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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

*CASE NO.: 1145/2013
Date heard: 08-10-2020
Date delivered: 13-08-2021*

In the matter between:

Zephania Wekie Marwaneng

Plaintiff

and

The Road Accident Fund

Defendant

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The plaintiff, Mr Zephania Wekie Marwaneng was injured in a motor vehicle accident on 1 September 2004. He has instituted a claim for damages against the defendant, the Road Accident Fund (RAF) in the amount of R 1807 282. 45. The merits of the claim were settled 100% in favour of the plaintiff on 16 October 2016 and in terms of a court order made on that day it was ordered that a preferential trial date be allocated in the second quarter of 2017 for quantum to be adjudicated. Due to all manner

of delays occasioned by the RAF the matter was only enrolled for hearing on 6 October 2020.

2. The RAF was not present at the quantum trial, having terminated the mandate of their attorneys some months prior to the trial date. However with the assistance of Mr A Rakgwala, the RAF's judgment monitor, who acted as go-between, the parties managed to engage in settlement negotiations over the first two days set down for trial. In the event, Ms Erasmus, who appeared for the plaintiff informed on 8 October when the trial commenced, that the parties had reached agreement as to general damages in the amount of R450, 000, 00. The only outstanding issue to be determined and upon which the parties could not reach agreement, is that of loss of income.
3. The plaintiff was the only witness to give *vica voce* evidence. The affidavits of the plaintiff's experts, Ms Brink, industrial psychologist, Ms J Raats, occupational therapist and the plaintiff's actuary Ms M Barnard were accepted as evidence in the trial.

The plaintiff's evidence

4. The plaintiff, who was born on 17 October 1973 (47 years old at date of trial) was a police constable when the accident occurred. He had joined the South African Police Service just a year before, on 20 September 2003.

5. After the accident he was hospitalised for about 3 months and was off from work for about 6 months. When he returned to work he was placed on light duty since he was still on crutches.
6. He is currently a vetting investigator, which he explained involves the checking of case dockets to determine whether further investigation is merited. In effect he does the office or administrative work of an investigation.
7. The plaintiff testified that he cannot do normal police work as a result of the injuries sustained in the accident. He had suffered fractures to both legs. His left leg has been left slightly shorter than his right leg. He has a slight limp. He cannot walk or drive for long distances without having to stop to make himself comfortable. He feels pain in his legs when it is cold or overcast. He cannot do the physical tests consisting of exercises required by his employer every three months. Instead he has to produce a medical certificate which excuses him from such exercises.
8. The plaintiff testified that he has only been able to be promoted to the rank of sergeant (in an administrative position) during December 2012 after applying for the position numerous times. His evidence was that he would have been promoted much earlier had it not been for the accident. According to the plaintiff the SAPS agreement with the relevant trade unions is that police officials should qualify for promotion after two years of holding a specific rank. The plaintiff conceded that such promotion is not

automatic and that the agreement only relates to qualification for promotion.

9. The plaintiff also testified that most of his colleagues with whom he had started training in the SAPS were now warrant officers and that he thought that he could also be at that rank now had it not been for the accident.
10. He explained that since he could no longer do physical work or field work he can only apply for administrative posts whereas the able-bodied police officials were allowed to apply for both the administrative positions and the active positions. Since there are fewer administrative positions in the SAPS than active positions his prospects for promotion have been curtailed, hence him still being a sergeant after 7 years.

The experts

11. Ms Brink, the plaintiff's industrial psychologist evaluated the plaintiff during March 2014. She had sight of the medical reports presented to her by the plaintiff's attorney which included a report by Dr L J Marais, orthopaedic surgeon. His report detailed the plaintiff's injuries as a segmental comminuted fracture of the shaft of the left femur and a sub-trochanteric fracture of the right femur. There is a shortening of the plaintiff's left leg of between 1.5 to 2 centimetres. Ms Brink has also noted that the orthopaedic surgeon indicated that the plaintiff has sustained a degree of permanent damage. His whole person impairment is 11% and he suffers from about 11% permanent partial work

disability which will not increase by more than a few percentile points during his occupational lifespan. I pause to mention that although Dr L J Marias' report is not evidence before court, the plaintiff's experts as well as the defendants' industrial psychologist, Ms M Kheswa, who had compiled a joint minute with plaintiff's Ms Brink, have referred to his report.

