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

Reportable:	YES
Of Interest to other Judges:	YES
Circulate to Magistrates:	YES

Case no: 5212/2014

In the matter between:

RAMASIMANG ALFRED TAU

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY: MOROBANE, AJ

HEARD ON: 26 - 27 MARCH 2019 & 2 APRIL 2019

DELIVERED ON: 25 APRIL 2019

- [1] These are action proceedings in which the plaintiff sued the defendant in terms of the Road Accident Fund Act, 56 of 1996 for damages arising from bodily injuries sustained in a motor vehicle accident. The action was defended.
- [2] On the 4th of June 2011 at approximately 02h00 Mr Tau, the plaintiff, was involved in a road accident on the R73 road between Welkom and Virginia in the immediate vicinity of the Bronville off-ramp. Two vehicles were involved in a collision, one with registration [...] of which plaintiff was the driver and another with registration [...] driven by Justice Pakathi, the insured driver.
- [3] The parties had previously settled the merits on the basis that defendant is liable for payment of 80% of plaintiff's proven or agreed damages. Plaintiff's past medical and hospital expenses were settled during the trial.
- [4] The only issue in dispute is the quantum of plaintiff's claim regarding the past and future loss of income.
- [5] By agreement between the parties, the joint minutes of Drs LF Oelofse and HL Moloto, Orthopaedic Surgeons, were admitted into evidence. Both the experts agreed that plaintiff sustained a head injury, chest injury, left hip injury and right forearm injury.
- [6] The same applies to the joint minutes of Mrs Stroebel and Mrs Moagi, Occupational Therapists, which were also admitted without having to lead evidence. Both the experts agreed that plaintiff will benefit from the occupational therapy and other interventions. Based on Dr Oelofse's opinion, Mrs Stroebel is of the opinion that plaintiff should undergo a hip replacement procedure. Mrs Moagi agrees with her only in the event the court favours Dr Oelofse's prognosis.

- [7] Plaintiff testified and led evidence of the following expert witnesses, namely Dr LF Oelofse - Orthopaedic Surgeon, Dr EJ Jacobs – Industrial Psychologist and Mr W Boshoff - Actuary. The defendant did not lead any evidence. In my view, the witnesses were honest and objective. Their evidence was uncontested. I have no reason to doubt them.
- [8] Plaintiff testified that before the accident he was the section overseer at the Beatrix Mines (Sibanye Gold). He was a shift boss and his duties were to go underground, into the tunnels, to test the area and certify it safe. This work entailed a lot of walking, crawling and carrying items on an uneven surface. After the accident he could not perform the same duties due to his hip and right arm injuries. He was reassigned to work at the training centre to train new mine recruits and to handle the safety of the mine. In line with this job, he had to undergo medical and physical tests and be certified to be fit to perform his duties. Unfortunately, he failed those tests because of his injuries. As a result, he could not obtain the red ticket which is compulsory for everyone working underground. A red ticket is a certificate issued by the mine to an employee who has successfully undergone and completed the prescribed medical and physical tests. He testified that it was hard to cope and had problems to perform the demonstrations. He was dismissed in July 2018 for reasons unrelated to his injuries. Plaintiff's direct evidence could not be contradicted during cross examination, except that the reason for his dismissal was not related to the accident. I accept his version.
- [9] Dr EJ Jacobs testified on plaintiff's probable career path by disregarding and, alternatively, regarding the accident and the

sequelae thereof. Plaintiff's formal qualifications, experience and skills were used to understand and determine his earning capacity. He testified that plaintiff could have progressed to become a mine overseer, but for the accident. He earned a monthly salary together with the housing, pension and medical benefits. Plaintiff received other incentives for working on Saturdays and Sundays, among others. He would have earned on Patterson table C4/5 and retired at the age of 60. On the injured career, Dr Jacobs further testified that plaintiff has lost all his work benefits. Plaintiff can perform sedentary type of work. He concluded that plaintiff would have most likely found employment outside the mining sector and earn on a Patterson table B3–C1/2. As a consequence of his work restrictions, plaintiff may remain unemployed for a lengthy period.

- [10] Dr Oelofse recommends a work re-evaluation to be conducted in order to establish what type of work plaintiff can do. He disagrees with Dr Moloto's opinion that the injuries sustained by plaintiff have not affected his ability to work. He opines that Dr Moloto did not receive the X-rays or may have received them after completing his (Dr Moloto's) report. Dr Oelofse's recommended that plaintiff has to do a hip replacement as soon as possible. He opines that even if hip replacement were to be done, plaintiff would still not be allowed to do his previous job. The ulna can be successfully treated by the union of the bone if it were the only injury sustained by the plaintiff. His conclusion is that plaintiff is unable to do underground work due to his injuries.
- [11] Mr Willem Boshoff based his calculations on the information provided to him and compiled a report. He testified that after

allocating 80% apportionment to the plaintiff's loss of earnings, he applied the RAF cap which still left the plaintiff with a huge loss.

