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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: 1334/2013

In the matter between:

MACKENZIE BEN NTSANE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

HEARD ON: 27 & 30 AUGUST 2019 and 20 SEPTEMBER 2019

JUDGMENT BY: VOGES, AJ

DELIVERED ON: 10 OCTOBER 2019

- [1] On 8 August 2009 in Kroonstad, the Plaintiff, a pedestrian at the time, was knocked down by a motor vehicle [...], insured by the Defendant, the Road Accident Fund (RAF).
- [2] The plaintiff sustained a fracture of the left tibia/fibula. He was hospitalized and had to undergo medical treatment. He will also require medical treatment in future.
- [3] After the amendment of his claim, the Plaintiff claims in this action compensation from the Defendant as a result of injuries sustained during this incident in the following amounts:
- | | | |
|----|--|-------------------|
| 1. | Future Medical Expenses | Undertaking i t o |
| | | Section 17(4)(a) |
| 2. | Past and future loss of income | R2 182 175.00 |
| 3. | General damages in respect of pain and suffering, loss of | |
| | enjoyment of amenities of life, disfigurement and disability | R500 000.00 |
- [4] The merits of the matter had been settled on the basis that the Defendant is liable for 100% of the proven or agreed damages of the Plaintiff.
- [5] The Defendant also undertook to cover future medical expenses of the Plaintiff in terms of Section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996.
- [6] During the trial the claim for general damages was also settled in the amount of R400 000.
- [7] This court is thus called upon to decide the quantum of the plaintiff's claim in respect of past and future loss of earnings.

[8] The following witnesses testified for the Plaintiff:

1. Mr McKenzie Ben Ntsane, the Plaintiff
2. Dr Louis Francois Oelofse, an orthopaedic surgeon
3. Mr Johan Landman, an industrial psychologist
4. Mr Willem Hendrik Boshoff, an actuary of Munro Forensic Actuaries.

[9] The Defendant only called Ms Moipone Kheswa, an Industrial Psychologist.

[10] The Plaintiff testified that he passed matric and is a married man of 35 years old. He has 3 children and was employed at Pamodzi Gold Mine as a Stope Team member at the time of the accident. He worked underground and earned R8000.00 per month. He aspired to become a team leader. During the accident on 8 August 2009 he sustained a fracture of the left lower leg and his knee was injured. He was admitted to hospital for 2 weeks, his leg was put in plaster of Paris and he was on crutches for another 6 – 7 months after his discharge from hospital. He could not return to work because of his injuries.

In 2010 he secured a job as a chef at Wimpy at a salary of R2500 per month. He left in 2011/2012 because “the money was too little”. He managed to do this work with the help of pain killers.

He then found employment at Joel Mine as Stope Team member from 27 April 2011. He struggled to perform his duties because of his injuries and was allocated the job of a winch operator, which was an easier job. He worked as such until 11 May 2017, when he failed the compulsory physical test and had to leave.

Since then he has been unemployed and survives on grant money and the assistance of his mother.

During cross examination it transpired that he could not return to Pamodzi mine after the accident as the mine had closed down and that he refused surgery of the injured leg because he was afraid of the consequences of such an operation.

- [11] Dr Oelofse examined the plaintiff twice (on 25 June 2014 and 15 May 2018) and compiled two reports in this respect, namely exhibits B and C.

He confirmed the fractures of the tibia and fibula of the left leg of the Plaintiff and found that the Plaintiff suffered a medial and/or lateral meniscus tear, instability of the medial collateral ligament and post-traumatic osteo-arthritis of the medial compartment of the knee joint. Dr Oelofse also confirmed the treatment he received and that his leg was in a plaster cast for 4 months. As a result his left leg is now 2.5 cm shorter than the right leg and requires a built up shoe. He will possibly also have to have a knee replacement, or more than one, in future.

Dr Oelofse regards it to be a “serious long-term impairment or loss of a body function” that will not allow physical work. He may, however, be able to do light duty or sedentary work. Due to the deterioration of his condition he will probably have to retire earlier.

- [12] When questioned about the Plaintiff’s refusal to have his leg operated, Dr Oelofse was of the opinion that the conservative treatment (plaster cast) was at the time the better option.