12. Ms Brink was of the opinion that, but for the accident, the plaintiff would have continued his employment in the SAPS until the normal retirement age of 60 years and that there was no reason why he would not have been able to progress as per the promotional policy of the SAPS. With satisfactory service, the plaintiff would have been able to progress at one notch, which equals 4% of his basic salary, every 3 years.
13. From a post-morbid career and earnings perspective Ms Brink consulted with the plaintiff's station commander Captain Ndanda, who reported that the plaintiff was coping in his job albeit with occasional pain during inclement weather. Captain Ndanda indicated that the plaintiff will still be promotable to a warrant officer position in future.
14. Ms Brink is of the opinion, given the overall body of expert opinion that the plaintiff's work capacity has been compromised, that the plaintiff is at risk, despite Captain Ndanda's feedback, of not consistently receiving the notch increases for satisfactory work performance and that he may therefore not progress to his likely pre-morbid career ceiling earnings. The exact financial

impact of this risk cannot in her opinion be predicted reliably and she therefore recommends that it be dealt with by means of a higher than normal contingency percentage.

15. Ms Brink, as mentioned, has compiled a joint minute with the defendant's industrial psychologist, Ms Kheswa on 20 March 2017. Ms Kheswa was of the opinion that there was no reason why the plaintiff could not progress to the levels indicated pre-accident and also saw no reason for any delay in achieving it. In Ms Kheswa's report dated 7 March 2017, a mere two weeks prior to the joint minute, she however states with reference to plaintiff's experts' reports (Dr Marais and Ms Raats), that *"the writer concludes that the accident under discussion has not rendered Mr Marwaneng unemployable. It would seem as if the accident only reduced his functional abilities in terms of efficiency, effectiveness and productivity as compared to his uninjured counterparts, but did not stop him from working to date. He seems to be well accommodated by his current employer. Perhaps the fairest way of compensating him for the injuries sustained in this accident in question is by means of an appropriate contingency to be agreed upon by both legal teams involved."*

(Own highlighting)

16. In an addendum to her original report, dated 23 November 2018, Ms Brink updated the available salary scales for members of the SAPS. She confirmed her initial view of the slower career and earnings progression of the plaintiff, which is supported by the

fact that he has remained in the post of sergeant since she had evaluated him. This slow progression she states would clearly also have a definite impact on the pension the plaintiff would receive once he retires.

17. Ms Raats, the plaintiff's occupational therapist who evaluated the plaintiff during January 2014 was of the view with regard to the plaintiff's work duties that;

"The therapist is of the opinion that Mr Marwaneng is coping well in his current work position. He is well able to manage and participate in his work and he is also reporting that he has no complaints and he manages well. He will be able to work in administrative type, sedentary type and light work. He will need to often change his position if he works in sedentary work so that he will not be bothered with pain in his legs. Mr Marwaneng will not be able to work in heavy weight jobs. He will not be able to work in medium weight jobs for a long period. He will be able to work in medium weight activities for short periods at a time, but he should rather avoid working medium weight jobs and stick to light weight, administrative duties."

18. Ms M Barnard, the plaintiff's actuary, from the firm Quantum Actuarial Services CC, has completed an initial actuarial report based on the reports of Ms Brink and instructions received from plaintiff's legal representatives, as at 1 April 2019. She updated the report based on the same information on 6 October 2020.

General Damages

19. Ms Erasmus has referred me, with regard to general damages, to comparable cases in order for me to make an informed decision on the appropriateness of the amount of R450, 000, 00, which the parties had reached an agreement on. These cases include *Smit v Padongelukkefonds QOD, vd V* at E3 -11; *Mgudlwa V Road Accident Fund QOD; Vol VI* at E 3-1; *Abrahams v RAF 2014 (J2-1) QOD 7 (ECP); Roe v RAF 2010 JDR 0445 (GSJ) and Khumalo v The Road Accident Fund 2006 JDR 0289 (W)*.

