



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: 5449/2016

In the matter between:

LEFA EPHRAIM NKOEBELE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: **12 JUNE 2019**

CORAM: **S.G.MEINTJES, AJ**

JUDGMENT BY: **S.G.MEINTJES, AJ**

DELIVERED: **15 AUGUST 2019**

- [1] This case concerned the plaintiff's claim against the defendant, claiming damages for serious bodily injuries he sustained in a motor vehicle accident on 23 September 2014 at Aliwal Street,

Arboretum, Bloemfontein. Plaintiff was at the time of the accident 31 years old. Currently he is 36 years old.

- [2] It is to be noted that the merits were already settled between the parties. The defendant conceded to liability for all (100%) of plaintiff's proven or agreed damages he would prove to have suffered.
- [3] Defendant also promised to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, for the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injury sustained by him in the motor vehicle accident on 23 September 2014, after such costs have been incurred and upon proof thereof.
- [4] The defendant also agreed to pay the amount of **R 76 035.85** as claimed, for past hospital and medical expenses.
- [5] Defendant also agreed (at the last minute during arguments), to pay **R 300 000.00** in settlement of plaintiff's claim for general damages.
- [6] The plaintiff has received an amount **R 48 800.89** from the Workman's Compensation Commissioner.

- [7] The only outstanding issue then to be decided, is to determine the quantum of plaintiff's past and future loss of income or earning capacity.
- [8] In Road Accident Fund v Guedes 2006(5) SA (SCA) on p586 para(8)¹ the court held: *"It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity...The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefor only make an estimate of the present value of the loss that is a very rough estimate...The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist in such a calculation an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just..."*
- [9] No viva voce evidence was led in this matter. Expert reports by Dr. J.J. Schutte (General Practitioner), Dr. L.F. Oelofse and Dr. T.S. Bogatso (Orthopaedic Surgeons), Alana Stroebel and Success Moagi (Occupational Therapists), Dr. E. Jacobs and Dr. M. Kheswa (Industrial Psychologists) and actuarial reports respectively compiled by Munro Forensic Actuaries and NBC Holdings. A Joint Minute between Alana Stroebel and Success Moagi was also submitted.

¹ Road Accident Fund v Guedes 2006(5) SA (SCA) on p586 para (8)

- [10] The contents of all the medical reports relied upon by the plaintiff i.e the report by Dr. Schutte, both reports by Dr. Oelofse, both reports by Alana Stroebel, the report by Dr. Jacobs and the actuarial report of Munro Forensic Actuaries were not disputed by the defendant. The defendant however does not accept the contingency deductions therein suggested.
- [11] It followed clearly from the report of Dr. Schutte that plaintiff has a whole-person impairment (WPI) of **7%**, however according to the narrative test, the plaintiff has a serious long-term impairment which could cause loss of body function. It is common cause between the parties that the injuries sustained by plaintiff are serious and that he consequently qualifies for compensation in respect of his claim for damages.
- [12] Dr. Oelofse stated in his report dated 9 October 2018 that plaintiff would have been able to work until the normal retirement age of 65 (sixty five) years, if not for the accident and his injury sustained. He will, after the accident, be able to work to the retirement age of 60 (sixty) years, if accommodated in a light duty/sedentary position. If not so accommodated, he must not be allowed to do physical labour again. Plaintiff's unfortunate condition, according to him, also deteriorated since his first consultation, because he has developed post-traumatic osteoarthritis of the knee joint and he has a "probability" of **50%** for the degeneration in his knee joint to progress to end-stage osteoarthritis. There is also a progression of pain and he indicated the likelihood of knee replacement procedures in future.

- [13] With reference to the Joint Minute between the Occupational Therapists, Stroebel (for plaintiff) and Moagi (for defendant) the following (page 7 and onwards) is of relevance:

“8.4.The plaintiff reported the following to both writers:

Pre-accident employment:

- 8.4.1** *He has work experience as a driver (and in addition as a Gardener, as reported to Ms Stroebel) and mainly within the security industry, previously as a Security Supervisor, an Inspector and an Armed Response Officer. We refer ...*
- 8.4.2** *At the time of the accident in question, he was employed as an Armed Response Officer at Chubb Security.*

Post-accident employment:

- 8.4.3** *He remained on sick leave for a 12- period.*
- 8.4.4** *He suffered a loss of income during the periods of absence i.e.receiving a reduced salary for a few months...and no salary until he was accommodated in October 2015.*
- 8.4.5** *In October 2015,the plaintiff was accommodated in an alternative position as a Dispatch Operator.*
- 8.4.6** *He suffered a further loss of income when accommodated, i.e. reduced salary as a Dispatcher, when compared to his salary as an Armed Response Officer.*
- 8.4.7** *We defer to..*
- 8.5** *On the day...*
- 8.6** *On the day of Ms Stroebel’s re-evaluation (5 November 2018), the plaintiff reported the following:*
- 8.6.1** *He remained in the accommodated position as a*

Dispatch Operator until he was retrenched in December 2017,when National Security took over Chubb Security. Deferral is given...

8.6.2 He remained unemployed for five months, until he was able to secure employment at Bloem Water on 1 June 2018 as a Security Guard."

