the defendant had objected to the RAF4 form. The RAF4 form was completed by Doctor Collin Morari on 5 June 2009 which is approximately six months after the accident which occurred on 26 December 2008.

It is trite that if the defendant objects to the report and raises a dispute then this court's jurisdiction is ousted and the matter is to be referred to a medical tribunal. The question to be resolved is therefore whether the defendant did in fact object as provided in the Act in order for the matter to be referred to the tribunal. In the RAF4 form paragraph 4.10 Doctor Morari answers the question "Has the patient reached MMI?" affirmatively. MMI is the acronym for Maximum Medical Improvement. At the date of examination he was therefore of the opinion that the plaintiff would not increase its recover or her recovery to a better situation. This form was handed in as EXHIBIT A and attached thereto there is a clinical report of Doctor Morari's examination and on page 9 he finds that the plaintiff has a 57 percent whole person impairment. It is trite that the injuries are serious. The plaintiff suffered a very serious brain injury which left her left half of her body paralysed. She also suffered a fracture of the left patella and some other injuries as well. To the RAF4 form the attorneys for the defendant wrote a letter dated 18 March 2011 i.e. more than two years after the accident and the RAF form was completed. In

this letter the following was stated:

"We refer to the above matter and advise that the Road Accident Fund hereby reject the assessment on the RAF4 form in terms of the Regulation 3(3)(d)(i). Reasons. The plaintiff had not reached MMI at the time of the completion of the RAF4 form."

There is no medical opinion on behalf of the defendant supporting the aforesaid reasons for objecting to the RAF form. It flies in the face of the express finding by Doctor Morari that MMI had indeed been reached. In the pre-trial minute which was held on 6 April 2011 certain questions are recorded. In paragraph 7.9.1 it is recorded that the defendant maintains that MMI had not been reached despite the finding at paragraph 4.10 of the RAF4 form. It further states that the defendant instructed its attorneys to object to MMI in any matters which are less than two years from the date of accident. This is an arbitrary and a discriminatory instruction which is unrelated to any logical assessment of the facts of this case. There is no Act or Rule which states that MMI cannot be reached before the lapse of two years after the accident. The fact that the examination by Doctor Morari occurred some six months after the accident does not prevent a medical opinion being held that the patient had indeed reached Maximum Medical Improvement. The statement by the defendant as recorded in paragraph 7.9.1 of the pre-trial minute is therefore devoid of any legal or medical basis. The defendant cannot issue such an instruction validly. Furthermore in paragraph 7.10 the following question is asked:

"Given that the regulations entitle the plaintiff to file an RAF4 form prior to MMI being reached when does the defendant say that MMI will be reached? Answer.

One to two years post accident."

This answer nullifies entirely the answer given in paragraph 7.9.1. According to the answer in 7.10 MMI can be reached before the lapse of two years. All the more reason therefore to find that the defendant's blanket instruction to reject all RAF4 forms if the examination is done less than two years after the collision. In paragraph 7.11 the defendant further states that the RAF4 examination was "nevertheless conducted too early". An examination will only be conducted too early if there is some indication that at the time of such examination the patient had not yet reached Maximum Medical Improvement, but there is no such evidence on behalf of the defendant. On the contrary the evidence of the plaintiff's experts are uncontested as the defendant did not file any experts notices or summaries.

In the plaintiff's expert bundle page 53 Doctor Shevel, the psychiatrist, records that the organic brain syndrome is probably permanent. So too there is a further report on page 96 which again states that there will be no further spontaneous improvement. All of this is uncontested and there is no evidence whatsoever to indicate that the time at which Doctor Morari conducted his examination and found that MMI had been reached is inappropriate. There is therefore no basis to argue that the examination was conducted too early or that MMI had not yet been reached.

I am therefore of the view that this court does have jurisdiction to hear the question of general damages and that it need not be referred to the tribunal. The argument that just because a dispute was raised the

matter must be referred to the tribunal has no substance to it. The dispute which the defendant is entitled to raise must be a genuine dispute. It cannot be an objection which has no medical or legal basis. In this case the objection have no medical or legal basis. In my view such an objection is purely obstructive and will carry the necessary punitive costs because of the unnecessary expenses incurred as a result of such objection.

I therefore find that the legal points argued by the defendant is dismissed with costs on an attorney and client scale.

Smith acts as the curator *ad litem* to the injured patient who is a 25-year old girl Duduzile Ngobeni. It is now necessary to determine the general damages for pain and suffering, loss of amenities of life, disfigurement etcetera. According to the report of Doctor Michael Scher she suffered a left hemiparesis, left shoulder being painful and painful teeth. At the time of the accident she was employed as a receptionist as a courier company. According to Doctor Scher's assessment following on the motor vehicle accident the plaintiff sustained the following, a closed head injury with concussion which was complicated by neurophysical sequela namely a left hemiparesis as well as suspected right side involvement and speech impairment. A left out of clavicle fracture and a fracture to the mandible.

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As to her injury to her jaw Doctor Langenegger a maxilla, facial and oral surgeon opined that she suffered from headaches and that she had speech difficulties and that it was difficult to understand her. Her left side of her body was weak although she is able to write with her right

hand. She is still unfit for her previous employment. She used to play cricket, but is now unable to do so. Her memory is not good and she gets angry quickly and she has to sleep a lot. She is unable to eat tough food as she has pain in the Temporomandibular joints and anterior mandible. She says no teeth were lost in the accident, but her sense of vision and hearing are still in order. She has not sense of smell and an impaired sense of taste. She walks with a crutch.

