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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 54/2015

(1)	<u>REPORTABLE:</u> <u>YES/NO</u>
(2)	<u>OF INTEREST TO</u> <u>THE JUDGES:</u> <u>YES/NO</u>

In the matter between:

ELECK NYAKA

:PLAINTIFF

And

ROAD ACCIDENT FUND

:DEFENDANT

JUDGEMENT

SEMENYA J:

1. Plaintiff instituted action against the defendant for general damages and loss of earnings/earning capacity. The action arises out of a motor vehicle accident that occurred on the 15 March 2013 along Dresden-Burgersfort road. The plaintiff was a passenger in a motor vehicle with registration numbers and letters [D...] when it collided with another vehicle.
2. At the onset of the trial, the parties informed me that the defendant has already conceded 100% liability in favour of the plaintiff. The issue of general damages has also been settled and the defendant has furnished the plaintiff with an undertaking in terms of section 17 (4) of the Road Accident Fund Act for future medical expenses. There is no claim for past medical expenses.
3. The outstanding issue for determination by this court is whether the plaintiff suffered loss of earnings/earning capacity as a result of the accident. The parties agreed that this issue can be resolved based on the oral evidence of occupational therapists who could not agree on this point as well as other expert reports filed by the parties.

4. The parties agree that the plaintiff sustained left knee and head injuries, right mandible fracture which resulted in deformity, neck and spine injuries.
5. The plaintiff and Ms Petronella Radzuma (occupational therapist) testified for the plaintiff. The defendant led the evidence of Ms Kgomotso Montwedi, also an occupational therapist.
6. Plaintiff testified that he passed Grade 12 in 2002. He is a holder of a code 10 driver's licence. He secured employment as a taxi driver in 2009 and was earning R1200.00 per month. He returned to work 6 weeks after the accident but quit the very same day of his reporting when his employer refused his request to keep the taxi at his place of residence after hours. He added further that another reason why he quit was because his spine was painful. He stated that it was difficult for him to turn his head and observe mirrors as he used to do before the accident.
7. Plaintiff testified further that he had intended to remain in the taxi industry and aspired to have a taxi of his own. He stated that the requirement was that he should be under the employ of somebody else as a taxi driver for a period of five years before he can be given a licence to own one.
8. He remained unemployed for some time after the accident but subsequently secured part time employment at Boxer Super Store in bulk section. He is earning between

R1500.00 –R3000.00 per month. His daily duties entailed packing 25kg of, maize meal, 10kg of sugar, samp and rice as well as filling the refrigerator with cool drinks *etc.*

9. At some stage the manager became aware that he was not coping with the type of work allocated to him and shifted him to cleaning. It soon became clear to him that he is not coping with the task and was again shifted to the parcel counter. Plaintiff stated that this task was also strenuous as customers would bring big and heavy bags to the parcel counter. He constantly suffers from headache which he treats with bruffen. He stated that his employer is not threatening to expel him. He depends on his co-workers who allow him to rest at intervals.
10. Ms Radzuma testified that she examined the plaintiff on the 6 March 2015. She found that the plaintiff's ability to do medium work has been reduced and further that he will not cope with work that requires cognitive thinking. According to Ms Radzuma, the plaintiff is less competitive because he requires accommodation. She confined examination to sedentary, medium and heavy lifting. She stated that it would have been illegal for her to go beyond heavy object lifting because of the plaintiff's own weight. According to her test, she found that the plaintiff had already reached his maximum level of improvement.

11. During cross-examination Ms Radzuma stated that she ordinarily refers to other medico-legal reports whenever she does her examinations. She conceded that she was aware of the conclusions arrived at by Dr Williams, orthopaedic appointed by the plaintiff, wherein he stated that he does not foresee any need for future treatment of the plaintiff's knee nor does he foresee the possibility of future loss of income. She further agreed that Dr Williams did not state in his report that the plaintiff sustained neck injury which could support her conclusion that the plaintiff's ability to work as a taxi driver has been compromised.