- [12] Plaintiff led evidence of his orthopaedic surgeon and the industrial psychologist even though the joint minutes of these experts were handed in by agreement between the parties. The defendant indicated that it intended to call its expert witnesses as there was no unanimity of minds regarding some salient aspects of their respective reports. At the close of plaintiff's case, the defendant closed its case without calling a single witness. I accept the experts' opinion under the circumstance.
- [13] In ***BEE v Road Accident Fund***¹ the approach by Sutherland J in *Thomas v BD Sarens (Pty) Ltd*² was endorsed by the Supreme Court of Appeal that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement and where the experts reach an agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement.
- [14] The plaintiff was employed when the accident occurred. His dismissal from employment in July 2018 does not conclude that he would never be employed again. In as much as the reason for his dismissal is one of dishonesty and not directly related to the accident, another forum is seized with the matter which is yet to be finalised.
- [15] Plaintiff has established a *prima facie* case on a balance of probabilities in that his evidence remains uncontested. In light of the above, plaintiff is entitled to a sum of money which will place him in a position as he would have been had the accident not occurred.

¹ *BEE v Road Accident Fund* 2018 (4) SA 366 (A) paras 64-65

² *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161

- [16] In **AA Mutual Insurance Association Ltd v Maqula**³ the court stated that the law is settled in that a trial Court has a wide discretion to award what it considers to be a fair and adequate compensation to the injured party for his bodily injuries and their *sequelae*.
- [17] What remains to be considered is the contingencies that should be applied to the loss of earnings. Nicholas JA, in **Southern Insurance Association v Bailey NO**⁴ stated that any enquiry into damages for loss of earning capacity is speculative and from which the court can estimate the present value of the loss. The court stated further that one of the possible approaches was to try to make an assessment by way of mathematical calculations, on the basis of assumptions resting on the evidence.
- [19] The calculations by the actuary are the basis on which my assessment is made. I am of the view that the contingency deductions of 5% and 15% on uninjured past and future earnings respectively and of 50% on injured future earnings was correctly applied.
- [24] In comparison, the total loss of earnings is R8 977 915 excluding the RAF cap. That is:

Past Loss of Income

<i>Uninjured Earnings</i>	<i>Injured Earnings</i>	<i>Loss of Earnings</i>
R4 258 600	R2 708 600	
(R212 930)		
<u>R4 045 670</u>	<u>R2 708 600</u>	<u>R1 337 070</u>

³ *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 809A-B

⁴ *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) at 113G-114A

Future Loss of Income

<i>Uninjured Earnings</i>	<i>Injured Earnings</i>	
R10 882 700	R3 218 900	
(R1 632 405)	(R1 609 450)	
<u>R9 250 295</u>	<u>R1 609 450</u>	<u>R7 640 845</u>

[25] After applying the contingency, apportionment of plaintiff's proven damages and the RAF cap, the total loss of earnings amounts to R4 453 400.

[25] In the result I make the following order:

1. The defendant is liable for payment to the plaintiff in the amount of R4 507 071.42 (four million five hundred and seven thousand and seventy-one rand, forty-two cents) in full and final settlement, as set out hereunder:

- 1.1 R896 500.00 in respect of past loss of income;
- 1.2 R3 556 900.00 in respect of future loss of income;
- 1.3 R53 671.42 in respect of past medical and hospital expenses.

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

- 2.1 the costs attendant upon the obtaining of payment of the amounts referred to in this order;
- 2.2 the reasonable preparation, qualifying, accommodation, travelling and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:
 - 2.2.1 Munro Actuaries;
 - 2.2.2 Dr LF Oelofse (Orthopaedic Surgeon);

- 2.2.3 Dr E Jacobs (Industrial Psychologist);
- 2.2.4 Alana Stroebe (Occupational Therapist);
- 2.2.5 Marleen Joubert (Occupational Therapist).

- 2.3 The counsel's costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's attorneys, the plaintiff's witnesses and the plaintiff's experts;
 - 2.4 The attorneys' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's witnesses and the plaintiff's experts;
 - 2.5 The travelling costs occasioned by the plaintiff and the plaintiff's witnesses to attend to necessary consultation with his attorney and expert witnesses.
3. The payment provisions in respect of the aforesaid are ordered as follows:
- 3.1 Payment of the capital amount shall be made without set-off or deduction, within 30 calendar days from date of the 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 Number:	[....]

Reference: HL Buchner/J03308

- 3.2 Payment of the taxed or agreed costs shall be made within 14 days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney;
 - 3.3 No interest will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;
 - 3.4 Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at 10.25% (the statutory rate per annum), compounded.
4. In the event that costs are not agreed, the plaintiff agrees as follows:
- 4.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record; and
 - 4.2 The plaintiff shall allow the defendant 14 days to make payment of the taxed costs.

V.M. MOROBANE, AJ

On behalf of the plaintiff:

Adv. L Pohl SC
Instructed by:

Honey Attorneys
BLOEMFONTEIN

On behalf of the defendant:

Adv. M Mopeli
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