

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3801/2017

In the matter between:

NM OOSTHUIZEN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 06 SEPTEMBER 2022

JUDGMENT BY: KHOOE, AJ

DELIVERED ON: 17 MARCH 2023

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for the hand-down are deemed to be 10:00 on 17 March 2023.

- [1] On 5 May 2015, the plaintiff a male born 7 February 1989, was injured in a motor vehicle accident that occurred at the intersection of First Street and Stateway, Welkom, Free State Province. The plaintiff then proceeded to sue the defendant for the injuries he suffered as a result of the accident.
- [2] The merits of the claim were settled by agreement between the parties on 14 August 2018, on the basis that the defendant is liable for 80% of the plaintiff's

proven or agreed damages. The plaintiff's claim was for an amount of R 6 933 334.04, made up as follows:

2.1	Past medical and hospital expenses:00.0.	R	26 569.04
2.2	Future medical expenses:	R	540 000.00
2.3	Past and future loss of income:	R	5 766 765.00
2.4	General damages:	R	600 000.00

- [3] The matter served before me on 6 September 2022 with the parties agreeing that the plaintiff's claim for past medical and hospital expenses would stand over for later adjudication.
- [4] The parties further agreed to settle the general damages in the amount of R280 000.00 after apportionment of 20% was applied.
- [5] The defendant agreed to furnish an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 for payment of the plaintiff's future medical expenses.
- [6] I have been called upon to decide the past and future loss of income.
- [7] By agreement between the parties, the plaintiff handed in the reports of the following experts; Dr Khan, Dr Oelofse, Ms Liebenberg, Dr Jacobs and Munroe Forensic Actuaries.
- [8] Joint minutes signed by the orthopaedic surgeons Dr Oelofse and Dr Moloto, joint minute signed by occupational therapists Ms Liebenberg and Ms Moagi and joint minutes signed by industrial psychologists Dr Jacobs and Ms Kheswa were also handed in.
- [9] At the commencement of the trial, the plaintiff was called to testify. He testified that prior the accident, he was employed as an artisan rigger working at a mine underground. The only qualification he had was that of an artisan rigger. He testified that because of the accident, he had sustained abrasions to his left knee and ankle and had swelling on his left knee. He was taken to theatre

where an arthroscopy of his left knee was performed. Thereafter, he was discharged from hospital with a prescription of pain medication.

- [10] The plaintiff testified that he remained on crutches with a knee-ranger brace for at least two months. During this period, he attended physiotherapy and attended several follow-up appointments with an orthopaedic surgeon. He returned to work after six weeks. He testified that he received his basic monthly salary but did not receive additional income in the form of overtime, bonuses or standing time.
- [11] The plaintiff further testified that since the accident, he experiences pain daily in his left knee when walking or standing for long periods of time, when walking up and down stairs/inclines, while kneeling and squatting. He continues to have swelling in his left knee.
- [12] The defendant did not put any version to the plaintiff. During cross-examination, it was established that the plaintiff had been accommodated above the ground for the past six to seven years. He had been moved to the surface of the mine because he could no longer walk long distances. His supervisor has never complained about his inability to work. He has two assistants that work with him every day and he usually asks them for assistance if there is a task that he is unable to do. He further said that he had a red ticket, which means that he had passed his health test which includes a heat tolerance test for which he must climb stairs. He did however explain that he took painkillers to enable him to go through the test. He further explained that he has not applied for other work at the mine or elsewhere as he only has one qualification.
- [13] In their joint minute, the orthopaedic surgeons Dr Oelofse and Dr Moloto agreed that the plaintiff suffered a medial meniscus and anterior cruciate ligament tear, he suffers from chronic painful knee and post-traumatic osteoarthritis. They further agreed that the injury he sustained had a profound impact on the plaintiff's amenities of life and will continue to do so in the future. They agreed that the plaintiff is now an unfair competitor in the open labour market. They said that in their opinion the plaintiff must be accommodated in

a light-duty and sedentary working environment and must never be allowed to do physical labour. If he is to be accommodated, provision must be made for five years earlier retirement. Both experts agreed that the patient has reached maximum medical improvement as defined in the AMA guidelines and the Road Accident Fund Act 56 of 1996. They agreed that provision for the following treatment should be made; consultations, x-rays, physiotherapy, medication, biokinetics, arthroscopy of the knee and a total knee replacement.

[14] In their joint minute, Ms Liebenberg and Ms Moagi, the occupational therapists noted the left knee injury and agreed that the plaintiff will benefit from occupational therapy intervention. They agreed to defer the possibility for a future surgery to the orthopaedic surgeons. They agreed that pre- and post-operatively the plaintiff will benefit from physiotherapy. They also agreed that he will benefit from biokinetic intervention to improve biochemical alignment and from recommendations regarding participation in exercise.

