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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO:08588/15

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/NO
(3) REVISED.

In the matter between:

C M M

Appellant

and

Road Accident Fund

Respondent

JUDGMENT

KLAAREN AJ:

Introduction

[1] This case concerns a former security guard claiming damages for the loss of future earnings from the Road Accident Fund as the result of a road accident.

[2] The parties agreed that the plaintiff was 20% liable for the accident and the insured/uninsured driver was 80% liable. The parties further agreed that the issue of general damages could be referred to the Health Professions Council. Those aspects are dealt with in the order below but did not form part of the hearing in front of this court.

[3] In an accident while he was on duty in November 2012, the armed response vehicle driven by the plaintiff, M. C. M., collided with a 4 X 4 vehicle at an intersection. M. suffered a fracture of the left medial femoral condyle and a haemarthrosis of the right knee. As laid out more fully below, these injuries interfered with his performance of his then job as a reaction officer. M. used two crutches for four and a half months after his discharge and one crutch for a further six months. After a further operation, he used crutches for a further two months. It is M.'s case that these injuries have reduced him to the potential performance of sedentary work and occasional light physical demands.

[4] What was in dispute between the parties was the likely career path of the plaintiff, but for the accident. At the hearing, two witnesses were called, the plaintiff and the expert industrial psychologist Lewis Rosen. Called by the plaintiff, Rosen had submitted an expert's report, 'M. C. M.: Report on Career Prospects', dated 7 August 2015 and an amended report with the same title dated 4 September 2016.

M.'s Likely Career Path But-For the Accident

[5] M. C. M. gave evidence that, as of about two months before the hearing, he was no longer working at his former job as a reaction officer at ADT. In his view, his employment had been terminated due to his inability to wear and carry the heavy bullet-proof vests required for the job and his inability to run and chase after suspects. He tried to upskill to a typing position within ADT but failed the skills examination for that post. Since 2012, the company had assigned him 'light duty', keeping him on his reaction officer salary. He had been invited and had tried to go back to his job but was unable to perform. As he put it, "I didn't take a full day." He was currently looking for work but had not found anything. Cross-examination revealed that ADT had made a disability application on behalf of M. to Sanlam but this had been denied.

[6] M. joined ADT in 2008 and had been promoted twice by the time of his accident. His next promotion, should it occur, would have been to the level of supervisor. He admitted there was no promise nor any guarantee of a promotion, but noted that ADT was a large company and that they needed many supervisors.

[7] Lewis Rosen has six degrees and has worked as an industrial psychologist for 22 years. He was an impressive witness who clearly knew the theory and the practice of his field. Insofar as the issues before this court were narrowed to the question of the likely career path of M. but for the accident, Rosen's evidence was of great assistance to this court.

[8] Rosen contextualized his reports within the changing nature of the private security industry in South Africa. Rosen also explained briefly the theory behind the Paterson bands (termed the decision-band method elsewhere). Rosen noted that, based on M.'s job description before the accident, he placed M. as working at a Paterson B1 band. In his view, M. would likely have been promoted to a B2 post within about a year of the accident and then in a further three years would have likely been promoted to a supervisory post. Such a post in the terminology of the Paterson method is B4, a band supervising other B band employees. This description of M.'s likely career progression is dictated by Paterson general rules and methodology and does not represent a prediction of a jump over a B3 band. Rosen noted that ADT was paying M. a salary generally appropriate within the industry for the work he was performing before the accident, paying just slightly under the median. This correlation assisted Rosen in placing M. in a Paterson B1 band.

[9] Rosen justified his assessment that M. would be likely to be promoted on M.'s history of receiving good service certificates from his employer, the performance bonuses he received, and on a discussion Rosen had with his supervisor, Mr Ronnie Zwane, as part of Rosen's second report. Documentary evidence was presented to corroborate the good service certificates and bonuses. Rosen stated that in an industry such as the private security sector factors like trust, integrity and good work performance were valued. M. exhibits these factors. Further, M. had been experiencing upward mobility in his work history at ADT. While M.'s career prospects out of the Paterson B band were

constrained by his educational level, there was no reason to think that he would not be promoted within the B band. Rosen's view was that large companies such as ADT would wish to retain valued employees such as M.. Rosen noted that ADT's action in placing M. on 'light duty' was consistent with this view of the company's perception of the value of M..

[10] Rosen nonetheless stated that M.'s current career prospects were not good, unless there was significant retraining for skills such as typing. Rosen also noted that such skills were usually obtained through other experiences. In terms of future employability, M. was thus in a difficult position. His physical constraints prevent him from re-lapsing to the A band. M.'s lack of skills and his lack of experience make his hiring into another B band post difficult. Rosen stated it would be a very remote prospect for M. to find work in a saturated market where there were a limited number of jobs. In his updated report, Rosen wrote "Given that in the year subsequent to our report he has been unable to undergo [possible retraining into more sedentary work], together with the fact that he has been dismissed despite being polite and cooperative with his employer, we believe it unlikely that he will find retraining opportunities."

