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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: 1244/2023

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

DATE:

In the matter between:

KAMOGELO MOKETE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

BEFORE: **CHESIWE J**

HEARD ON: **21 NOVEMBER 2023**

DELIVERED ON: **18 APRIL 2024**

[1] The Plaintiff has instituted a claim against the Defendant for damages he suffered from a motor vehicle collision on 14 July 2018. The Plaintiff was a passenger in the motor vehicle with registration number H[...].

[2] The merits have been settled between the parties, with the Defendant conceding to being 100% liable for the Plaintiff's proven damages.

[3] The only issue left for determination is the loss of earnings and the appropriate amount to be awarded.

[4] Before commencement of trial on 01 November 2023, the parties agreed that the Plaintiff's expert reports be accepted by this Court, except for the expert reports of the Occupational Therapist and Industrial Psychologist, who were called to testify on the day of the trial. The actuarial report of the Plaintiff was also accepted on the basis that contingencies will be argued.

[5] Plaintiff sustained the following injuries: fractured right femur; head injury-bruises on the forehead; cutting on the upper lip. Moreover, plaintiff was hospitalized for a month and on discharge, he mobilised on crutches.

[6] Plaintiff pleaded that the collision occurred solely as a result of the negligence of the insured driver in one or more of the following respects:

“6.1 Drove at an excessive speed;

6.2 Failed and omitted to observe statutory traffic rules;

6.3 Failed to apply brakes in time.”

Plaintiff's oral evidence

[7] At the time of the accident, testified that he was 20 years, a learner at Brebner High School, doing grade 12. Plaintiff played for Brebner Soccer Club in Bloemfontein and received no salary and relied on sponsorships.

[8] That at the time of the accident, he sustained a fractured femur, an injury to his head and his upper lip. He was admitted at Pelonomi Hospital for a month and was operated on with insertion of steel and screws were inserted. Plaintiff is currently unable to run at capacity or walk for long distances as he experiences pain if he participated in sports. As a consequence of that, he no longer plays soccer.

[9] Plaintiff said he was previously employed at Clicks where he was earning R4 500, 00 (four thousand five hundred rand) per month. His duties involved doing cashier work and receiving and displaying stock. He only worked for 7 (seven) months at Clicks.

Plaintiff said he left Clicks as the operations were still fresh and it was painful to be on his feet and carrying boxes.

[10] Plaintiff then got a job at OK Furniture as a General Assistant from April 2022. He earned R4 956, 52 (four thousand nine hundred and fifty-six rand fifty-two cents). His duties entail cleaning the store, receiving and packing stock, collecting stock from the truck and lifting heavy boxes. He said the manager is sympathetic and allows him to take 15 (fifteen) minutes breaks when experiencing pain. Plaintiff is currently still employed at OK Furniture.

[11] Further, Plaintiff testified that since the accident, he can no longer play soccer as he is unable to run at full capacity. Plaintiff indicated that he had good prospects of playing professional soccer as three (3) of his soccer mates are now playing professional soccer. Plaintiff indicated that he thought he will be able to play professionally in Turkey.

[12] Moreover, under cross-examination, Plaintiff explained that he was hospitalized for three (3) weeks, from 14 to 31 July 2018 and to date continues to experience pains in his lower back and right leg. He further experiences cramps in both legs, usually this happens at night when he is sleeping.

[13] In light of the accident and dreams of playing professionally not being possible anymore, Plaintiff testified that he has since taken music part time.

[14] Plaintiff's next witness was Susan Van Jaarsveld, an Industrial Psychologist. She testified that Plaintiff will only be able to do sedentary work as he cannot do work of a physical nature. She said Plaintiff as a soccer player would have earned

between R5 000, 00 (five thousand rand) and R8 000, 00 (eight thousand rand) and that Plaintiff would have played soccer until the age of 25 and a good chance to become a soccer player.

[15] Ms Liza Marie De Klerk, an Occupational Therapist, testified on behalf of the Plaintiff and stated that on 6 June 2023, she consulted with the Plaintiff. Plaintiff informed her that he experiences pain in his right leg when he lifts heavy stuff, experiences pain and needles and has limited sensation in his right knee. Ms de Klerk emphasised that Plaintiff should not perform heavy duty work however, can perform light sedentary work. Further that Plaintiff's prospects of employment will influence his employability.

[16] That was the Plaintiff's evidence. Defendant closed its case without calling any witness. Both Counsel submitted written heads of argument.

[17] Plaintiff's contention is that his evidence has proven on the balance of probabilities that he has established a claim for loss of earnings and that the actuarial as apportioned should be relied upon by the Court. The Defendant contends that the Plaintiff did not discharge the onus of proving on a balance of probabilities he is vulnerable in the labour market.