- [13] Mr Landman was of the opinion that the Plaintiff would probably have been able to become a stope team leader had he not been injured. He testified about the

employability of the Plaintiff, taking into account the past history of the Plaintiff, the reports of Dr Oelofse and collateral information he obtained himself.

He came to the conclusion that the Plaintiff is, because of the result of his injuries, presently unfit to work as stope team member or winch operator or to do any work that may require physical ability. Although he has the capacity to do light duty or sedentary work, he does not have the experience, qualifications or tertiary training to be able to compete with able bodied persons for such positions.

Mr Landman was not aware of the fact that the Plaintiff was employed at the Wimpy for some time after the accident, but conceded that his earnings during this time will have to be taken into account by the actuaries in calculating his past and future loss of income.

- [14] Mr Boshoff, the actuary, based his calculations on the final report of Mr Landman. He, too, was not aware of the Plaintiff's employment at the Wimpy and conceded that the income that he received there must be incorporated in his calculations and must be subtracted from the past loss of income.

As no pay slips was available, Mr Boshoff used the income reflected on the IRP 5 certificates of the Plaintiff as obtained by Mr Landman as basis for his calculations.

He applied a 5% past and 20% future contingency rate with a retirement age of 60 years.

- [15] Ms Kheswa, the industrial psychologist called by the defendant, based her report on information obtained by a Ms Mavhumgu, a counsellor who was previously employed by Gcina Human Potential. She (Kheswa) did not interview the Plaintiff herself. Apart from some documents and reports supplied to her, she was unable

to contact any further persons. She was not supplied with the expert reports of the Plaintiff.

[16] **EVALUATION OF EVIDENCE**

The evidence in respect of the Plaintiff's injuries and present physical condition was not contested. Dr Oelofse's evidence was based on a thorough examination and evaluation of the Plaintiff and I find no reason not to accept his evidence.

[17] It was also not contested that the Plaintiff was unable to work for several months after the accident. Neither was it disputed that he failed the physical test required for further employment at Joel Mine.

[18] The Defendant has an issue with the Plaintiff's reason(s) for not returning to Phamodzi Mine, his failure to disclose his employment at Wimpy to his experts and the possibility of future employment.

[19] It is not disputed that Phamodzi Mine was in the process of closing down when Plaintiff was eventually in a position to return to work. Mr Landman's evidence in this regard is accepted as I can find no reason to reject his evidence. It makes sense that the closing of a mine will lead to retrenchments and that there was no possibility that the Plaintiff could remain in the employment of Phamodzi due to his injuries.

[20] The fact that the actuary did not incorporate the income that the Plaintiff received at the Wimpy in his calculations is not an insurmountable problem. It relates only to past income and can to some extent be quantified.

[21] Ms Kheswa based her opinion that the Plaintiff *“is likely to have remained employable in the semi-skilled to skilled category of employment”* on the fact that the Plaintiff obtained an HR Certificate. This fact is not borne out by any other evidence. It was the Plaintiff’s evidence that he only has a matric certificate and the alleged HR Certificate was not taken up with him during his evidence. His evidence in this regard is accepted.

[22] In the end it was the opinion of the expert witnesses of both the Plaintiff and the Defendant that the Plaintiff can still do light or sedentary work, but will have difficulty to obtain such a position due to his qualifications/lack thereof and his physical impairment.

[23] **LEGAL PRINCIPLES**

In terms of South African law a claim for loss of earnings in fact the Plaintiff’s loss of earning capacity and not his physical loss of income.

Santam Versekeringsmaatskappy beperk v Byleveldt 1973 (2) SA 146 (A) at 150C-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.”

There are no hard and fast rules to be applied in deciding what a fair and adequate compensation to an injured party should be. Arbitrary considerations must inevitably play a part. Any enquiry into future loss of income is by nature speculative because it involves a prediction of the future, as was said in ***Southern Insurance Association v Bailey NO*** 1984 (1) SA 98 (AD).

- [24] A judge has a discretion to award what he/she considers right. In exercising such discretion a wide variety of contingencies must be discounted. The following dictum appears in **AA Mutual Association Ltd v Maqula** 1978 (1) SA 805 (A) at 809A-B:

"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."

