



**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: 2582/2015

In the matter between:

SAMSON DANIEL KHOZA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT BY: C REINDERS, J

HEARD ON: 20 MARCH 2019

DELIVERED ON: 9 MAY 2019

[1] On 10 July 2012 on the N1 near Kroonstad the Plaintiff was a passenger in a motor vehicle which was involved in a collision

("the accident"). He was seriously injured and instituted action against the Defendant wherein various damages are claimed.

- [2] The merits were conceded by the Defendant and on 2 February 2016 an order by agreement confirmed the Defendant's liability for payment of 100% of the Plaintiff's proven or agreed damages.
- [3] At the commencement of the trial I was informed that Plaintiff's claim for general damages had to stand over for later adjudication as Defendant rejected the same with a resultant referral to the Health Professions Council of South Africa (HPCSA). I was requested to order a separation of issues in terms of Uniform Rule 33(4) and adjudicate only on the Plaintiff's past and future loss of income, and I so ordered. Mr Els, appearing on behalf of the Plaintiff, informed me that Defendant furnished the Plaintiff with an undertaking in terms of Sec 17(4)(a) of the Road Accident Fund Act 56 of 1996. It was so confirmed by Mr Mopeli who represented the Defendant.
- [4] Plaintiff's bundle containing reports of both Plaintiff and Defendant's expert witnesses, was handed in as Exhibit "A" with the parties in agreement that reference can be made to the expert reports in the said bundle. Joint minutes in respect of the occupational therapists (Ms L Olivier and Ms S Moagi, dated 14 March 2019) and orthopaedic surgeons (Drs HL Moloto and LF Oelofse, dated 14 March 2019) were handed in by agreement as respectively Exhibits "B" and "C". The parties agreed to rely on the mutually agreed conclusions of the experts as contained in the aforementioned joint minutes. An actuarial report by Munro Actuaries was included in Exhibit "A" (p 169-172). In the course

of the trial both parties referred to the expert reports as it appear in Exhibit "A".

- [5] To prove his damages Plaintiff testified and called Ms Stroebel and Dr Jacobs as witnesses. Defendant did not lead any viva voce evidence. I do not intend to repeat the evidence tendered by either Dr Jacobs or Ms Stroebel, save where applicable to adjudicate the matter. The Defendant led no expert evidence to counter the testimony of either Dr Jacobs or Ms Stroebel. I have been satisfied that they are both qualified and experienced experts in their respective fields. They were good witnesses and I do not have any reason not to accept their testimonies.
- [6] The extent of the injuries that the Plaintiff suffered are set out in his particulars of claim (and confirmed by expert witnesses) as a fracture of his right femur and a chest injury. According to the orthopaedic surgeons an internal fixation of the left femur was done on 12 July 2012, and the femur pin was removed during 2014. This left him with a shortened left leg. The sequelae of these injuries was not disputed and entails acute pain for 10 days, moderate pain for another four weeks and continuation of pain (especially in his hip area) with an impact on the Plaintiff's amenities of life. Dr Oelofse also diagnosed a knee injury with a possible medial meniscus tear and scarring and makes provision for arthroscopy of the knee joint. The experts agreed in para [6] that the patient **will do well with successful treatment**, and deferred to the opinion of an occupational therapist and industrial psychologist. (my emphasis)
- [7] The upshot of Plaintiff's testimony is that he was working as a street vendor selling fruit and vegetables at the time of the accident. His work entailed him to buy the fresh produce in bulk

prepare packets of the aforementioned, delegating it to someone to sell. He earned an average of R 1 200 weekly. Due to the accident he only returned to vending after a lengthy time in 2014, and upon his return he found that the competition had become stiff. In October 2017 he obtained a job as a driver, but ventured on his own during December 2017 when he was contracted to transport employees from Romans Pizza. This he did until December 2018 when his vehicle broke down and he could not afford to have it fixed. During the aforesaid period he made an income of R 2 000,00 monthly. In 2011 he had successfully completed a welding course certificate which equipped him to be a boiler maker. He applied for employment as such but was unsuccessful. He still suffers from pain (which worsens during inclement weather), is unable to climb ladders or stairs, cannot bend forward, crouch or kneel or lift heavy objects. As a result he would now not be able to do the work of a boiler maker. During cross examination Plaintiff was adamant that the R 1 200-00 income as a vendor was his net income, and as it was his target, he always reached it. Due to his injuries he did not return to this employ for 3 years, but his brother sustained the vending business on his behalf. Although he did not perform well at school his interest to obtain his welding certificate was kindled by a welder in his street and he had firm aspirations to be a boiler maker, sending out his curriculum vitae to mines without success.