Plaintiff's Expert Reports

[18] Ms van Jaarsveld in her report at paragraph 6.2, scenario 1¹ with regards to loss of earnings, states as follows:

¹ at paragraph 6.2, scenario 1

“Mr Mokete would have continued to play soccer at Brebner Soccer Club for a period of two years without receiving a salary, but depending on sponsorship for soccer gear. Taking into account Mr Mokete’s schooling and his soccer career until the accident, the writer is of the opinion that Mr Mokete could have followed a career as a Professional Soccer Player at a small South African Club and could have earned a basic salary that varied between R5 000 and R8 000 per month.”

[19] Dr Ziervogel, an Orthopaedic Surgeon in his report² stated as follows:

“It is known that metal close to all joint cause all sorts of complaints. The complaints should clear up once the metal is removed. The ossification will re-appear if an attempt is made to remove it. Normally it becomes asymptomatic in time.”

[20] Dr Ziervogel goes further and concludes that: “The patient’s normal life expectancy is from an orthopaedic point of view, not adversely affected by the injuries.”³

[21] Lisa-Marie de Klerk who is employed at Delport Occupational Therapists⁴ states as follows:

² Notice in terms of Rule 36(9)(a) & (b), page 52

³ Notice in terms of Rule 36(9)(a) & (b), page 57

⁴ Notice in terms of Rule 36(9)(a) & (b), page 78

“During the assessment, the client presented with challenges regarding functioning, especially with regard to his physical level of function

...

The client is able to perform his job tasks at present, however, his job poses some challenges in terms of the repetitive heavy lifting and carrying tasks which exacerbate and increase pain levels.”

[22] Plaintiff’s appointed Actuary, Johan Saucer post-morbid,⁵ stated that:

“Thereafter, he earned a salary, as a general assistant at OK Furniture, of R4 957,00 per month in current monetary terms. ... Thus an annual income of R63 939 ($4\,957 \times 12 \times 1.075$) in current monetary terms or R60 253 in 2022/04/01 monetary terms. We project this income with inflationary increases until early retirement at age of 48.5 ($(47 + 50) / 2$).”

[23] Defendant did not file any expert reports nor were there any joint minutes.

[24] Counsel on behalf of the Defendant attached to the written heads of argument a summary of the calculations which amounts a total loss of earnings at R556 067, 25 (five hundred fifty-six thousand sixty-seven rand twenty-five cents). There is no actuarial report from the Defendant’s side. The court can therefore only rely on the actuarial report of the Plaintiff.

Loss of income

⁵ Notice in terms of Rule 36(9)(a) & (b), page 35

[25] In **South Insurance Association Ltd v Bailey N.O**⁶, Nicholas AJA said the following:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles.”

[26] In **Pitt v Economic Insurance Co. Ltd**⁷, it was stated:

“...the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.

[27] For purposes of easy mathematical calculations on the different expert reports as well as information received from the Plaintiff, if actuarial calculations are impossible, the Court never the less determines the Plaintiff's loss of earning capacity arithmetically on the basis of estimation, but not proved earnings.

[28] In this instance, Plaintiff was employed as a Shop Assistant/Cashier at Clicks, earning a salary of R6 433, 71 (six thousand four hundred thirty-three rand seventy-one cents) per month. However, Plaintiff left at Clicks as he could not cope with the physical demands of the work. Plaintiff was then employed at OK Furnitures as a General Assistant to date earning a salary of R4 956, 62 (four thousand nine hundred fifty-six rand sixty-two cents) per month. He testified that the work demand at OK Furniture is much heavier than at Clicks, however is allowed to take breaks in

⁶ 1984 (1) SA 98 (A) at 99 A

⁷ 1957 (3) SA 284 (N)

between to recover from the pain in his leg and hip. Plaintiff explained that his employment at OK Furniture is due to his dire financial circumstance.

[29] Even though the experts in their opinion that the Plaintiff has experienced physical challenges in his current employment and that he is gradually developing osteoarthritis,⁸ Plaintiff still has to go for further surgery to remove the steel plates, which will reduce the pain experienced. Despite the Plaintiff's injuries he continued to work even lifting heavy boxes. This indicates that the Plaintiff's injuries do not deter him from finding employment. Even if it is employment in a lower skilled level in the labour market.

[30] Mrs Delport,⁹ Dr Zie vogel stated that:

“The patient works as a general assistant. He will find it hard to this after a total knee replacement.”