[11] Under cross-examination, Rosen stated he had considered, within his scope of expertise, the views of the doctor who was of the view that M. could work. These views were referenced in, for instance, the disability application that ADT had made to Sanlam on behalf of M., an application which was denied. In Rosen's view, the doctor's views were only one input in his estimation of M.'s ability to perform work. Other inputs were also of value in

forming Rosen's opinion, including the plaintiff's own views of his inability to perform certain physical work – in this case the work of a reaction officer – where the plaintiff had tried but had failed to perform such work after his accident. This was confirmed by M.'s supervisor, Ronny Zwane, who stated M. had tried several times to do the work of a reaction officer. Zwane noted that, despite his failure, M. had remained "respectful and cooperative". This was significant, according to Rosen, as it demonstrated that M. had not entered into a situation of learned helplessness after his accident. As the second of Rosen's reports stated, "[t]he obvious problem was that there is a disconnect between the view of [the doctor] and the subjective experience of Mr M.." Rosen further pointed to views and evidence within his expert community supporting the importance of patients' beliefs in chronic pain.

[12] Under cross-examination, the Fund also asked Rosen why he had not asked Zwane what M.'s Paterson band grading was according to ADT. Rosen admitted that Zwane might have been able to access such information from ADT's human resources or administrative divisions. But Rosen noted that he had contacted Zwane as part of his second report for an update regarding M.'s current status with ADT and had already performed the work of Paterson banding for M.'s reaction officer post in his earlier report, objectively grading the post and noting the correlation with the salary paid by ADT.

[13] With respect to the likely career path of M. but for the accident, Rosen's evidence withstood cross-examination by the Fund. I find it likely that M.'s career within ADT but for the accident would have progressed through a B2 and

a B4 promotion within the time frames indicated by Rosen. I also note the information gained through the cross-examination of Rosen that M. is not in a situation of learned helplessness, although his retraining opportunities were unlikely.

Calculation of Loss of Future Earnings

[14] M.'s counsel urged that I adopt a calculation of loss of future earning based on the experts' reports provided. The latest actuarial report provided was dated 28 October 2016. To do so would be to adopt the second of the two methods referred to in *Southern v Bailey*. Indeed, he argued that such a method was to be preferred. The actuarial report provided a figure of R2 949 171 (Basis 1) for the loss of income by M. assuming he would be unemployed and R 2 299 604 (Basis 2) assuming he would have a residual earning capacity of R6000 pm to age 65.

[15] Within the mode of calculating loss of income through reference to the expert reports, to the extent that I have doubts regarding M.'s career path, M.'s counsel noted I can temper those doubts by increasing the contingencies provided for.

[16] The deductions used for general contingencies in the expert's report of 28 October 2016 for the value of the income but for the accident were 5% for accrued income and 15% for prospective income. The deductions used for

general contingencies for the value of the income having regard to the accident were 0% for accrued income and 40% for prospective income.

[17] Counsel for the Fund argued that I should adopt the method of estimating the future loss of earning without detailed reference to financial calculations. She suggested that I award a figure representing 20% of the present value of the future earnings of M. but for the accident. This meant a figure of R589 834.20 as 20% of R2 949 171, the figure calculated as loss of income but for the accident on the basis of M. remaining unemployed (Basis 1).

[18] The amount of damages for loss of future earnings will be reduced by 20% in line with the parties' agreement that M. was 20% negligent for the 2012 road accident.

[19] Assisted by Rosen's expert evidence and the cross-examination thereof, I do indeed have some doubts that M.'s future earnings capacity will be merely residual. His demonstrated value to ADT and his continuous exemplary attitude work to show both his loss of future earnings and his potential to rebound. I thus propose to adjust the contingencies from the expert report of 28 October 2016 from 15% to 25% for M.'s gross prospective value of income but for the accident. I propose to use Basis 1, where the base assumption is that M. remains unemployed.

[20] Assuming correct maths, this use of a 25% contingencies level yields a net prospective value of income but for the accident as R3 273 693 less R818 423

or R2 455 270. To this we must add the net accrued loss of income having regard to the accident, R166 532. The total loss of income on Basis 1 (unemployed) with a 25% contingencies level is thus R2 621 802.

[21] In line with the agreement between the parties of 80% liability in the plaintiff's favour, this sum will be reduced to R2 097 441.60 in the order granted.

[22] Having heard the counsel for the parties and having read the documents filed of record, it is ordered that:

1. The Defendant is liable for 80% of the plaintiff's proven damages.
2. The Defendant shall provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay 80% of the costs relating to the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying goods to him arising out of injuries sustained by him in a motor vehicle collision which occurred on 2 November 2012, after such costs have been incurred and on proof thereof.
3. The Defendant shall pay to the plaintiff the amount of R 2 097 441.60 in respect of the plaintiff's loss of earnings/earning capacity on or before 31 December 2016. Should any payment be late, interest on the amount will be calculated at the rate of 10.5%. Payment shall be made through means of a direct transfer to the account of the plaintiff's attorneys: Swartz Attorneys, Trust Account number 6202 1804 259, First National Bank, Balfour Park, Branch Code 212 217.
4. The Defendant is ordered to pay the plaintiff's costs of suit up to date, as taxed or agreed, such costs to include:
 - a. The costs attendant upon the obtaining of payment of the amount referred to in paragraph 3 above;
 - b. Costs of counsel; and
 - c. The costs of preparing and obtaining the medico-legal reports and qualifying fees, if any, of the plaintiff's following experts: Dr Barlin, Ms Reynolds, Dr Kaplan, Ms Prinsloo, Mr Rosen, and Mr Kramer.
5. The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorneys of record and allow the defendant 14 court days to make payment of the taxed costs.
6. The issue of general damages is postponed *sine die* for determination by the Health Professions' Council of South Africa.

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION (JOHANNESBURG)**