- [25] In **Southern Insurance Association Ltd v Bailey NO**, supra at 114E it was said:

"...while the result of an actuarial computation may be no more than an "informed guess" it has the advantage of an attempt to ascertain the value of what was lost on a logical basis"

[26] **QUANTUM OF LOSS**

The actuarial report of mr Boshoff was of great assistance to come to a fair decision. The 5% contingency deduction applied to the past uninjured and injured scenarios appears to be fair and appropriate in the circumstances.

The past loss of the Plaintiff is largely known. What needs to be incorporated in the amount as calculated by mr Boshoff is the income earned by the Plaintiff at the Wimpy. The Plaintiff submitted that a period of 19 months in this regard is applicable. At a salary of R2500 per month it comes to a total of R47 500.00.

Taking into account that the accident occurred on 8 August 2009, that the Plaintiff's leg was in a plaster cast for 7 months during which time he could not work at all and that he started to work at Joel Mine on 27 April 2011 it seems to me that his employment at the Wimpy for the period between the injury and his

new employment might have been shorter than 19 months. I will, however, accept the Plaintiff's submission that R47 500 be deducted from the past loss suffered by the Plaintiff, as it will favour the Defendant in the circumstances.

[27] Mr Boshoff based his calculation of future loss on the report of Mr Landman and took into account that, uninjured, the Plaintiff might have been promoted to stope team leader by the age of 45. He also took into account, as testified by Dr Oelofse and Mr Landman that the Plaintiff will most probably have to retire at the age of 60 because of the injuries he sustained. A contingency deduction of 20% was applied in respect of future loss of income. It appears to be appropriate within the factual context of this case.

For the past two and a half years the Plaintiff did not succeed in securing any employment and the chances of him finding a sedentary job seems extremely slim.

I am satisfied that I can rely on the calculations of Mr Boshoff in respect of the Plaintiff's future loss of income. The amount of R1 923 680.00 after the 20% contingency deduction also seems to be reasonable in the circumstances of this case.

[28] In the premises the following order is made:

1. The Defendant is ordered to pay the Plaintiff the amount of R2 537 050.00, compiled as follows:

1.1 Past and future loss of income: R2 137 050.00

1.2 General damages: R400 000.00

into the following bank account:

HONEY ATTORNEYS TRUST ACCOUNT

Nedbank Maitland Street Branch, Bloemfontein

Branch Code: 11023400

Account No: [...]

Ref: D J Joubert/YV/I22569

within 30 days from date of this order.

2. Should payment not be made within 30 days the Defendant will be liable to payment of interest on the capital amount at 10.25%.
3. The Defendant must provide an undertaking to the Plaintiff in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for payment by the Defendant of 100% of the costs of the 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 him arising out of injuries sustained by him in the motor vehicle collision of 8 August 2009 after the costs have been incurred and upon proof thereof.
4. The Defendant is to pay the Plaintiff's taxed or agreed party and party costs on High Court Scale to date of this order, including but not limited to the following:

4.1 Full qualifying fees of the following expert witnesses:

4.1.1 Dr R Khan (General Practitioner)

4.1.2 Drs Verster & Partners (Radiologists)

4.1.3 Dr L F Oelofse (Orthopaedic Surgeon)

4.1.4 Drs Van Dyk & Partners (Radiologists)

4.1.5 Ms K Swanepoel (Physiotherapist)

4.1.6 Ms A George (Occupational Therapist)

4.1.7 Mr J Landman (Industrial Psychologist)

4.1.8 Munro Forensic Actuaries

4.2 The reasonable costs incurred by and on behalf of the Plaintiff in attending the medico legal examinations of all experts from both parties, including fees for travelling time, accommodation and disbursements incurred in such amount as allowed by the taxing master.

4.3 Full reservation fees and travelling expenses of the following experts:

4.3.1 Dr L F Oelofse (Orthopaedic Surgeon)

4.3.2 Mr J Landman (Industrial Psychologist)

4.3.3 Munro Forensic Actuaries

4.4. Counsel's fees

5. In the event that costs are not agreed upon:

5.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record; and

5.2 The Plaintiff shall allow the Defendant fourteen (14) court days to make payment of the taxed costs.

VOGES, AJ

On behalf of Plaintiff: Adv. H Delarey
Instructed by: Honey Attorneys
Bloemfontein

On behalf of Defendant: Adv. J Ferreira
Instructed by: Maduba Attorneys
Bloemfontein