



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

CASE NO: 57226/2016

**DELETE WHICHEVER IS NOT
APPLICABLE**

(1) REPORTABLE: ~~YES~~ / NO.

**(2) OF INTEREST TO OTHER
JUDGES: ~~YES~~ / NO.**

(3) REVISED.

DATE 16 May 2019

SIGNATURE *[Signature]* AJ

In the matter between:

M SMITH

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

BOTHA, AJ:

[1] In this matter the plaintiff instituted an action against the defendant for damages as a result of bodily injuries suffered following a motor vehicle collision that occurred on the 22th of June 2014.

[2] The defendant initially disputed liability for the accident, however, the defendant conceded the issue of liability in favour of the plaintiff for the damages suffered as a result of the motor vehicle collision.

[3] The defendant tendered an undertaking in terms of section 17(4)(a), which was duly accepted by the plaintiff.

[4] Consequently, the defendant is liable for 100% of the plaintiff's proven and / or agreed damages.

[5] The disputes are mainly as follows:

- 5.1 quantification of the amount in respect of past medical expenses;
- 5.2 quantification of the amount in respect of general damages;
- 5.3 quantification of the plaintiff's claim for loss of income / earning capacity.

[6] Before I deal with the separate heads of damages as outlined hereinabove, I deem it necessary to succinctly deal with the *viva voce* evidence presented on behalf of the plaintiff. The defendant did not call any witnesses.

DR. ENGELBRECHT:

[7] The plaintiff was an existing patient of Dr. Engelbrecht (Neurosurgeon), at the date of the accident. Dr. Engelbrecht testified that he consulted with the plaintiff as a patient on 11 March 2014.

[8] The plaintiff *inter alia* complained of moderate pain in his back when he drove a motor vehicle for long periods, mild stiffness in the neck area which was exacerbated when he remained in one position for a long time and slight weakness in his right arm.

[9] He further referred to the diagnostic radiologist report from Dr. Van Rensburg & Partners (Annexure "B") to his notice in terms of rule 36(9)(b).

[10] According to this report the plaintiff had a Posterior Osteophytic and Discogenic disease at level C5/6 and minimal at level C6/7. There was also a slight narrowing of both lateral foramina especially on the right side at level C5/6 and to a lesser degree level C6/7 especially on the right side.

[11] Dr. Engelbrecht ruled out the need for surgery in the foreseeable future, and recommended conservative treatment that included physiotherapy and medication.

[12] Dr. Engelbrecht testified that the plaintiff would not have needed a fusion of the discs referred to as a result of his condition prior to the motor vehicle collision for a further period of approximately 10-years. The effects of the motor vehicle collision were the sole cause for the need of immediate surgery and fusion after the collision.

[13] The plaintiff will probably need a further fusion and/or fusions within the next 10-years.

THE PLAINTIFF:

[14] The plaintiff testified that although he was diagnosed with a pre-existing condition as defined by Dr. Engelbrecht, that he could not proceed with his normal day -to- day activities, including work related activities.

[15] The plaintiff testified that he is a fitter and turner but that he was employed as a pipeline inspector, who had to inspect water pipelines and fix any leaks he came across.

[16] The diameter of these pipes are 1.4 metres by 600 millimetres and it was a physically demanding task to inspect these pipelines.

[17] He testified that Dr. Engelbrecht prescribed mybulen and/or mypays (pain medication) and that he could still continue with his work with the prescribed medication. It was only after 8-hours in the confined spaces in these pipelines that he started to take strain.

[18] The medication helped and he never took sick leave because of this pre-existing neck condition. He returned to work in August 2014 and was given light duty for 6-weeks. When he proceeded with his physical inspections of the pipelines thereafter, he could not move like he use to and his employer used him for office/administrative purposes (sedentary work). His employer was sympathetic and merely accommodated him in this regard.

[19] The company that employed the plaintiff, is currently being wound-up as I understand it and all its employees' services were terminated.

[20] The plaintiff further testified that he survived various previous retrenchments and that due to his skill as a pipe inspector it appears that he was a specialised fitter and turner that would not have struggled to find employment.

[21] He also failed an induction for the first time in his career, after the accident.