12. Ms Radzuma stated that the job of a cleaner and a packer requires good cognitive endurance. She agreed that during consultation the plaintiff did to inform her that he left his job as a taxi driver because of neck pain. When asked as to whether she agrees that the reasons for the plaintiff's leaving his job as a taxi driver is not accident related, Ms Radzuma stated that she does not know why he wanted to go home with the taxi.

13. Ms Montwedi, the defendant's occupational therapist testified that she was not in possession of other medico-legal reports when she examined the plaintiff. She however had the reports when she made her findings. She stated that the plaintiff informed her that he left his job as a taxi driver because his employer did not allow him to keep his taxi at home after hours. According to her, the plaintiff is suited for sedentary, light, medium and occasionally heavy duty and has the residual capacity

to work as a taxi driver. She stated that she is aware that Dr Mazwi, a neurosurgeon appointed by the plaintiff stated in his report that the plaintiff does not have mental disturbance. Ms Montwedi, stated further that the plaintiff is able to lift up to 24kg weights safely but that she noted that 27kg was too heavy for him.

14. During cross-examination Ms Montwedi conceded that she does not know the type of work the plaintiff is currently doing. She further conceded that the findings arrived at by other experts, including that of Dr Mazwi, do not have a bearing on her own conclusions as she was not in possession of the relevant reports as at the time of reporting. She further stated that she did not do the cognitive tests because she was not in possession of the psychologist's report and further that the plaintiff did not report that he has cognitive challenges.

15. In **Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A) at 917B** it was held that it was held that:

"In our law, under the Lex Aquilia, the defendant must make good the difference between the value of the defendant's estate after the commission of the delict and the value of the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes loss, if such loss diminishes the estate."

16. It was argued on behalf of the plaintiff that the evidence of Ms Montwedi should be disregarded on the basis that she failed to enquire about the plaintiff's current employment. It was further submitted that I should have regard to the scenario of the plaintiff's industrial psychologist only and accept it as the most fair and reasonable scenario.
17. It was contended on behalf of the plaintiff that I should find that, but for the accident, the plaintiff would have been able to continue with his job as a driver. It was submitted that the evidence of the plaintiff that he wanted to work as a truck driver and that he loves the job very much was unchallenged. I fail to find any reason why the defendant should be required to contest the evidence of the plaintiff's own ambition.
18. The industrial psychologists agree that the plaintiff has been compromised to a degree by the accident and that the accident related injuries have affected his vocational possibilities to a degree. It is however not correct, as submitted by the plaintiff, that both industrial psychologists agree that, but for the accident, the plaintiff would have been able to continue to be a driver. On the contrary, Ms Krause (for the defendant) opines that with a driver's licence, the plaintiff, post- accident, may still function as a semi-skilled driver in the non-corporate environment.

19. My understanding of Mr Smit's (for the plaintiff) opinion on the other hand is that the plaintiff will find it difficult to secure employment as a driver, not because of the accident, but because of the economic climate in South Africa. The defendant's contention that the plaintiff's inability to work as a driver is not accident related seems to me to be common cause to most experts.

20. I further agree with the defendant's contention that the plaintiff's evidence that he cannot continue to work at the Super Store because of the injuries he sustained in the accident should be rejected. Ms Rudzani's opinion is not in line with the opinions of other experts. Dr Williams noted that the knee injury on the LEI is calculated at 0% and that he does not foresee any future treatment for it.

21. Dr Segwapa, a specialist neurosurgeon appointed by the plaintiff, reported that the plaintiff denied any sufferings from headaches. He opines further that the pain on the right lumbar is caused by sleeping on the right lateral position and therefore not because of the neck injury as plaintiff has alleged. I conclude, based on expert reports, that the plaintiff is still employable and retains residual capacity to work as a taxi driver.

22. My finding that the plaintiff retains residual capacity to drive a taxi is further supported by reasons furnished by the plaintiff himself as to why he left his job. Firstly, it is because his employer did not allow him to keep the taxi at his own home.

This cannot be not be related to the accident. Secondly, it is because his neck was painful. This is not supported by expert evidence.

