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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: **3877/2017**

In the Matter between:

T N Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

CORAM: POHL, AJ

HEARD ON: 3, 4 and 6 SEPTEMBER 2019

JUDGMENT BY: POHL, AJ

DELIVERED ON: 6 SEPTEMBER 2019

INTRODUCTION:

- [1] This is an action by the Plaintiff against the Road Accident Fund. The Plaintiff claims compensation from the defendant as a result of injuries he sustained when he, as pedestrian, was run over by a motor vehicle on 6 May 2016.
- [2] The merits of the matter had been settled on the basis that the Defendant is liable for 90% of the Plaintiff's proven or agreed damages. This agreement was made an order of Court on 14 August 2018. This Court is thus now called upon to decide the quantum of the plaintiff's claim and thus the amount to be paid to him by the Defendant.
- [3] The sub-heads of damages to be decided by this Court are the following: Future medical expenses, past and future loss of income and general damages.

THE EVIDENCE

- [4] Except for two joint minutes, only the Plaintiff presented any evidence. The plaintiff himself testified, his industrial psychologist, Mr Ben Moodie testified and the actuary Mr Johan Sauer also testified. The first joint minute is a joint minute between Dr Oelofse and Dr Moloto, the respective orthopaedic surgeons of parties.

This minute serves before this Court as Exhibit “A”. The second joint minute is a joint minute between H Meyer and S Moagi, the respective occupational therapists of the parties. This minute serves before this Court as exhibit “B”. The Defendant closed its case without calling any witnesses.

- [5] From the joint minute, Exhibit “A”, it appears that the orthopaedic surgeons are in agreement that the Plaintiff suffered from a left knee injury in the form of a patella fracture, which was treated by way of an internal fixation. They however furthermore agree that the Plaintiff sits with a united patella fracture, but with painful instrumentation, a possible meniscus injury and atrophy of the muscles. In the premises they agree that the Plaintiff is thus now an unfair competitor in the open labour market. They agree that he must be accommodated in a light duty and sedentary working environment and that he should never be allowed to do physical labour.
- [6] From the joint minute, Exhibit “B”, it appears that the occupational therapists are in agreement that, with regards to the Plaintiff’s residual work capacity, that he is at present not suited for occupations that fall within the full range of light, medium, heavy to very heavy type of work. The reason being the injury he sustained to his knee. They note that the Plaintiff’s pre-accident work tasks as Chef, fell within the category of light to medium range of work, which requires pain free optimum limb function and strength. They thus agree that his workability for his pre-accident work tasks are reduced to the extent that he is no longer an equal competitor in the open labour market. They conclude that the

Plaintiff will only be capable of sedentary work, with some aspects of light work with minimal mobility demands.

- [7] The Plaintiff testified that after the accident and due to the injuries he sustained, he is no longer able to do the work he had done as a chef before the accident. He testified to the effect that the work of a chef requires you to stand for long periods and he is not able to do that anymore. According to him, he went back to work after a few months. He was accommodated by his employer with less strenuous work. He however lost his work because of the fact that he apparently stole food from his employer. He testified to the effect that he earned virtually the same salary from this employer when he came back after the accident. He further testified that he went to school, but was not able to pass grade 10. He has no other qualifications.
- [8] The industrial psychologist, Mr Ben Moodie's evidence in essence was that, with regards to the Plaintiff's pre-accident income potential, in general, it can be accepted that individuals that holds a below grade 12 level of school qualification, such as the Plaintiff, enter the open labour market in an unskilled capacity, progressing with time and experience to the semi-skilled category. He would have reached the pinnacle of his career between the average of the median and upper quartile of the semi-skilled category of work, i.e R116 000.00 per annum.
- [9] With regards to the Plaintiff's post-accident income potential, Mr Moodie emphasizes that due to the Plaintiff's physical limitations as a result of the injuries, coupled with the fact that he has a

below grade 12 school qualification, he will not qualify for typical light work. He opines that the type of income that he will be able to earn will be on par with the pre-accident scenario, but with the difference that post-accident his chances of obtaining and sustaining suitable employment are very slim. With his physical and scholastic limitations, he now has to compete with a large number of able bodied job seekers.