[22] Adv. Rossouw SC on behalf the defendant conceded in argument that both Dr. Engelbrecht and the plaintiff were reliable witnesses. I will further elaborate upon this aspect hereinbelow.

[23] Both the plaintiff and the defendant appointed Industrial Psychologists namely Dr. Dries Schreuder appointed by the plaintiff and Herbert Kanengoni appointed by the defendant.

[24] On 19 July 2018 the said Industrial Psychologist conducted a telephonic pre-trial meeting, and recorded in a joint minute which *inter alia* states the following:

24.1 The plaintiff was a mechanical supervisor fitter and turner at the time of the accident and would probably have worked in this capacity until normal retirement age;

24.2 They agreed on the plaintiff's pre-accident total average earnings of R346,451.40 per annum and that this figure should be used to calculate premorbid income, inflationary adjusted;

- 24.3 Dr. Dries Schreuder suggested that the plaintiff's current income (R346,451.40) be used to calculate premorbid income, inflationary adjusted;
- 24.4 Dr. Kanengoni suggested that assuming that the plaintiff would have continued working for Viva Engineering Projects, there was a probability of the plaintiff requiring further industry related training in order to increase chances of being promoted. In the event that the plaintiff upgraded his education, there is a higher possibility pre-accident that his earnings would have moved to between the median and upper quartiles for grade C5 by the time he reached his career plateau at the age of 45 in 2019;
- 24.5 Both agreed on a retirement age of 65;
- 24.6 They agreed that after the accident, the plaintiff could not cope with the physical requirements of his job and had to mostly perform administrative tasks;
- 24.7 They agreed that the plaintiff's career has been significantly compromised and that the plaintiff will be in a very disadvantaged position should he lose his job;
- 24.8 They agreed that the plaintiff is a vulnerable employee whose productivity is compromised by the accident.

[25] In a follow-up joint minute of a meeting conducted by Dr. Schreuder and Dr. Kanengoni on 2 April 2019, it was *inter alia* recorded that:

- 25.1 The plaintiff is restricted to sympathetic employment which is sedentary and supervisory in nature, but sympathetic employment requires the prospective employer to be aware of the situation and the understanding of it. This is uncommon in most cases;

25.2 They recorded that securing a supervision job in his field of expertise is unlikely and his options as a fitter and turner are restricted;

25.3 The plaintiff may struggle to secure a stable gainful employment for the remainder of his working life.

[26] In the matter of Bee v Road Accident Fund 2018(4) SA 366 SCA para. 64 the Supreme Court of Appeal endorsed Sutherland, J's approach in Thomas v BD Sarens (Pty) Ltd 2012 ZAGPJHC, that found that in the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference.

[27] Neither the plaintiff nor the defendant repudiated the facts agreed by the experts more specifically the joint minutes of the Industrial Psychologist. I will therefore rely on the facts agreed by the experts, utilising my own discretion and the evidence given by Dr. Engelbrecht and the plaintiff, which was conceded to be reliable by the defendant's senior counsel.

[28] The argument presented on behalf of the defendant, can mainly be summarized as follows.

[29] There is no dispute that the accident caused an acceleration of the plaintiff's operation with 10-years or less resulting in an early immobility of the neck and, on the other hand, an acceleration of the alleviation of his symptoms and an earlier revision of the operation.

[30] The main difference between the plaintiff's injured and uninjured position is that the plaintiff, now that the accident has occurred, has to live 10-years or less longer with a fusion of two of his vertebrae. The plaintiff did not suffer a

more serious injury as a result of the insured drivers conduct then it would otherwise have been the case.

[31] It was therefore contended that this was not a typical (eggshell case) as the plaintiff did not suffer a more serious injury as a result of the insured drivers conduct.

[32] I cannot ignore the evidence presented by Dr. Engelbrecht, the plaintiff and the joint minutes of the IP's.

[33] Although Adv. Rossouw SC made out a compelling argument that the plaintiff did not suffer more severe injuries due to the accident, this argument is not substantiated by fact.

[34] Considering the joint minutes of the IP's, and the *viva voce* evidence presented by the witnesses, I cannot make such a finding.