- [8] Ms Stroebel confirmed her report and explained how her assessment of Plaintiff was done, using the so called WorkWell functional capacity standardised test and the Valpar standardised samples. There were no disagreements between Ms Stroebel and Ms Moagi (as occupational therapists) in their joint minute. They

agreed on the Plaintiff's loss of amenities, the necessity of occupational therapy, that the physical limitations experienced by Plaintiff due to his injuries (struggling to bend forward, crouching, kneeling and climbing obstacles) would have negatively impacted on his employ and that he would be an unequal competitor in the open labour market. The aforementioned physical constraints agreed upon by the occupational therapists corroborated the Plaintiff's oral testimony in this regard. The occupational therapists agreed that Plaintiff's pre-accident employment as a vendor can be categorised within the parameters of sedentary to light work (with medium or heavy work depending on the weight of fresh produce that must be packed), whilst his post-accident employ as a driver amounts to light work. The postulation that the Plaintiff might have succeeded in securing employment as a boiler maker, was common cause in the reports of both these experts. Ms Stroebel has experience in evaluating boiler makers within the mining industry, categorising same as medium to heavy work. Ms Moagi agreed and stated that it is indeed categorised as such in the Dictionary of Occupational Titles. Although not rendered unemployable due to his injuries, Plaintiff would not be able to cope with the demands of a boilermaker should he be able to procure employment in this occupation.

- [9] During cross-examination Ms Stroebel was confronted by Mr Mopeli with Dr Oelofse's report as it appears from p 47-63 in Annexure "A", with specific reference to para 11.2 where Dr Oelofse stated that he believes that "with successful treatment, he (plaintiff) would be able to continue with his current part-time employment", and "with successful treatment, the patient's productivity will increase". Dr Oelofse deferred to the opinion of "an

Occupational Therapist and an Industrial Psychologist with regards to the patient's future productivity, working ability and retirement." Ms Stroebel testified that the conclusions reached by her (with which Ms Kheswa agreed) were based on the well-recognised tests and after having had sight of Dr Oelofse's report. These were her findings at the time when her report (and the joint minute) had been concluded, and she stands by it.

- [10] Dr Jacobs confirmed his reports and the conclusions arrived at therein. In his view Plaintiff would struggle to find suitable employment in future due to the severe pain experienced and physical constraints after the accident which left him vulnerable in the open labour market. He opined that it is not impossible that Plaintiff could have obtained a job in the mining sector as his intention was. It is highly unlikely that Plaintiff would have remained unskilled and stagnant in his career. Plaintiff was only 22 years at the time of the accident, and one cannot depart from the point of view that Plaintiff would have stayed in the same position as an unskilled vendor. Although it is not disputed that Plaintiff still has an earning capacity, he does not have any skills for sedentary jobs and is unable to do medium to heavy labour. Dr Jacobs explained that in his estimation of the Plaintiff's past and future loss of income, he was guided by the well-recognised and accepted Koch's Quantum Yearbook. The income earned as a vendor as testified by the Plaintiff is in line with the figures of Koch's Annual Income Tables for the time of the accident and his past loss of earnings. Koch's 2019 table was annexed as Annexure "A" to his "Addendum Report". According hereto the suggested earnings assumptions for unskilled workers in all sectors are R 20 700 – R 36 300 – R 82 000 per year. A semi-

skilled worker's income assumptions in all sectors are R 36 300 – R 82 000 – R 178 000 per year. He concluded that Plaintiff indeed suffered a loss of past and future income.

- [11] Dr Jacobs was likewise confronted with the report of Dr Oelofse and the aforementioned opinion as set out in para [9] herein before. He alluded to the fact that, despite Dr Oelofse's finding that "with successful treatment, the patient's productivity will increase", Dr Oelofse still opined that "the patient **MUST** be accommodated in a light duty/sedentary working environment as determined by an Occupational Therapist." (emphasis that of Dr Oelofse)
- [12] As mentioned, Dr Oelofse deferred to the expert opinions of an occupational therapist and industrial psychologist regarding functionality and past and present employment of the Plaintiff. Although Ms Kheswa did not testify and there were no joint minutes filed from these experts, it would in any event appear on face value that the following would have been confirmed by her had she testified: (Report by Ms Kheswa on p 207-226 of Annexure "A")
- [12.1] Ms Kheswa reported that she was provided with the reports of Ms Moagi and Dr Moloto. On p12 of her report she opined that the Plaintiff's earnings could probably have escalated to the upper quartile earnings of self-employed persons in the non-corporate sector (R 73 000.00 per annum) when he reached 45 years. Alternatively, writer notes that considering his age (21 years, 06 months), level of education (Grade 09) and his 08 weeks Boiler Making Certificate, had he decided to secure work elsewhere, he would have remained working in the unskilled semi-skilled employment category. His earnings might have escalated