According to Doctor Langenegger she will have to undergo several operations to mend her jaws and teeth. On a rough calculation these future operations will cost in the vicinity of a R134 000. She will require implants. Doctor Langenegger concluded that she must have experienced a lot of pain and suffering as a result of the accident and that she suffered a big loss of amenities. According to Doctor Botha a specialist physician the head injury was severe based on the fact that she had posttraumatic amnesia. She had head and facial scars and she developed a left sides hemiplegia. She will require further MIR scanning to assess the true nature of the severe head injury. She was in respiratory distress when in the Natalspruit Hospital. She might suffer future aspiration pneumonia and would require physiotherapy. He also confirmed that she had pain in her jaw while masticating. She also appeared to have cognitive difficulties, but Doctor Botha deferred to a neurosurgeon or neurologist in this regard. Her remaining life expectancy would be approximately 45 years indicating a lifespan of 72 years in all.

A plastic and reconstructive surgeon Doctor Paul Braun indicated that there were marked areas of scarring which were ugly and

conspicuous. Her left shoulder presented with multiple keloids between three and five centimetres long. There were also multiple keloid scars on her left breast. There was a three centimetre keloid on her right cheek which was also ugly and conspicuous and would require reconstructive surgery to remove the scars and keloids. He finally stated that although this will improve the scars it will not remove the scars and the patient will remain serious disfigured as a result of the accident.

Doctor Shevel a psychiatrist was also consulted by the patient. In his examination she had difficulty in mathematical questions. He further concluded that the type and severity of the head injury suffered by the patient is almost always associated with varying degrees of permanent neuropsychiatric and neurocognitive deficits. These were enumerated by Doctor Shevel as follows.

1. Post accident occupational impairment.
2. Memory difficulties.
3. Difficulties sustaining concentration.
4. Irritability and frustration.
5. A depressed mood.
6. Emotional lability.
7. Crying out in frustration.
8. Distracted by background noise.
9. Cannot follow multiple conversations and avoids being with people.
10. Change in the sleep pattern with tendency to hypersomnia.
11. Daytime fatigue.

12. Loss of libido.
13. Lacks confidence to be in a relationship.
14. Poor numeracy skills.
15. Limited understanding of the litigation process.
16. Tendency towards social isolation and a decreased tolerance to alcohol.

He also found that the patient will never be in a position to fully understand or manage her finances. Although she is currently being cared for by her parents her situation will deteriorate after they have died and she will then be required to be looked after by a caregiver thus she would be unable to live independently. She cannot cook for herself as she cannot maintain her balance properly in holding a plate or pot with both hands. She is also unemployable in the open labour market. She also suffers from depression. He found that there has been a devastating loss of amenities of life and she will remain with significant neurophysical deficits. Her psychiatric condition impacted negatively on her interpersonal skills and relationship.

Doctor Jean Joubert a specialist neurosurgeon examined her and found the following disabilities. The patient had significant disability due to the sequela of the severe head injury. She had neurocognitive and neurophysical problems including a left sided hemiparesis with decreased dexterity, spasticity and a flexion contracture of the left leg, dysprosody and cognitive impairment. Due to the severity of the injury she should have a formal neuropsychological occupational therapy and psychiatric evaluation.

According to Marilyn Aden a counselling psychologist with special interest in clinical neuropsychology the patient still demonstrated neurophysical, neurocognitive and neuropsychiatric sequela to the injuries sustained. She indicated moderate to severe diffuse as well as right and left hemisphere deficits and difficulties with strong frontal lobe overlay which included low physical and mental endurance, below average to poor fine motor speed and dexterity especially in the left hand affected by the hemiplegia, variable and psychomotor speed with notable decrease on complex tasks, significant variations in attention span, concentration and information processing capacity. Perceptive language problems affecting her processing and understanding of what was said to her. Her reading speed was slow. Slightly dysarthric speech as well as problems in expressing herself when answering questions. Written expression was simplistic and below expectations for her level of education. Wide ranging executive deficits and difficulties affecting working memory, problem solving and abstract reasoning and inhibition and error monitoring. Variable verbal memory span with flat verbal learning and falloff in delayed recall. There was also a tendency to get confused and confabulated. Variable visual memory, learning through doing was below par and learning through looking showed significant falloff in delayed recall. Scaled score scatter on verbal and nonverbal subtests with verbal performances being poorer than nonverbal ones. Mild organic signs, mood and behaviour manifestations in keeping with frontal lobe dysfunction. These difficulties will impair her ability to utilise residual cognitive abilities. She also agreed that the patient would require a high

level of assistance to live independently and that she is unable to run her personal and financial affairs thus she requires a curator *ad litem* to oversee the litigation process and the protection of funds awarded to her.

It is obvious to me that the patient suffered severe loss of amenities of life considering all the medical reports referred to above. She was after the accident one and a half months in a coma in the ICU, thereafter, she spent another three and a half months in a general ward. Her marriage prospects have been severely curtailed. She has also isolated herself from social contact which causes the marriage prospects to be even less. Her speech impediment will obviously affect her future career to such an extent that she is unemployable and will not be able to continue her studies.

Taking into consideration all these impediments, pain, suffering, loss of amenities of life I am of the view that a substantial amount should be awarded to her as general damages. Lately the awards have increased and Mr Van Baarselaar for the plaintiff referred me to a recent case unreported adjudicated by Van Oosten, J where similar injuries were at stake. The learned judge there awarded an amount for general damages in the vicinity of R800 000. That occurred in 2006. If escalated with the appropriate percentage in regard to inflation and the diminishing value of money it would amount to an order of R1 million as of today. In my view that is not an inappropriate amount and I therefore grant the patient general damages in the amount of R1 million.

In this matter I grant an order in terms of the Draft Order marked X paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9. So it is paragraph one all the way

through to nine of the Draft Order marked X.