GENERAL LEGAL PRINCIPLES:

[10] As a point of departure, it must be remembered that this case as all other cases, can only be decided on the evidence that was presented to the Court. In this case, only the Plaintiff presented any evidence in Court, except for the joint minutes.

[11] In terms of South-African law, a claim for loss of earnings, is in fact the Plaintiff's loss of earning capacity and not his physical loss of income. I align myself with the following dicta in the decision of **SANTAM Versekeringsmaatskappy Beperk v Byleveldt**, 1973 (2) SA 146 (A) te p150C-D:

*“Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, **is ’n verlies van geskiktheid en nie ’n verlies aan inkomste nie.**”*

[12] It is clear from the contents of the joint minutes and the evidence aduced by and on behalf of the Plaintiff, the he indeed suffers

from a loss of earning capacity and that he should thus be compensated in this regard. The fact that the Plaintiff lost his job as a result of him stealing from his employer, does not take away the proven fact that he suffers from a loss of earning capacity. Put differently, the theft did not take away the consequences of the injuries he sustained in the accident, which forms the core of his diminished earning capacity.

- [13] With regards to the approach to the contents of joint minutes between experts, I agree fully with the Supreme Court of Appeal in the decision of **BEE v Road Accident Fund**, 2018 (SA) 366 (SCA) and in particular paragraphs [65] and [66] at p 383 to 384:

“[64] Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement unless it does so clearly and at the very latest, at the outset of the trial. In the absence of 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. Where the experts reach an agreement on a

matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The Trial Court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare. Sutherland J's exposition has been approved in several subsequent cases, including in a decision of the Full Court of the Gauteng Division, Pretoria in Malema v Road Accident Fund....

[65] *In my view we should in general endorse Sutherland J's approach, subject to the qualifications which will follow...*

[66] *Facts and opinions on which the litigants experts agree are not quite the same as admissions by or agreements between the litigants themselves (whether directly or, commonly, through their legal representatives) because a witness is not an agent of the litigant who engages him or her. Expert witnesses nevertheless stand on a different footing from other witnesses. A party cannot call an expert witness without furnishing a summary of the expert's opinions and the reasons for his opinions. Since it is common for experts to agree on some matters and disagree on others, it is desirable, for efficient case management that experts should meet with a view of reaching*

*sensible agreement on as much as possible, so that the expert testimony can be confined to matters truly in dispute. Where, as here, the Court has directed experts to meet and file Joint Minutes, and where the experts have done so, the Joint Minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. **In the absence of repudiation (i.e. fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue.***

[14] The joint minutes were of course handed in by agreement and the Defendant of course did not attempt to repudiate same. I therefore have no qualms in accepting same and the agreements contained in them as reliable evidence.

[15] In deciding what a fair and adequate compensation to an injured party should be, I once again agree with the Supreme Court of Appeal in the decision of **AA Mutual Association Ltd v Maqula**, 1978 (1) (SA) 805 (A), at p 809, where the following dicta appears:

“It is settled law that a trial court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae.”

[16] With regards to the appropriate contingency deduction to be applied in the future injured scenario, it is important to have regard to the fact that it is to a large extent a speculative exercise because the future is unknown, as opposed to the past, which is largely known. The Court must however endeavour to be fair to both parties in deciding on the appropriate deduction to be made.

PLAINTIFF’S LOSS OF INCOME:

[17] I accept the evidence of the Plaintiff’s industrial expert Mr Moodie with regards to the Plaintiff’s pre-accident and post-accident income potential. There is no evidence presented by the Defendant to the contrary. Mr Moodie’s evidence is furthermore based on the acceptable and accepted evidence of the other

experts, reiterated in the joint minutes. The actuary, Mr Sauer, clearly and correctly, took this evidence into account when he did his calculations.

[18] The 5% contingency deduction which is applied in the uninjured scenario in respect of the Plaintiff's past loss of income, had the accident not occurred, appears to be fair and appropriate in the circumstances. As indicated above, the past is largely known and there is no evidence before me to indicate that a percentage of more or less than 5% should be applied. The 15% contingency deduction in the uninjured scenario in respect of the Plaintiff's future loss of income, also appears to be appropriate within the factual context of this case.