[31] Further that Plaintiff is “able to perform his job tasks at present, however his job poses some challenges in terms of the repetitive heavy lifting and carrying tasks which exacerbates and increases pain level.”¹⁰

[32] The Court takes cognisance of the fact that Plaintiff is put in the position which otherwise wouldn't have been, had it not been for the accident. Indeed, the removal of the steel plate would ease the pain in the leg. Thus, the Plaintiff will be able to find alternative employment. Though still employed at OK Furniture, Plaintiff testified

⁸ Index: Plaintiff's Expert Notices and Reports, page 53

⁹ Index: Plaintiff's Expert Notices and Reports, page 15

¹⁰ Index: Plaintiff's Expert Notices and Reports, page 15-16

that he has not applied for alternative employment. Furthermore, Plaintiff's evidence was that his future plans to professionally play soccer will not happen due to the injuries suffered. However, Plaintiff intends to "pursue a professional career in composing and performing music and would like to have his own record label someday." ¹¹This kind of job is sedentary by nature and Plaintiff will be able to easily adjust to his future career plans.

[33] Plaintiff came forth as a truthful and honest witness. He told this Court the reasons for leaving the employment at Clicks. And even though he suffers pain, he continues to do heavy duty work at OK Furniture. Plaintiff in my view is not idling, feeling sorry for himself and making unemployment in the country an issue. He continues to be employed in spite of the pain experienced. Moreover, Plaintiff is prepared to remove the steel plate which will indeed relieve the pain.

[34] Notwithstanding the seriousness of his injuries from a physical point of view and the fact that he has steel plates in his right leg, he continues to work. From the expert reports, it is not stated unequivocally that Plaintiff would not be capable to do any work in the future. As already stated above, Plaintiff wishes to compose and perform music professionally.

[35] There is no doubt the country's unemployment rate is an issue and Plaintiff will have to compete with his peers in the same labour market. Indeed, Plaintiff finds himself in a difficult position with no tertiary qualifications but only with a Grade 12 Certificate.

[36] Taking into consideration the various expert reports, in my view there is a possibility that Plaintiff may post morbid and after removing the steel plate be able to

¹¹ Index: Plaintiff's Expert Notices and Reports, page 78

find or do some sedentary work even though currently, is doing heavy work at testified.

[37] When working in a sedentary capacity, Plaintiff will require the following: reasonable accommodation: allowance to change posture as needed when experiencing discomfort, carry and lift reasonably weighted objects with both hands, a workplace that must be ergonomically designed and structured especially during sedentary work/workstation, ergonomical tools and equipment which implies additional financial expenses and limitation in standing, walking and carrying.¹²

[38] The Actuary structures two scenarios for the Plaintiff, that is if he retires at age 47 years to 50 years or at age 65 years.¹³ Having considered actuarial calculations of both scenarios, I am inclined to apply Scenario 2 of post-morbid retirement between ages 47 to 50.¹⁴ The applicable contingencies as used by the Actuary, are indeed fair and just on the second scenario.

[39] The past loss of earnings minus contingency deduction of 5%/5% and future loss of earnings minus contingency deductions of 15%/35%¹⁵ is calculated as follows:

Pre-morbid	Post-morbid	Loss
		(Difference)

¹² Index: Plaintiff's Expert Notices and Reports, pages 18-19

¹³ Index: Plaintiff's Expert Notices and Reports, J Sauer (Actuary), pages 29-38

¹⁴ Index: Plaintiff's Expert Notices and Reports, J Sauer (Actuary), page 34

¹⁵ Index: Plaintiff's Expert Notices and Reports, J Sauer (Actuary), page 35

252 030	142 056		
-12 602	-7 103		
239 428	134 953	104 475	Past earnings
			Minus contingency deduction (5%/5%)
3 707 118	1 082 174		Past loss of earnings
-556 068	-378 761		Future earnings
3 151 050	703 413	2 447 637	Minus contingency deductions (15%/35%)

Future loss of earnings

2 552 112	Total loss of earnings
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2 552 112	Total loss of earnings after RAF cap
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[40] It was said in **Masemola v Road Accident Fund**¹⁶ that: “It is now settled that contingencies, whether negative or positive, are as important control mechanisms to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to both parties. There is no hard and fast rule regarding contingency allowances.

[41] Taking into consideration that there being a possibility that the Plaintiff’s pains will be eased by the removal of the steel plate and that he may find employment in a

¹⁶ [2023] ZAGPPHC 553; 17336/2017 (2 July 2023)

sedentary capacity or even as he wishes, to be a music composer and performer, the actuarial Scenario 2 would be more appropriate.

[42] I accordingly order as follows:

1. The Defendant is to pay the Plaintiff in respect of future loss of earnings, an amount of R2 552 112, 00 (two million five hundred and fifty-two thousand one hundred and twelve rand) within 180 days from the date of this Court order;
2. The Defendant is to pay interests on the above amount if not paid within 180 days.
3. The Defendant to pay the costs of suit.

CHESIWE, J

On behalf of Plaintiff: Adv. K P Mohono

Instructed by: Mavuya Attorneys Inc.

BLOEMFONTEIN

On behalf of the Defendant: Ms C Bornman

Instructed by: State Attorney c/o Road Accident Fund

BLOEMFONTEIN