

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
11/10/2010
DATE SIGNATURE

Case No: 23910/09

Date heard: 06/10/2010

Date of judgment: 11/10/2010

In the matter between:

Themba Blessing Thwala

PLAINTIFF

and

Road Accident Fund

DEFENDANT

JUDGMENT

DU PLESSIS J:

On 8 October 2006 the plaintiff was injured in a motor vehicle accident. He claims damages resulting from those injuries. The defendant has conceded that it is liable for such damages as the plaintiff may be found to have suffered.

It is not in dispute that the plaintiff has suffered damages in the sum of R2000 in respect of past medical and hospital expenses. It is also not in dispute

that the plaintiff will in the future have to undergo further medical and hospital treatment for his injuries. In respect thereof the defendant has accepted liability to furnish to the plaintiff a certificate in terms of section 17(4)(a) of the **Road Accident Fund Act, 56 of 1996**.

The defendant does not dispute that, due to his injuries, the plaintiff has suffered a loss of earning capacity. The quantum of such loss is, however, in dispute. Similarly, the defendant does not dispute that the plaintiff has suffered general damages for pain, suffering, loss of amenities of life and the like. The quantum of general damages is in dispute.

No oral evidence was led. As evidence the plaintiff handed in, without objection, certain expert reports that the defendant was unable to dispute. I proceed to summarise the facts as they appear from those reports.

The plaintiff sustained the following injuries: A blow to the right side of the head with an open wound that was sutured; a blow to the right ear, also with an open wound that was sutured; abrasions on the forehead and nose; an unspecified injury to the right shoulder; a blow on the right knee with an open wound that was sutured; a fracture of the left radius and ulna. The doctors did an open reduction and an internal fixation of the fractured arm but there were complications and the fractured bones would not unite. As a result of the fractured arm and its sequelae, the plaintiff has lost substantial power in the left hand. He has also lost rotational movement as well as pro- and supination. The

use of his left hand has been limited severely: He finds it difficult to open, close and unlock doors, to handle eating utensils and to hold a cup with the left hand. When he stands, the hand hangs limp. In his present condition, the plaintiff is unable to perform physical work that requires both hands. He will, apart from surgery to remove the plate in his arm, require reconstructive surgery to address the limitations of the left hand. If successful, the surgery will leave the plaintiff with a nearly normal left hand. The plaintiff has a 20% chance of developing dramatic osteoarthritis in his left wrist with an associated loss of function. It is not in issue that the injuries did not affect the plaintiff's longevity nor, assuming the surgery to be successful, his working life.

Born in 1982, the plaintiff was 24 at the time of the collision. Having failed twice in earlier grades, he passed grade 11 at school but failed grade 12. The plaintiff's father passed grade 5 at school and earns a living by transporting goods with his bakkie. The plaintiff's mother had no formal schooling and she is unemployed. His brother is employed as a paramedic, having done a 6 months course in that field.

The plaintiff entered the labour market in 2004 (when he was 22). He worked as a security guard for six months. In the five months from January to May 2005, he worked as a shop assistant in "different shops". From June 2005 until some time before the accident, he worked as an assistant to a fork lift driver. At the time of the accident he was unemployed: The concern he had worked for

closed down. He has not worked since the accident but he did receive a disability grant

The industrial psychologist whose report was handed in as evidence expresses the opinion that the plaintiff would, but for the accident, have followed a career path that, at the age of about 30 to 35 could have taken any one of three possible directions: But for the accident, he would have obtained employment as an unskilled worker in the non-corporate sector of the economy within between six and twelve months after he had lost his job. Thereafter he could, as a first possibility, have continued working as an unskilled worker in the non-corporate sector, gradually progressing in income until the age of 45. From then on he could have received only inflationary increases. As a second possibility, the plaintiff could have received on the job training and could have progressed to semi-skilled work at about the age of 30 to 35. In the third place the industrial psychologist points out that the plaintiff could have obtained work in the corporate sector which, on a career path similar to the second possibility, would have enabled him to earn a substantially higher income.

In an actuarial report before the court, the actuary made three calculations that he respectively calls "basis 1", "basis 2" and "basis 3". Basis 1 assumes the possible career path where the plaintiff remains an unskilled worker. Basis 2 assumes that the plaintiff would have remained in the non-corporate sector but would have progressed to semi-skilled work. Basis 3, the most optimistic,

assumes a career in the corporate sector progressing to a semi-skilled worker. I shall refer to the respective calculations as basis 1, 2 and 3 as did the actuary.

In discussions before the start of the trial, the plaintiff contended for using the actuary's basis 3 to quantify the plaintiff's loss of earning capacity. The defendant contended for using basis 1. During discussions in my chambers I suggested that using basis 2 would constitute a fair midway. When the trial started I was informed that the parties have agreed that basis 2 should be used as a basis for quantifying the plaintiff's loss of earning capacity. That, however, did not dispose of the issue: Each party still contended that allowance should be made for contingencies before the loss of earning capacity can be quantified. I proceed to consider that.

The quantification of a loss of earning capacity entails essentially two questions. First, it is necessary to determine how the injuries impacted on the plaintiff's earnings from the date of the accident until the date the determination is made ("past loss of earnings"). In the second place it is necessary to determine how the injuries impacted upon the plaintiff's ability to earn in the future, from the date of the calculation to the end of his earning career ("future loss of earnings").

