THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 256/2015

In the matter between:

DEBBIE MAHLAKU MASEMOLA **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral Citation: *Masemola v Road Accident Fund* (256/2015) [2016] ZASCA 72 (25 May 2016)

Coram: Tshiqi, Swain and Dambuza JJA and Baartman and Kathree-Setiloane AJJA

Heard: **17 May 2016**

Delivered: **25 May 2016**

Summary: Delict – claim for future loss of earnings – applicable contingency percentage rate to be deducted for pre-morbid future loss of earnings – discretion of the trial court to make a subjective estimate – court of appeal may not interfere unless the trial court has misdirected itself – contingency percentage rate to be deducted reduced.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (De Klerk AJ sitting as court of first instance):

1. The appeal is upheld with costs, including costs consequent upon the employment of two counsel.
2. The order of the court a quo is set aside and in its stead is substituted:
   '(a) The pre-morbid contingency to be deducted for future loss of earnings is 10 per cent.
   (b) The defendant is ordered to pay the plaintiff's costs including the costs of the plaintiff's experts.'

JUDGMENT

Tshiqi JA (Swain and Dambuza JJA and Baartman and Kathree-Setiloane concurring)

[1] On 1 November 2011 the appellant, plaintiff in the court a quo, Mrs Debbie Mahlaku Masemola was a passenger in a motor vehicle, when it collided with another one along Mmameng road travelling towards Marble Hall in the Limpopo Province. As a result of the accident she sustained head injuries, soft tissue injuries to her neck and right elbow, and also multiple abrasions and lacerations to her face.

[2] The Road Accident Fund (RAF), the defendant in the court a quo and the respondent in the present appeal, has conceded 100 per cent of the merits in her favour, and has undertaken to furnish her with an undertaking in terms of s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996, to cover her past and future medical expenses. Regarding the claim for loss of earnings, the parties could not agree on

the percentage to be deducted for pre-morbid contingencies but agreed that the basis for its calculation was the actuarial report by Johan Sauer Actuaries and Consultants and would be argued on the basis of the report of the Industrial Psychologist, Mr Louis Linde (the Linde report). The actuarial report was prepared on the basis of the Linde report and contains certificates showing calculations for pre-morbid and post-morbid contingency deductions for past and future loss of earnings. The parties then approached the Gauteng Division, Pretoria (De Klerk AJ) and requested it to adjudicate on that outstanding issue and presented it with the actuarial report and the certificate reflecting the calculations. The court was not asked to determine the quantum for the parties as it was agreed that this would be calculated by the parties themselves once the court had determined what percentage deduction was applicable.

[3] However, despite being appraised of the agreement, it erroneously considered the issue it had to decide to be 'the quantum of the plaintiff's claim for future loss of earning capacity' but nevertheless stated that 'the gist of the dispute was the assessment of a proper allowance for contingency'. It concluded that 'a figure of 15 per cent would meet the case' and that 'its findings would result in an award of a round figure of R406 000 for loss of future earning capacity'. It then ordered the defendant to pay the plaintiff's costs including the costs of her experts.

[4] Once it became apparent that the court a quo had not only misconceived the nature of the order sought by the parties, but also made an arithmetical error, the appellant's legal team was instructed to file an application for leave to appeal the order of the court a quo. The appellant's legal team, realising that such further litigation would delay the finalisation of the matter, and in an attempt to avoid incurring further costs to the detriment of the appellant, approached the RAF's legal team with a view to settling the matter amicably between the parties. After numerous enquiries, the appellant's legal team was informed by the RAF's legal team that the RAF was not prepared to settle the matter and that it stood by the court a quo's judgment.

[5] The appellant therefore lodged its application for leave to appeal together with an application for condonation as it was out of time.[1] It cited two grounds: First, that the court a quo erred in finding that the contingency percentage rate to be deducted for pre-morbid future loss of earnings should be 15 per cent; and second, that it erred in its calculation and the awarding an amount of R406 000 for loss of future earning capacity, contrary to what had already been agreed upon by the parties. The application for condonation was refused with no order as to costs.

[6] This appeal is with the leave of this court. And it turns on the contingency percentage rate to be deducted for the calculation of the appellant's pre-morbid future loss of earnings and the setting aside of the erroneous award made by the court a quo for future loss of earnings.

[7] The appeal was not opposed albeit that the attitude of the RAF remained that it was not prepared to settle the matter. We were informed by counsel from the bar that attempts to settle the matter continued until the day before the hearing as the appellant's legal team still wished to avoid unduly burdening the appellant with costs. There is no reason to disbelieve counsel for the appellant because in his affidavit in support of the application for condonation that served before the court a quo, he also outlines the attempts made in order to resolve the matter amicably and it was not denied by the RAF. Counsel also informed us that although the appellant had argued for a contingency deduction of 10 per cent as recommended by the actuary and was not entirely happy with the higher contingency deduction of 15 per cent, the main issue raised with the RAF was the patent arithmetical error made by the court a quo, and the appellant was willing to settle the matter at that rate in order to avoid incurring further costs of the appeal.