The general damages awards in these matters range from R482 000, 00 to R1 million in current value.

20. I do not intend to deal with each of the cases referred to individually. In general they are distinguishable from the present case in that the injuries and sequelae appear to range between somewhat more serious to much more serious than that *in casu*. However it does serve as a helpful guideline.

21. In considering whether a fair settlement has been reached I take into account that the plaintiff spent at least 2 months in hospital after the accident (from the experts reports), where an open reduction and internal fixation of both fractures were performed using an intra-medullary nail with locking screws on the right and a sliding hip screw on the left side.

He suffered substantial pain and discomfort. He had to learn to walk again, first with a walking frame and then on crutches. His left leg has been left shorter than the right. He currently walks

unaided, but with a slight limp. He still endures pain on occasion and has sustained a certain degree of permanent impairment to his body and activities.

22. In the circumstances I am satisfied that the agreed amount of **R450 000, 00** for general damages is appropriate compensation for the plaintiff and is an amount which is fair to both parties.

Loss of income

23. The plaintiff's actuary Ms Barnard, has been instructed to calculate the plaintiff's loss of earnings based on a contingency of 5% in respect of past loss of earnings and 35% in respect of future loss of earnings. Ms Erasmus submitted that though the contingency for future loss of earnings is much higher than the normal deduction of 15%, it addresses the aspects raised by the industrial psychologists in their individual reports i.e. the predicted slower career progression (which has now been confirmed) and its general impact on his future earnings. I can find no fault with the suggested contingencies.
24. Ms Barnard has based her calculations on the projected pre-morbid and post-morbid career paths and potential earnings of the plaintiff as provided by Ms Brink, taking into account the contingencies and has determined a past loss of income in the amount of R283 341, 00, and a future loss of income of R1 334 599. 00. The total loss of income thus amounting to **R1617 940, 00**.

Costs

25. The only remaining aspect is that of the costs of the action. Ms Erasmus indicated that she had intended to seek costs on the attorney client scale but that based on the fact that the defendant had eventually engaged in settlement negotiations, the plaintiff would suffice with party and party costs. In a draft order which she has attached to her heads of argument Ms Erasmus however seeks the cost of obtaining all expert reports furnished to the defendant and the costs of obtaining documents etc. for consideration by the experts. Such costs would essentially boil down to attorney client costs and will therefore not be allowed. Similarly the costs sought for the attendance at court and consultations of an interpreter, which have not been shown to have been necessary, cannot be allowed.

In the event the following orders are made:

- 1) The defendant shall pay to plaintiff the sum of R2 067 940 (two million sixty seven thousand nine hundred and forty Rand);**
- 2) The above amount shall be paid into the plaintiff's attorney's trust account, the details thereof to be supplied to the defendant in writing;**
- 3) In the event of default on the above payment, interest shall accrue on such outstanding amount at the current prescribed statutory rate, calculated from the due date in accordance with the Road Accident Fund Act 56 of 1996 until the date of payment;**

- 4) Defendant shall pay the plaintiff's taxed or agreed costs of the instructing and correspondent attorneys into the above mentioned account, which costs shall include, but not be limited to the following:**
- 4.1 The fees of senior junior counsel for preparation and the day fees of 6, 7 and 8 October 2020;**
 - 4.2 The reasonable qualifying, preparation and reservation fees of the experts, Dr L J Marais, Ms J Raats, Ms M Barnard and Ms N Brink, including the costs of consultation fees with the legal teams, if any;**
 - 4.3 The reasonable travelling and accommodation costs, if any, incurred in transporting the plaintiff to all medico-legal appointments;**
 - 4.4 The above-mentioned payment with regard to costs shall be subject to the following conditions:**
 - 4.4.1 The plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on the defendant's attorney of record; and**
 - 4.4.2 The plaintiff shall allow the defendant 14 (fourteen) calendar days to make payment of the taxed costs;**
 - 4.4.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at the prescribed statutory rate calculated from due date until the date of payment.**



CC WILLIAMS

JUDGE

For Plaintiff:	Adv. S Erasmus Potgieter Inc. c/o Haarhoffs Inc.
For Defendant:	No appearance