[35] According to Dr. Engelbrecht it would not have been necessary to have operated upon the plaintiff within the next 10-years, but for the accident. The plaintiff clearly testified that premorbid he was able to have performed his daily tasks, however, after the said accident he was not able to work as before.

[36] I therefore find that the deterioration in the plaintiff's physical impairment, is as a result of the collision. It follows that the plaintiff indeed suffered a monetary loss to the extent that his earning capacity is impaired as a result of the accident and that it caused monetary damage to the plaintiff.

[37] I will therefore deal with the separate heads of damages as follows:

Past Medical Expenses:

37.1 I do not agree with the defendant's contention, that the damages suffered by the plaintiff in this regard, are basically the loss of interest, in that but for the accident that the medical expenses would have been incurred in any event at a later stage.

37.2 The accident necessitated the plaintiff's medical expenses and he will in all probability incur a further fusion or fusions in the future which would not have been the case, but for the accident.

37.3. I therefore award the full amount of R108,877.87 to the plaintiff.

General Damages:

37.4 I was referred to a number of comparable cases regarding general damages. No two cases are exactly alike therefore past cases can only serve as a rough guide and ultimately each case must be determined on its own facts.

37.5 Counsel for the defendant referred me to various comparable cases referring to whiplash including the matter of Mashaba v The Road Accident Fund (Transvaal Provincial Division: case number 15683/2004), where the plaintiff was involved in rear-end collisions on two consecutive days. On each occasion she sustained a soft tissue flexion-extension injury of the neck (whiplash injury). After the first accident the plaintiff experienced a severe headache and painful neck. She was examined in hospital, x-rays were taken and she was discharged with a neck-brace, painkillers and anti-

inflammatory medication. At the time of the second accident the plaintiff was wearing a neck-brace. A few days after the second collision she was examined, more x-rays were taken, and medication was prescribed. No subsequent treatment or visits to medical practitioners apart from one visit to a physiotherapist. The court granted general damages in the amount of R40,000.00-valued at R86,000.00 in current money terms.

37.6 It was argued on behalf of the defendant that the symptoms displayed by Ms Mashaba are similar to that of the plaintiff.

37.7 Some of the symptoms might be the same, however, Mr Smith was diagnosed with a cervical spine injury according to the joint minutes of the respective orthopaedic surgeons.

37.8 On 24 June 2014, Dr. Engelbrecht the plaintiff's neurosurgeon diagnosed the plaintiff with the following:

37.8.1 Severe cervical headaches; neck pains and pins and needles in both arms;

37.8.2 plaintiff suffered from spondylosis at disc level C5/6 and C6/7;

37.8.3 Severe soft tissue injury to the disc level area C5/6 and C6/7.

37.9 I reiterate that although the plaintiff suffered from spondylosis, Dr. Engelbrecht testified that immediate surgery resulted directly from the motor vehicle collision.

37.10 The plaintiff needed an immediate anterior cervical discectomy and fusion of C5/6 and C6/7.

37.11 Dr. Engelbrecht conducted anterior cervical discectomy with fusion of C5/6 and C6/7 on 26 June 2014.

37.12 Counsel for the plaintiff referred me to the matter of NM v The Road Accident Fund (case number: 49890/2014) where the plaintiff sustained a neck injury at level C2 resulting in a posterior C1/2 fusion. No further surgery was recommended. The court awarded an amount of R325,000.00-valued at R345,000.00 in current money terms.

37.13 In my view, an award of R345,000.00 is appropriate taking all factors into account.

Loss of income / earning capacity:

37.14 It is trite that contingency deduction is a prerogative of the court and is largely a value judgment.

37.15 It was submitted on behalf of the defendant that the plaintiff in an uninjured state had a 70% chance of completing his career path and in the injured state he has a 60% chance of completing same.

37.16 This translates into a differential of 10% between the pre and postmorbidity career paths.

37.17 It was submitted on behalf of the plaintiff, that I apply a 20% premorbid contingency and a 70% postmorbid contingency.

37.18 Plaintiff's counsel submitted further, that I can apply a higher contingency of 25% although he did not deem it as fair. Taking everything into consideration, I find that a 25% contingency premorbid should be applied to the present matter.