[8] It would have made perfect sense for the parties to simply correct the error and settle the matter as proposed by the appellant without incurring the further costs of the appeal. According to the actuarial calculation, the award payable if a 15 per

[1] The judgment of the court a quo was handed down on 18 August 2014. This means that the application for leave to appeal had to be lodged with the court a quo within one month, ie on or before 18 September 2014. The application for condonation for the late filing of the application for leave to appeal was lodged with the court a quo on 20 October 2014, which was just over a month out of the prescribed time for lodging the application for leave to appeal.

cent contingency deduction is made is R552 748.60 and if a 10 per cent contingency deduction is made, it is R593 924. The difference between the two amounts is R41 175.40 and the legal costs occasioned by this appeal obviously exceed that amount. It is thus not clear on what conceivable basis the RAF refused to settle the matter when it was clear that the court a quo had not only misconceived the issue it was required to determine, but also made an obvious error that could not be justified in anyway on the basis of the actuarial report that the parties had presented to the court by agreement as a basis for its determination. I say so because the actuarial calculations presented to the court show that if a 15 per cent contingency deduction is made for pre-morbid future loss of earnings, the award would be R552 748.60, and not R406 000.

[9] It is regrettable that the RAF has wasted money that should have otherwise been efficiently used to pay for the claimants in an appeal like this. Meanwhile Mrs Masemola, has been made to wait unnecessarily, for lengthy periods for her matter to be finalised. I can only hope that the RAF will prioritise this matter to avoid further injustice to her.

The contingency percentage deduction

[10] The Linde report states that Mrs Masemola left school after passing grade 10 and that she was a full-time home maker until she worked as a domestic worker for two years. She resigned from that position because she was expecting her second child. She completed a three week security training course and registered as a grade C security service provider with the Private Security Industry Regulatory Authority (PSIRA). She also completed a six months' certificate in early childhood development and obtained a learners' driving licence.

[11] At the time of the accident, Mrs Masemola was a full-time home maker but would, according to the Linde report, have chosen to pursue a career as a security service provider, had the accident not occurred, hence a qualification in that industry. She would have entered the industry at a grade E level and would have probably been promoted to grade C level approximately three to five years after that. That level would probably have been her ceiling until retirement. After the accident, she secured part time employment with a local community work programme, Mvula Trust,

where she worked for two days a week doing cleaning, gardening and assisting school children to read and write. She is also employed on a part-time basis as a domestic worker on a once weekly basis.

[12] According to the Linde report, Mrs Masemola has suffered partial past and future loss of earnings and earning capacity resulting from pain and discomfort, and may probably need further surgery in future. Her employment prospects have been limited and she is now probably suitable for sedentary, light, and moderate physical work. She is presently not able to perform her household chores, or stand for long periods without assistance or without suffering dizziness and nausea and as a result, employment as either a security officer or full-time domestic worker will no longer be viable. Her part-time employment with Mvula Trust was on a contract basis and was due to come to an end in 2014. Then she would have to rely on her one-day-a-week employment as a domestic worker. Her prospects of re-employment in that position or any other position would be adversely affected by the fact that most tasks cause her backache, while long hours and in the sun cause her a headache.

[13] The actuarial report, in calculating her future loss of income, assumed that she would have commenced work as a grade E security guard. For pre-morbid contingency deductions for future loss of income, the actuary applied 10 per cent contingencies and 15 per cent for post-morbid contingency deductions.

[14] It is trite that the determination of allowances for contingencies involves, by its very nature, a process of subjective impression or estimation rather than an objective calculation. Thus, whenever allowances on which judicial opinions may vary appreciably, this court will not interfere with a determination made by a trial court and substitute it with its own estimates, unless the trial court misdirected itself in some material respect, or if this court's own estimates and those of the trial court are strikingly disparate, or else where this court is otherwise firmly convinced that the trial court's estimates are wrong. (See *Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A) at 965G-H.)

[15] The court a quo accepted the Linde report and opinion expressed in it, that had the accident not happened, the appellant would probably have returned to the

open labour market as a security officer, and that now that the accident has happened, she would not be able to engage in employment as a security officer nor as a full-time domestic worker. It also noted that one of the factors it had to consider in exercising its discretion was a possibility that the plaintiff may have less than a normal life expectancy. Despite acknowledging all those factors the court imposed a higher deduction of 15 per cent. In so doing the court a quo erred.

[16] The appellant is clearly an ambitious woman who aimed to improve her employment prospects so that she could fend for herself. Whilst raising her children she was not content with simply being a full-time home maker but commenced employment as a domestic worker for two years, and only resigned because she was expecting her second born child. She also had ambitions of being a security officer and thus completed security training and registered as a grade C security service provider. She also completed a six month certificate in early childhood development and obtained a learner's licence.

[17] After the accident, she did not sit at home and feel sorry for herself but she again went out into the open labour market in an attempt to make ends meet, but is, as a result of the injuries she sustained in the accident, not able to secure permanent employment. The resultant consequence of allowing a higher contingency deduction for pre-morbid future loss of earnings is that she will get a lower award for damages for loss of earnings. That means that the court a quo had very little regard to her potential earning capacity, had the accident not happened. This court must thus interfere with the trial court's estimate, and the pre-morbid contingency deduction pertaining to future loss of earnings is consequently reduced to 10 per cent.

[18] It is not necessary to correct the mathematical error made by the trial court as the award will be calculated on the basis of this order as agreed between the parties.

[19] In the result I make the following order:

1. The appeal is upheld with costs, including costs consequent upon the employment of two counsel.

2. The order of the court a quo is set aside and in its stead is substituted:

‘(a) The pre-morbid contingency to be deducted for future loss of earnings is 10 per cent.

(b) The defendant is ordered to pay the plaintiff’s costs including the costs of the plaintiff’s experts.’

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

For Appellant:	P J J De Jager SC (with him J P F De Klerk)
Instructed by:	Loubser Van Der Walt Attorneys, Pretoria
	Kramer Weihmann & Joubert Inc., Bloemfontein
For Respondent:	No appearance