equivalent to the median of semi-skilled employees in the non-corporate sector when he reached 45 years. According to Koch 2018, semi-skilled employees earn between R 25 500 – R 73 000 –R 160 000 per year.

[12.2] At p 15 of her report Ms Kheswa opines as follows:

“One wonders whether his pain symptoms will increase in future and to what extent. The intensity of his pain will directly correlate with the percentage of impairment on his work capacity, meaning the greater the pain, the greater negative influence on his work output.

Writer acknowledges that Mr Khoza’s employment opportunities have been curtailed and that he may be disadvantaged in terms of effectiveness, efficiency and productivity when compared to his uninjured counterparts...The writer hereby opines that he will struggle to compete fairly as he used to before the accident in question. The writer is also of the opinion that even in sedentary work he may find it very difficult to secure jobs due to low level of education, lack of experience in such jobs and undesirable skills repertoire... Therefore this accident in question has severely compromised his employability and ability to compete for jobs in the open labour market.”

[12.3] At p 16 of her report she states:

“Due to the sequelae of the accident, his competitiveness, efficiency and productivity have been limited. A higher than

normal contingency percentage should therefore be negotiated by the legal teams or determined by the Court.”

[13] In my view it is clear that Ms Kheswa reached the same conclusions as Dr Jacobs in respect to Plaintiff’s vulnerability in the open labour market and his resultant loss of past and future earnings. She did not deny that the Plaintiff would have difficulty in finding employ post-morbid, nor did she differ from Dr Jacobs that the Plaintiff could have obtained employment as a boiler maker had it not been for the sequelae of the injuries sustained by him. These conclusions were reached by her with the knowledge of the expert opinion of Dr Moloto.

[14] In his closing arguments Mr Mopeli pressed hard that I should find the knee injury sustained by the Plaintiff as evidenced by Dr Oelofse, can heal with proper administration of treatment. He argued that any impact of injuries that Plaintiff sustained can be addressed by the Defendant’s undertaking for payment of future medical expenses. I do not agree with him. The experts’ agreement was not that the Plaintiff did not and would not suffer any past or future loss of income. What they agreed upon under the heading: “Productivity and Retirement”, is that the Plaintiff “will do well with successful treatment”. This to me does not translate to the Plaintiff after intervention of medical treatment (with the rider that such treatment be successful) not having any physical constraints and/or pain at all. They (quite correctly in my view) deferred to the opinion of an occupational therapist and industrial psychologist.

- [15] Mr Mopeli further contended that, even if I should find that Plaintiff did suffer a loss of income, the Plaintiff did not prove that the reduction of his earning capacity has resulted in his diminished patrimony or estate. In support of his contention, he relied *inter alia* on **Rudman v Road Accident Fund 2003(2) SA 234** (at 241 H). I was also referred to the unreported judgment of **SJ Mooki v The Road Accident Fund** (case number 5978/2015, delivered in this Division on 3 December 2018). In the latter case my sister Mbhele, J held that the plaintiff, a school principal, did not succeed in proving that the physical impairments suffered by him due to injuries sustained in a motor vehicle accident, resulted in his patrimonial loss. The plaintiff's claim for future loss of earnings was consequently dismissed. In view of all the aforementioned Mr Mopeli submitted that Plaintiff's claim for past and future loss of income, be dismissed.
- [16] In my view the Mooki-matter is distinguishable from the facts *in casu*. In that matter the core functions of a school principal were set out by the industrial psychologist of the plaintiff. She opined that, despite his physical limitations, the plaintiff could still continue with his work as a principal. The learned judge concluded that the experts' evidence showed that the plaintiff's injuries did not affect his ability to perform his core duties as a principal, and accordingly he did not succeed in proving a loss or reduction in his earning capacity.
- [17] In the facts of this matter the occupational therapists agreed on the inherent physical demands of both a vendor and the postulation of the plaintiff becoming a boilermaker. The injuries sustained and the resulting adverse impact on Plaintiff (as set out in para [6] above), are common cause and thoroughly

documented in the joint minutes of the experts (Exhibits “B” and “C”). It cannot be gainsaid that Plaintiff experienced pain and suffering as a result of the accident. He was hospitalised and underwent surgery twice. It is furthermore confirmed by all the experts that he still experiences pain on a daily basis and has physical constraints. His loss of income was uncontested. Mr Els submitted that it is clear from the evidence that Plaintiff’s loss of income would result in the diminishing of his patrimony. I agree with him.