37.19 Considering the *viva voce* evidence presented, and the contents of the joint minutes of the respective IP's, I find that a higher contingency should apply to the injured state. Differently stated, a 25% contingency premorbid must be applied, and a 70% contingency postmorbid must be applied. This implies, that there is a 45% differential between pre and postmorbid career paths.

37.20 I deem it necessary to repeat some of the findings contained in the IP's joint minutes which are as follows:

- 37.20.1 The plaintiff's career has been significantly compromised;
- 37.20.2 Should the plaintiff lose his job, will find himself in a very disadvantage position;
- 37.20.3 He will probably remain unemployed for a long period of time should he lose his current job;
- 37.20.4 The plaintiff remains a vulnerable employee whose productivity is compromised by the accident.



[38] Taking all the evidence into account, I find that the plaintiff has a 30% chance of completing his career path in the injured state i.e. he has a 30% chance of completing his career path in his present state.

[39] The IP's agreed that the plaintiff's pre-accident total average earnings is R346,451.40 per annum.

[40] The plaintiff's IP dealt with the salary of the plaintiff as referred to at the time of the accident and to only add inflationary increases until retirement. This calculation of the scenario appears from scenario 1 in the actuary report drafted by Human & Morris Actuaries.

[41] The second scenario proposed by the defendant's IP is more favourable towards the plaintiff and suggested that the plaintiff if he continued working for Viva Engineering Projects, would probably acquire further industry related training in order to increase the chance of being promoted. This is the basis for scenario 2 in the actuary report.

[42] It was submitted on behalf of the plaintiff that a third scenario existed, in that the amounts contained in scenarios 1 and 2 be added together and then be divided by two.

[43] I do not know if this submission is actuarially sound, as it was not dealt with in the actuary report.

[44] There is no evidence of further training the plaintiff obtained after his qualification as a fitter and turner.

[45] During cross-examination, the plaintiff stated that the duties contained on page 8 of Dr. Dries Schreuder's report dated 22 May 2018 were mostly contained on his CV, but that he was not qualified therein and that it was just some experience.

[46] From the plaintiff's work history and his testimony, it appears unlikely that he would have acquired further industry related training in order to increase his chance of being promoted. I therefore find that the scenario provided by Dr. Dries Schreuder should be utilised in calculating the plaintiff's future loss.

[47] Regarding the plaintiff's retirement age, it appears that the IPs' agreed on a retirement age of 65 in the joint minutes dated 19 July 2018.

[48] No further evidence was presented regarding the contention that the plaintiff would have retired at the age of 60. I therefore find that the calculation regarding the plaintiff's future loss should be based on the retirement age of 65.

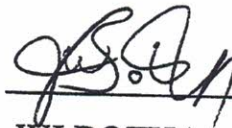
[49] Based upon my finding, there is a 45% differential between the pre and postmorbidity career paths of the plaintiff. Using this differential on the future income calculated by the actuary based on scenario 1 in the amount of R5,242,038.00, the plaintiff suffered a loss of income earning capacity in the amount of R2,358,917.10.

[50] I make the following order:

1. The defendant is to pay the plaintiff R2,812,794.97 (two million, eight hundred and twelve thousand, seven hundred and ninety four rand and ninety seven cents) (which includes future loss of income of

R2,358,917.10 (two million, three hundred and fifty eight thousand, nine hundred and seventeen rand and ten cents)) and past medical expenses in the amount of R108,877.87 (one hundred and eight rand, eight hundred and seventy seven rand, eighty seven cents);

2. Defendant is to pay interest at a rate of 10.25% as from the date 14-days after the date of this order;
3. The defendant is to pay the agreed or taxed party -and- party costs of this action including cost of two counsel where employed and including all relevant qualifying fees of the experts.


WJ BOTHA

Acting Judge of the High
Court

Gauteng Division, Pretoria

Date of Hearing: 4 April 2019

Judgment delivered: 16 May 2019

APPEARANCES:

For the Plaintiff:

Adv. JG Cilliers SC

Adv. M Van Rooyen

Instructed by: Marais Basson Inc., Pretoria

For the Defendant:

Adv. AB Rossouw SC

Adv. A Frosch

Instructed by: Pule Inc., Pretoria