23. Ms Rudzane's findings are rejected on the following grounds. She testified that she was in possession of Dr William and Dr Segwapa's reports at the time of assessment. She nonetheless ignored his findings that he does not foresee any future loss of income and future treatment of the knee. Furthermore, on cognitive functions, she again ignored Dr Segwapa's observation that the plaintiff paid attention well during the interview and sustained it throughout and that he has no neuro-physical impairments. Although Ms Rudzane testified that the plaintiff found it difficult to carry out certain tasks at the Super Store, I am unable to find any correlation between his inability to do so and the injuries he sustained as a result of the accident.

24. With regard to pre-morbid scenario, it is indeed so that the industrial psychologists' report that the industry related salaries for taxi drivers is R4000.00. However, it cannot be correct that the plaintiff was under paid as he was not employed on a permanent basis. He earned a salary of a part time taxi driver. I agree with the plaintiff's contention that there is no evidence that he would have progressed to full time employment in that regard (due to high level of employment). I therefore find that his past earning should be calculated on the basis that he was earning R1200.00 pre-accident.

25. Having rejected the evidence of the plaintiff and that of Ms Rudzani, I however note that according to the joint minutes of the industrial psychologists, the plaintiff's accident –related injuries has affected his vocational possibilities to a degree. No light is shared with regard to the extent thereof (it is unclear as to a "certain degree" means). I will accept, based on the joint minutes of industrial psychologists, that the plaintiff has been compromised to a certain degree. He is entitled to be compensated for this compromise.

26. With regard to the calculation of loss, I find the following statement made by **Nicholson JA in Southern Insurance Association Limited v Bailey NO 1984 (1) SA 98 (A) at 113F-114E** to be of assistance;

"While the result of an actuarial computation may be no more "an informed guess," it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge's "gut feeling" (to use the words of the appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."

27. I have decided to calculate the plaintiff's loss as per the actuarial calculations of Munro's scenario 2, as it is in line with the findings that the plaintiff is still employable. I accept that the plaintiff will be able to work up to the age of 65.

28. It is trite that contingencies (the hazards of life) are within the discretion of the court

– **Van der Plaats v SA Mutual Fire and General Insurance Co Ltd 1980(3) SA 105(A)** . In view of the findings that the plaintiff can still work post-accident, I agree with the defendant's argument that a higher contingency of 30% for future loss and 5% for past loss should be applied.

29. In the result I give judgement for the plaintiff as follows:

29.1. Payment of;

1.1. R11 000.00 for past loss; of earning

1.2. R256 060.00 for future loss; of earning capacity

29.2. The defendant would not be liable for payment of interest on condition that payment is made timeously;

29.3. In the event of the defendant not making payment timeous, the defendant will pay interest of 10% per annum on the amount stated in 1.1 and 1.2.

29.4. In addition the defendant shall pay the following

29.5. The defendant shall pay the plaintiff's costs on the High Court party and party scale. Such costs shall include the fee and qualifying expenses of all experts witnesses that prepared medico-legal reports that referred to during argument;

29.6. Costs of travelling costs of the plaintiff to attend the medico-legal examinations with the defendant's experts.

29.7. The reasonable costs of attending the examinations and obtaining the medico-legal, reports and such reports addendum and any joint reports;

29.8. The costs of preparation of the trial bundle; and

29.9. The reasonable costs of the plaintiff's attorney which shall include travelling costs, attendance to court, costs of preparation of pre-trial conferences and formulation of pre-trial minutes and the costs of actual attendance of pre-trial conference.

SEMENYA M.V
JUDGE OF THE HIGH COURT, POLOKWANE;
LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : MR. MASHABELA M.D
INSTRUCTED BY : MASHABELA ATTORNEYS
FOR THE DEFENDANT : ADV. MAMPHADENI
INSTRUCTED BY : HAMMANN MOOSA INC.
DATE OF HEARING : 15 FEBRUARY 2018
DATE OF JUDGEMENT : 09 MAY 2018