[15] In the joint minute, Dr Jacobs and Ms Kheswa agreed that the plaintiff was a qualified artisan at the time of the accident and was working as a rigger for Sibanye Gold Mine. They agreed that his career progression as a foreman was likely but it was difficult to substantiate. They agreed on his gross income which included his salary, his overtime and standby income. They agreed on the likely early retirement age and noted the expert medical reports regarding his injuries. Dr Jacobs noted that after the joint minutes of the orthopaedic surgeons dated 5 May 2020, a further assessment of the plaintiff was conducted on 4 April 2022. Following that assessment and a consultation with the plaintiff's foreman Mr Viljoen on 22 June 2022, it was confirmed that the plaintiff was still performing the job of an artisan even though mostly working on the surface. Because this is still considered heavy physical work his retirement age would likely be forty to forty- five years according to Ms Liebenberg.

[16] Dr Jacobs and Ms Kheswa then agreed on the following calculation:

- R 809 751.00 per annum in 2020 (December 2021 - August 2031 age 42 ½ years)

- R 239 000.00 per annum in 2020 (September 2031- February 2044)
- Early retirement at age 55.

PAST LOSS OF INCOME

Overtime: R 12 036 + R 7 868+ R 15 288 (average R 11730 p/m).

Loss for 2 months R 23 460 – R 1 798 = R 21 662

Standby: R 2 629; R 2 442 and R 1 503 (average R 2192)

Loss for 2 months R4382.

- [17] The defendant closed its case without presenting any evidence. At the end of the re-examination, I gave the parties an opportunity to file heads of argument. The plaintiff would file his heads of argument on 12 September 2022, the defendant would file on 16 September 2022 and the plaintiff would file his response thereto on 19 September 2022. Both parties filed on the set timelines and my gratitude goes to both of them for their extensive heads of argument.
- [18] From the heads of argument a new issue arose. The plaintiff understood the agreement by the defendant to allow their handing in of expert reports to mean that the reports would serve as evidence without the need to call in the experts to testify. Counsel for the plaintiff submitted that the plaintiff's evidence was left unchallenged as the defendant failed to lead any evidence to rebut the evidence presented by the plaintiff and failed to present any expert evidence. Counsel further submitted that even in cross-examination there was hardly any challenge to the plaintiff's evidence.
- [19] The defendant on the other hand contends that the consent was merely to facilitate the tendering of evidence and to shorten the proceedings. Counsel for the defendant submitted that if the defendant admitted the evidence, it would mean that everything is common cause and later argument would be nonsensical. She submitted that the defendant is, *inter alia*, to highlight issues arising out of the evidence, to refer to contradictions between witnesses, and to deal with improbabilities.

- [20] Before dealing with the quantum claim, I need to clarify the new issue arising from the heads of argument. Indeed, the parties agreed to the plaintiffs' handing in of the reports without the need for calling the experts to testify. In this case it makes it challenging as the defendant had appointed experts and the defendant chose not to allow those expert reports to be tendered in as evidence. Why this was done is unknown. It is therefore assumed that the defendant accepts the contents of the plaintiff's reports as correct, otherwise the defendant would have insisted that all the experts be called in so they could be challenged with contradicting opinions or views and for them to clarify or qualify and/or change views if confronted with a different view they had not considered.
- [21] The above should not be construed to mean that in the absence or failure by the defendant to produce expert evidence, the court will blindly accept the evidence of the experts without in depth analysis. The future loss of income claim before me is for a significant amount. The court as the ultimate arbiter has the responsibility to guard against abuse and to jealously protect its powers while at the same time ensuring that justice is served.
- [22] Counsel for the defendant submitted that because the plaintiff is currently employed by the same employer and in the same position, with the employer accommodating him by moving him above ground at the mine, he no longer performs strenuous underground work as done prior the accident.
- [23] Counsel further submitted that in the plaintiff's own evidence seven years post the accident, he has not looked for other employment opportunities nor has he undergone any training or studies to equip himself to do other work and the fact that he has not been attending any physiotherapy sessions or other treatment for his leg that he alleges gives him daily pain and discomfort, does not correlate with the picture that he is portraying to the court.
- [24] Counsel for the defendant also submitted that the joint minutes of the experts do not address or consider the fact that the plaintiff is no longer working underground and that although he is still classified as an artisan rigger, his duties are not the same as prior the accident. She further submitted that the

experts did not consider that the plaintiff has two assistants that help him with his daily tasks.

- [25] As already mentioned above the defendant agreed to the handing in of the expert reports without the need to call the experts to testify. There was a further joint minute which was handed in by agreement by Dr Jacobs and Ms Kheswa which was handed in by agreement after all evidence had been tendered. In that joint minute, Dr Jacobs confirmed that the plaintiff was examined again in April 2021 by Dr Oelofse after the joint minute of 5 May 2020. In Dr Oelofse's opinion, if the plaintiff is still performing heavy physical demands his likely retirement age would be 40 to 45 years. Mr Viljoen, the plaintiff's foreman, confirmed that he is still performing heavy duty work.
- [26] With the above in mind, the defendant's averment that the plaintiff is not doing the same work he was doing prior the accident is incorrect. The only difference is that he now works above ground. The work he currently does is still considered to be heavy-duty work even though he now has two assistants assisting him. He testified in re-examination that every rigger has an assistant anyway.
- [27] The plaintiff in cross-examination explained that he has not gone for physiotherapy because when he is off-sick he loses money, he works 8 ½ hours per day during the week from 5:30 am to 13:45pm and 12 hours in the weekend. He confirmed that he still needs to take painkillers to alleviate the pain and undertook to attend physiotherapy sessions should the defendant give him an undertaking for medical expenses.
- [28] The plaintiff admitted to not applying for any other jobs but explained that he is only qualified as a rigger. He admitted that it would be better to be a crane driver but he explained that he does not have a license. He stressed that it would be a lower pay and that the current mine he works at procures crane drivers from outside. He further admitted that he has not applied for a supervisory job but explained that it is because his foreman has not approved that.