[19] The 5% contingency deduction applied in the injured scenario in respect of the Plaintiff's past loss of earnings, also appears to be fair in the circumstances.

[20] Given the fact that the Plaintiff now suffers from a diminished earning capacity, requires the Court to apply a somewhat higher

contingency deduction in respect of his future loss of earnings. The fact of the matter is that the evidence of Mr Moodie was to the effect that because of the Plaintiff's injuries, which necessitates light physical work, coupled with his low level of education, the Plaintiff's chances of obtaining and sustaining employment post accident, are very slim. Mr Moodie opines that the chances of the Plaintiff securing and holding down employment in future can not be more than between 20% to 30%. If one furthermore take the present rate of unemployment in South Africa of 34% to 36% on the evidence of Mr Moodie into account, it is my view that a contingency deduction in respect of the future in the injured scenario of 75%, would be fair and appropriate in the circumstances.

- [21] The Plaintiff also led the evidence of Mr Sauer, an actuary. He confirmed in evidence the contents of his expert report that serves before Court. In essence, his evidence is to the effect that based on Mr Moodie's evidence the appropriate contingency deduction in the future scenario would be 75%. Put differently, since Mr Moodie testified to the effect that given the Plaintiff's injuries and consequential diminished earning capacity, coupled with his grade

10 qualification, the likelihood of him being gainfully employed in future, will not be more than 25% of the rest of his working life.

[22] Mr Sauer testified that the 10% apportionment can simply be done on the total amounts that the Court may decide to award to the Plaintiff. This is what I will do.

[23] Just before the close of the Plaintiff's case, The Plaintiff moved for an amendment of the particulars of claim. He applied for an amendment to the effect that his loss in respect of future loss of damages be amended from an amount of **R450 000.00** to **R1 663 670.00**. This was the amount that Mr Sauer testified to as being the Plaintiff's future loss of income. No objection was raised by the Defendant when the evidence was led. Although the application for amendment was opposed, I exercised my discretion in favour of the applicant and allowed the amendment.

[24] I am satisfied that the calculations done by Mr Sauer on the second scenario is done on the correct factual basis, and I thus find that the Plaintiff's past and future loss of income amounts to

R1 181 999.00 less the 10% apportionment. Such an amount would thus be fair and appropriate in the circumstances, I.e.

R1 063 799.00

GENERAL DAMAGES:

[25] In argument, Me Motshabi, for the Defendant, confirmed that the Defendant apparently already tendered an amount of **R350 000.00**, before any apportionment is applied, in respect of General Damages. If one has regard to the joint minutes of the orthopaedic surgeons and the occupational therapists, exhibits “A” and “B” and the evidence of the plaintiff and then compares same to previous awards by the Court, I am of the view that an award in respect of the Plaintiff’s general damages in the amount of **R350 000.00** would be fair and appropriate in the circumstances. Thus **R315 000.00** after apportionment.

FUTURE MEDICAL EXPENSES:

[26] The Plaintiff's future medical expenses will be covered by an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, to be provided by the Defendant. The undertaking will however be limited to **90%** of such expenses by virtue of the apportionment referred to in paragraph 2, supra.

[27] In the Premises, the following order is made:

1. The Defendant will pay the Plaintiff (after apportionment), the amount of **R1 378 799.00**

which amount is compiled as follows:

- (i) Loss of income **R1 063 799.00**
- (ii) General damages **R315 000.00**

2. The Defendant is to furnish the Plaintiff in terms of Section 17(4)(a) of the Road Accident Fund Act with an undertaking, limited to **90%**, for future accommodation of the Plaintiff in a hospital or a

nursing home or the treatment of or rendering of a service or supplying of goods to him, arising out of the injuries sustained by him in the motor vehicle collision of 6 May 2016.

3. Costs of Suit to be paid by the Defendant, except that the Plaintiff is liable for the wasted costs occasioned by the postponement of the trial on 4 September 2019.

L. LE R. POHL, AJ

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