- [18] I have already indicated that I was impressed by the (uncontested) evidence of both Ms Stroebe and Dr Jacobs, supported by their respective counterparts in their expert reports. Accordingly I have no hesitation in finding that the Plaintiff succeeded in proving on a balance of probabilities that he had suffered a past and future loss of income.
- [19] In determining the quantum of Plaintiff’s past and future loss of income, I have a discretion to award what I consider to be right depending on the circumstances of the case. As such I am not bound by actuarial calculations, although same is of assistance to court.

See: **Legal Assurance Co Ltd v Botha** 1963 (1) SA 608 (A)

This discretion also pertains to the application of contingencies, in view of my impression of the matter at hand.

- [20] The amended particulars of claim seeks compensation in respect of past and future loss of income in the amount of R 458 035.00 and R 1 940 315-00 respectively. Included in Exhibit “A” is the actuarial calculations done by Munro Actuaries. The Defendant did

not file an actuarial report, nor did it challenge the assumptions on which the actuarial calculations were done. I have already indicated that I accept the uncontested evidence of Dr Jacobs, and subsequently the basis and actuarial calculation (based on Plaintiff's loss according to Dr Jacobs) as set out on p 169 of annexure "A", is accepted by me. In my discretion I am satisfied that the contingency deductions of 15% in the uninjured state for past and future earnings are reasonable. I have also been satisfied that in view of my impression of the matter at hand a 40% contingency deduction on future earnings in the injured state, is likewise reasonable.

[21] I accept the calculations done by the actuary as aforementioned and conclude that Plaintiff has proven a past loss of income in the amount of R 458 035.00 and a future loss of income in the amount of R 1 940 315.00. The Plaintiff is also entitled to his costs.

[22] The following orders will therefore issue:

1. The Defendant shall pay the Plaintiff the amount of R 2 398 350.00 as set out hereunder:
 - 1.1 R 458 035.00 in respect of past loss of income;
 - 1.2 R 1 940 315.00 in respect of future loss of income resulting from a motor vehicle collision that occurred on 10 July 2012.
2. Payment of the total capital amount as set out in prayer 1 above shall be made on or before the 1st of July 2019 failure whereof interest will accrue calculated as per the statutory rate *a tempora morae*.
3. The Defendant is ordered to furnish to the Plaintiff an undertaking in terms of Section 17(4)(a) of the Road Accident Fund 56 of 1996, for 100% of the costs of future

accommodation of the Plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the Plaintiff arising out of injuries sustained by him in the motor vehicle collision as aforementioned, in terms of which undertaking the Defendant will be obliged to compensate him in respect of the said costs after the costs have been incurred and on proof thereof.

4. Defendant is ordered to pay Plaintiff's taxed or agreed costs, such costs to include (but not limited to) the costs set out hereunder:

4.1 The reasonable preparation/qualifying/accommodation/travelling and full reservation fees and expenses (if any) of the following experts:

4.1.1 Munro Actuaries (actuaries);

4.1.2 Dr LF Oelofse (orthopaedic surgeon);

4.1.3 Dr Everd Jacobs (industrial psychologist);

4.1.4 Ms Alana Stroebel (occupational therapist);

4.1.4 Dr JJ Schutte (general practitioner)

4.2 The costs relating to the Plaintiff attending the above medico legal examinations.

5. In the event that costs are not agreed the Plaintiff shall:

5.1 Serve a notice of taxation on the Defendant's attorney of record; and

5.2 allow the Defendant fourteen (14) court days to make payment after taxation and allocation.

6. The Plaintiff's claim for general damages is postponed to the pre-trial roll of 18 November 2019 for continuation of the matter.

C REINDERS, J

On behalf of Plaintiff: Adv J Els
Instructed by:
Honey Attorneys
Bloemfontein

On behalf of Defendant : Adv M Mopeli
Instructed by:
Maduba Attorneys
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