I start with the plaintiff's past loss of earnings. Using the report of the industrial psychologist as a basis, the actuary calculated the plaintiff's probable earnings, had it not been for the accident, from the date of the accident to the date of the calculation (5 October 2010). In each of the three bases, the actuary

arrived at a different figure. I do not understand that. Having regard to the report of the industrial psychologist, I would have expected the three figures to have been the same. Counsel informed me, however, that they are content to use the figure in basis 2, R107 066, as representing the past earnings had it not been for the accident. The actuary however did not allow for "general contingencies", unforeseen negative or positive events that might have befallen the plaintiff in the period between the accident and the calculation. In my view the evidence does not point to significant positive events that might have influenced the plaintiff's past earnings had it not been for the accident. On the negative side, there is a real possibility that he might not have obtained work within a year after losing his job a few months before the accident. I say that having regard to his work history and to the general levels of unemployment in the country. Further periods of unemployment may also have impacted negatively on the plaintiff's past earnings but for the accident. In my view 5% should be deducted from the figure the actuary used as representing the plaintiff's past earnings but for the accident. The figure of R107 066 must be reduced to R 101 713 (107 066 – 5353).

To arrive at the plaintiff's past loss of earnings, his actual income from the date to the accident to the date of the calculation must be deducted from his past earnings had it not been for the accident. It is common cause that he received a disability grant of R32 610. It is therefore concluded that the plaintiff's past loss of earnings must be quantified at R69 69 103 (R101 713 - R 32610).

In order to quantify the plaintiff's future loss of earnings, the actuary calculated, for purposes of basis 2, that, but for the accident, the plaintiff would have earned, expressed as a present day lump sum, R1 336 896. The reader will recall that the calculation was made on the basis that the plaintiff would have worked in the non-corporate sector, would have undergone on the job training and would have progressed to a semi-skilled work at between the ages of 30 and 35. For the plaintiff Mr Uys argued that at worst for the plaintiff, 15% must be deducted from that figure to allow for unforeseen contingencies. Mr Knoetze for the defendant submitted that 55% should be deducted for contingencies.

The figure itself allows for contingencies, both negative and positive: The plaintiff might not have been able, but for the accident, to have undergone on the job training and to have obtained semi-skilled work. In such event the figure is too high and that used in basis 1 should have been used. On the other hand, the figure might be too low, and that in basis 3 should have been used. The plaintiff only worked for a relatively short period before the accident. It is impossible, on that history to conclude with any confidence what would have happened had it not been for the accident. His father has shown, albeit on a low level, entrepreneurial skills. His brother has obtained a semi-skilled work. The plaintiff's mother, on the other hand, is uneducated, unskilled and unemployed. In my view to make a further deduction for contingencies would render a figure that is by its nature very uncertain, even more uncertain.

According to the actuary's calculation, the plaintiff will, having regard to the accident, earn a present day sum of R476 558. Mr Uys contended that from that figure a further 55% must be deducted. Counsel submitted that such a deduction would allow for the possibility that the surgery to rectify the hand might not be successful. It would also allow for the fact that the plaintiff has been out of the labour market and will find it hard to catch up. Mr Knoetze also submitted that 55% should be deducted but on the basis that the same must be done in respect of future earnings but for the accident.

There is no evidence of a substantial risk that the surgery might not be successful. I have been informed that the surgery will probably be performed early in 2011 in which event the plaintiff will, from about June 2011 be able to work and to live a near normal life. Subject thereto that he may find it difficult to get employment at the outset, he will probably be able to do unskilled work. In basis 1 a career of unskilled work but for the accident is quantified at about R800 000. Having regard thereto, I am of the view that the R476 558 allowed for a similar career having regard to the accident, is on the low side. In this respect, too, it is my view that a deduction for contingencies will serve no purpose other than to render the imprecise even more imprecise. In addition, it must be borne in mind that future earnings but for the accident and future earnings having regard to the accident are factors used to arrive at an ultimate figure that seeks to quantify the plaintiff's future loss of earnings. In this case, by using the figure in basis 2 as representing earnings but for the accident, one has, as I have explained, already allowed for substantial positive and negative contingencies.

That substantial allowance will be reflected in the final figure and it is unnecessary also to make a contingency deduction from the future earnings having regard to the accident.

I conclude that the figure representing future loss of earnings in basis 2 must be taken as representing the plaintiff's future loss of earnings. On that basis the award for loss of earning capacity will be R 684203 (Past loss of earnings of R69 103 + future loss of earnings of R615 100).

That brings me to general damages. Counsel referred me to **Ferber v Caledonian Insurance CO Ltd (Corbett and Buchanan, The Quantum of Damages, Vol I, 347)**, **Tafen v Road Accident Fund (Corbett and Honey, The Quantum of Damages, Vol V, D4¹)** and **AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (AS)** I do not intend to summarise those cases. Having regard to the facts therein and the present day values of the relevant awards, an amount of R250 000 should in my view be awarded. I take into account that the plaintiff is presently disfigured and suffers substantial loss of amenities but that the intended surgery will probably rectify that.

The parties have agreed on the costs order to be made.

The following order is accordingly made:

¹ An arbitration award.

1. Judgment is granted for the plaintiff against the defendant in the sum of R936 203.00. The amount is payable on or before 28th November 2010, into the plaintiff's attorneys' trust banking account number 030355818 at Standard Bank, White River.
2. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 to pay the plaintiff's future hospital and medical expenses.
3. The defendant is ordered to pay the plaintiff's costs including:
 - 3.1 The costs of the expert reports served on the defendant or in its possession;
 - 3.2 The qualifying and reservation costs of the experts in 3.1 above;
 - 3.3 The plaintiff's reasonable travelling ^{expenses} to attend his own expert assessments;
 - 3.4 The costs of senior/junior counsel.
4. The plaintiff is declared a necessary witness



B.R. du Plessis

Judge of the High Court.

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