The Occupational Therapists agreed that plaintiff's pre-accident work as an Armed Response Officer can be categorized within the parameters of sedentary to medium work. They also agreed that considering mobility restrictions, the plaintiff is currently best suited for sedentary to occasional light work. Plaintiff does not meet all the physical requirements of his pre-accident work as an Armed Response Officer. They agreed that, even in plaintiff's current position as a security guard, he can be expected to be disadvantaged with regards to efficiency and effectiveness in comparison to his uninjured Security Guard peers. They agreed that plaintiff's current residual limitations render him vulnerable in an open labour market compared to his pre-injury abilities and uninjured peers. He is currently considered an unequal competitor within the open labour market, with regards to efficiency and effectiveness when compared to his able-bodied peers. He will have limitations in meeting requirements classified as full range light (i.e. frequent walking and standing demands) and medium work, considering Dr. Oelofse's report, i.e. ***"the degeneration in his knee joint and the probability that he will suffer from chronic pain for the rest of his life. Plaintiff therefor should not presently or in future perform work exceeding sedentary and occasional light work."***

The totality of these reports indicating undisputedly that plaintiff, as a result of the vehicle accident, did sustain a serious injury, resulting in a loss of income/earnings because his employability has been negatively affected by the injury he sustained. His work choices are restricted in the open labour market.

- [14] The actuarial report prepared by Munro Forensic Actuaries, stated the actuarial calculations. The actuary guided by Dr Jacobs, who also indicated that plaintiff's career is at risk. Plaintiff is since his injury, not regarded as suitable for a career in security. It is Dr. Jacobs's opinion that it is highly unlikely that he will obtain and sustain a sedentary position requiring administrative capacity and skills. Also according to him *"there is a significant risk created by the accident that changed his capacity to earn. He should be compensated for this."* To be read into this, also undisputedly, that plaintiff's capacity to earn in future, was also negatively affected by the accident.

The actuaries in their report applied the following contingencies:

Uninjured: **5%** and **15%** on past and future earnings respectively
(R 3 668 685.00)

Injured: **40%** on future earnings **(R 2 308 749.00)**

The total loss of plaintiff's earnings being **R 1 466 920.00.**

- [15] Counsel for the defendant submitted that a **10%** and **15%** contingency deduction on the pre-morbid loss of earnings of plaintiff, respectively for past and future earnings **(R4 185 735.00)**, and a **25%** deduction on the post-morbid loss of earnings **(R 3 324 725.00)** would be reasonable. The total loss of

earnings **R 861 010.00**. The actuary institution for defendant in their report, and upon which it does not rely on, applied a **5%** contingency deduction in respect of the past earnings both in regard to pre-accident and post-accident and **15%** in respect in respect of pre-accident future earnings (**R 1 946 029.00**) and **25%** in respect of post-accident future earnings (**R 1 751 119.00**) in their calculations.

- [16] In *Road Accident Fund v Kerridge* 2019(2) SA 233 (SCA) par 42² the court held as follows: ***"Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W) where the court said: "In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by authors of a certain type of almanac, is not numbered among the qualifications for judicial office."*** And in par 43:³ ***"It is for this reason that a trial court has a wide discretion when it comes to determining contingencies"***.
- [17] In order to determine the appropriate contingency deductions, and to estimate the monetary value of plaintiff's loss, the actuarial calculations of, and the contingencies applied by Munro Actuaries, in my discretion, should be used as a useful basis, bearing in mind the age of plaintiff at the time of the accident and his current age and the fact that he, as a result of the accident and injury sustained, had to engage in less lucrative employment. This calculation in plaintiff's circumstances, is reasonable and

² *Road Accident Fund v Kerridge* 2019(2) SA 233 (SCA) par 42

³ par 43

just. His age should be taken into account in respect of both pre-morbid and post-morbid contingencies. In *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) par [116]⁴ the court said: *“The younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant’s likely career path”*.

There are uncertainties and risks in respect of plaintiff’s post-morbid circumstances i.e. his career is at risk. It seemed he is not suitable for a career in security, and the unlikelihood that he will obtain and sustain a sedentary position requiring administrative skills, according to Dr. Jacobs. His adverse health condition due to his injury, circumstances that therefor should aggravate contingencies.

[18] In the result the following order is issued:

ORDER:

- [19] 1) The defendant is ordered to pay the plaintiff the sum of **R 76 035.85** in respect of his past hospital and medical expenses;
- 2) The defendant is ordered to pay the plaintiff the sum of **R 300 000.00** in respect of general damages;
- 3) The defendant is ordered to pay the plaintiff the sum of **R 58 171.11** in respect of past loss of income (**R 106 975.00**)

⁴ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) par [116]

minus the amount of **R 48 800.89** Workman's Compensation already received);

- 4) The defendant is ordered to pay the plaintiff the sum of **R 1 359 945.00** in respect of future loss of income;
- 5) The defendant is ordered to pay interest *a tempore morae* at the rate of **10,5% per annum** from date of judgment to date of payment if payment is not effected within 14 days of judgment;
- 6) Defendant is liable for payment of plaintiff's taxed or agreed party and party costs in respect of the merits on the High Court scale up to date of this order;
- 7) In the event that costs are not agreed, the plaintiff agrees as follows:
 - 7.1 The plaintiff shall serve a notice of taxation on the Defendant's attorney of record; and
 - 7.2 The plaintiff shall allow the defendant fourteen (14) court days to make payment of the taxed costs.

SG MEINTJIES, AJ

I concur.

SG MEINTJIES, AJ

On behalf of the plaintiff:

Adv. J.J.F. Hefer

Instructed by: H.L. Buchner

Honey Attorneys

BLOEMFONTEIN

On behalf of the defendant:

Adv. I. Sander

Instructed by: N. Maduba

Maduba Attorneys

BLOEMFONTEIN