



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: 1483/2017

In the matter between:

LWAYEPHI JAMES NOVEMBER
and

Plaintiff

ROAD ACCIDENT FUND

Defendant

HEARD ON: 1 FEBRUARY 2022

JUDGEMENT BY: LITHEKO, AJ

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 24 March 2022. The date and time for hand-down is deemed to be 24 March 2022 at 12:00

- [1] The plaintiff, an adult male born on the 6th January 1974, instituted an action for damages arising from bodily injuries that he sustained in a motor collision which occurred on the 1st August 2016 at 8h00 on the Dealesville/Bloemfontein road, approximately 20 kilometres from Dealesville.

[2] The claim is for payment of R3,119,657.00 for the following heads of damages:

2.1. Past medical and hospital expenses	R 5,000.00
2.2. Estimated future medical treatment	R 45,000.00
2.3. Past loss of income	R 257,229.00
2.4. Estimated future loss of income	R2,312,428.00
2.5. General Damages	R 500,000.00

[3] On the 29th October 2021, De Kock AJ ordered the defendant to pay to plaintiff the sum of R 500,000.00 in respect of general damages. The plaintiff's claim for loss of earnings and past medical expenses was postponed for hearing on the 1st, 2nd and 4th February 2022.

[4] On the 1st February 2022, before the commencement of the hearing, Mrs Bornman, representing the defendant, confirmed that she is aware of the above trial dates but informed me that she does not have instructions and that, consequently, there would be no appearance for the defendant.

[5] Mr. Sanders, who appeared for the plaintiff, applied for an order that the trial proceed. I granted this application and made an order that the trial proceed on the basis that the defendant was in default. He informed the Court that the plaintiff abandons his claim for past medical expenses.

[6] What was left for determination by this Court is therefore the plaintiff's claim for past loss of income and future loss of earning capacity.

[7] Mr. Sanders submitted that based on the fact that there were no factual disputes raised in the pleadings, no *viva voce* evidence would be led. He relied on the affidavits of the experts and the contents of the various medico-legal reports discovered by the parties. I admitted the experts' affidavits and their reports into evidence as exhibits, in terms of Uniform Rule 38 (2), as I was of the view that no prejudice would be suffered by the defendant, who was in default of appearance in any event, and it would save time and costs to do so in the circumstances.

- [8] The plaintiff, who was employed by Tokologo Local Municipality as a waste truck driver and earning an annual income of R140,702.00 at the time of the motor vehicle accident, sustained the following bodily injuries as a result thereof:
- 8.1. right femur fracture,
 - 8.2. fractured bilateral metatarsals, and
 - 8.3. scalp laceration.
- [9] He was unable to work for a period of 5 (five) months after the accident and he was paid only a basic salary during this period. He could not perform overtime work, which he would have performed but for the accident, and consequently suffered loss of income in this regard.
- [10] According to the report of Dr DK Mutyaba, a Specialist Neurosurgeon, the plaintiff suffered a combined whole person impairment of 10% and his longevity was not affected by the accident.
- [11] The affidavit of Dr Louis Francois Oelofse, an Orthopaedic Surgeon was admitted into evidence as an exhibit and in his report he suggests that the plaintiff receive treatment in the form of arthroscopy and debridement of the right knee joint with a possible medial meniscus repair. He strongly recommends that the plaintiff should continue using nonsteroidal anti-inflammatory drugs and analgesics, physiotherapy, long-term rehabilitation and biokinetics. His opinion is that the plaintiff would have been able to work until the age of 65 (sixty-five) years had it not been for the accident and the injuries sustained and that if he is accommodated in a light duty/sedentary position, provision must be made for 5 (five) years' earlier retirement, otherwise he must not be allowed to do physical labour.
- [12] Ben Moodie, an Industrial Psychologist, concludes in his report that the plaintiff has become an unfair competitor in the open market as far as future employment is concerned and he will find it difficult to compete with other healthy people for work. He states that the plaintiff's injuries have a direct impact on his expertise

as a driver, affecting his ability to drive long distances, to kneel or squat and to carry weight.

- [13] Johan Sauer, an Actuary, regards the plaintiff as unemployable post-morbid. His calculation of the plaintiff's past loss of earnings, with a contingency deduction of 5 per cent is R257,229.00 and for the future loss of earnings the calculation is R2,434,134.00 with zero per cent contingency deduction. There Actuary has proffered no motivation for not applying any contingency deduction in respect of future loss of earnings or earning capacity.
- [14] It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their *sequelae*.¹
- [15] Against the above background, I find that there is proof on a preponderance of probabilities that the plaintiff has suffered loss of income and earning capacity due to the *sequelae* of the injuries that he sustained in the accident. The plaintiff's claim for future loss of earnings is the amount of R2,312,428.00, whereas the actuarial calculations amount to R2,434,134.00.
- [16] Mr Sanders submitted that it would be appropriate in the circumstances of this case to apply a 20 per cent contingency deduction to the amount determined by the Actuary for future loss of earnings. I do not think that it would be inappropriate to apply this percentage deduction for contingencies in respect of this head of damages.
- [17] In the result, I have come to the conclusion that the award along the lines as calculated by the Actuary, subject to the deductions applied in respect of future loss of earning capacity, should be made.

¹ A.A.Mutual Insurance Association Ltd. v Maqula 1978(1) SA 805 (A) at 809B.

[18] During the hearing, Mr Sanders submitted a draft order containing the relevant provisions generally found in orders of the nature sought in this matter and I propose to make an order based on that draft with some amendments.

[19] I make the following order:

1. The defendant is ordered to pay to the plaintiff the sum of R2,204,536.00 made up as follows:

R 257,229.00 in respect of past loss of earnings, and

R 1,947,307.00 in respect of future loss of earnings.

2. The amount in 1 shall be paid by direct transfer into the trust account of VZLR INC., the details whereof are the following:

ACCOUNT NAME	: VZLR INC.
BRANCH NAME	: ABSA BUSINESS BANK HILLCREST
BRANCH CODE	: 632005
TYPE OF ACCOUNT	: TRUST ACCOUNT
ACCOUNT NUMBER	: [...]

3. The amount referred to in 1 shall not bear interest unless the defendant fails to effect payment thereof within 30 (thirty) days of the date of this order, in which event interest shall accrue on the outstanding amount at the rate of 7% per annum (or the applicable *mora* rate) calculated from the 30th calendar day from the date of this order up to and including the date of payment thereof.

4. The defendant must make payment of the plaintiff's taxed or agreed party and party costs, which shall include the reasonable qualifying, preparation and reservation fees and costs of the following experts:

Dr L F Oelofse - Orthopedic Surgeon

Dr D K Mutyaba - Neurosurgeon

J Mbhele - Clinical Psychologist

Dr Van Heerden - Plastic and Reconstructive Surgeon

Dr A S Nhlapo	-	Neuropsychologist
Ms L Van Zyl	-	Occupational Therapist
Mr B Moodie	-	Industrial Psychologist
Mr J Sauer	-	Actuary

M. S. LITHEKO, AJ

For the Applicants:	Adv. A. Sanders
Instructed by:	VZLR Inc, Pretoria c/o Du Plooy Attorneys, Bloemfontein
For the Respondents:	No Appearance

/roosthuizen