[29] The experts agree that the plaintiff's earning capacity has been hampered by the accident. In as much as Counsel for the defendant argued that the work the plaintiff is currently doing is light, the argument is not supported by any evidence and I cannot do anything but reject it. It is true that the plaintiff could get a crane driving license which would be work that is considered to be lighter, however, It would be at a lower pay than what he is currently getting and there is also no guarantee that he will even secure a job after getting a license.

[30] I have no reason to question the joint minutes submitted by the various experts regarding the injuries, the recommendations regarding the type of work the plaintiff should undertake going forward and the provided calculations. Counsel for the defendant referred me to **Glenn Marc Bee v Road Accident Fund**¹ where it was said;

"The court can only make a proper determination of appropriate compensation to award if it takes into account all the relevant evidential material and not to be restricted to the joint minute of experts, which joint minute is based on erroneous assumptions and incorrect facts. If the court ignores reliable and credible evidence placed before it, that would undermine the purpose of the Road Accident Fund."

[31] However, in the present case before me, the defendant did not call any witnesses and agreed to the handing in of expert reports and joint minutes. I therefore have nothing before me that advances the defendant's contentions. The above paragraph is not applicable to this case as there is no evidence or joint minutes based on erroneous assumptions or incorrect facts.

[32] Munro actuaries calculated the plaintiff's past and future loss of earnings on the assumptions and opinions contained in Dr Jacobs's report. They applied a contingency deduction of 5% in respect of past loss of income, 15 % in respect of the plaintiff's future earnings in an uninjured scenario and 25% in respect of the plaintiff's future earnings in the injured scenario. The RAF

¹ (093/2017) [2018] ZASCA 52 (29 March 2018) at para [31].

Amendment Cap was applied after the apportionment. The amount for past and future loss of earnings as R 4 564 860.00.

[33] I find no reason to reject the version of the plaintiff as supported by the various experts. I am satisfied that the plaintiff has suffered injuries that have affected his future earning capacity. In my view it would be justified in the circumstances of this case to award an amount for past and future earnings as calculated by Munroe actuaries.

[34] In the result, I make the following order:

34.1 The defendant is liable for payment to the plaintiff in the amount of R 4 844 860.00 (Four Million Eight Hundred and Forty-Four Thousand, Eight Hundred and Sixty) [hereafter "capital amount"], resulting from a motor vehicle collision that occurred on 5 May 2015, as set out hereunder:

34.1.1 R 280 000.00 in respect of general damages;

34.1.2 R 4 564 860.00 in respect of past and future loss of income.

34.2 The defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or the treatment of or rendering of a service or supplying of goods to the Plaintiff arising out of injuries sustained by him in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate him in respect of the said costs after the costs have been incurred and on proof thereof.

34.3 The defendant to pay the plaintiff's taxed or agreed party and party costs on High Court scale, until date of this court order, including but not limited to the costs set out hereunder:

34.3.1 The reasonable qualifying fees of the following experts:

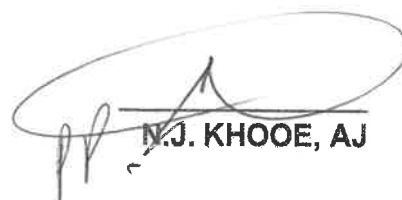
- 34.3.1.1 Dr LF Oelofse (Orthopaedic surgeon)
- 34.3.1.2 Dr RS Khan (Independent medical examiner)
- 34.3.1.3 Drs van Dyk And Partners (Radiologists)
- 34.3.1.4 Ms L Liebenberg (Occupational therapist)
- 34.3.1.5 Dr EJ Jacobs (Industrial psychologist)
- 34.3.1.6 Munro Forensic Actuaries.

34.4 The payment provisions in respect of the foregoing are ordered as follows:

34.4.1 Payment of the capital amounts shall be made without set-off or deduction, within 180 (hundred and eighty) calendar days from the date of granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys	- Trust Account
Bank	- Nedbank, Maitland Street Bfn
Branch Code	- 11023400
Account No.	- 1102475912
Reference	- HL Buchner/YV/J03743
	(Quote the reference at all times)

34.4.2 Payment of the taxed or agreed costs shall be made within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.



N.J. KHOOE, AJ

Appearance:

On behalf of the Plaintiff: Adv. J C Coetzer
Instructed by:
Honey Attorneys
Bloemfontein

On behalf of the Defendant: Ms. C. Bornman
Instructed by:
State Attorney
Bloemfontein