

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

Date of hearing: 30 January 2017

Date judgment: 7 March 2017

In the matter between:

Case number 26435/2013

W J M

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRENNER. AJ:

1. The only question for adjudication in this personal injury case is the claim by the plaintiff, W. J. M. ("M."), for future loss of income. The defendant, the Road Accident Fund ("the RAF"), conceded full liability on the merits, for the negligence of its insured driver, in a motor vehicle collision on 24 January 2010, in which M. was injured. He suffered a fracture of his C2 vertebra.

2. The RAF agreed to pay general damages of R450 000,00, and tendered an undertaking for future medical expenses under section 17(4)(a) of the Road Accident

Fund Act, 56 of 1996 ("the RAF Act"), and M.'s legal costs. The HPCSA tribunal had found that M. suffered from a 30% whole person impairment, and this had justified the claim for general damages.

3. The RAF conceded that M. would probably retire at the earlier age of 55. In the result, this meant that the actuarial calculations would have to take account of this agreement. The conclusions drawn in the report of M.'s expert, orthopaedic surgeon Dr LF Oelofse ("Oelofse"), dated 13 July 2015, were conceded by the RAF as correct.

4. M. was born on [...] September 1977. M. testified, together with his experts, occupational therapist Geraldine Lourens ("Lourens") and industrial psychologist Karen Kotze ("Kotze") . Industrial psychologist Caro Cilliers ("Cilliers") testified for the RAF. No further vive voce evidence was tendered.

5. The following facts pertaining to M. were gleaned from the expert reports handed up to Court by agreement, and from his vive voce evidence.

6. M. was born on 18 September 1977 and was an electrical technician employed at Assmang Chrome Works in Machadadorp, Mpumalanga, ("Assmang"), at the date of the accident, having worked there for almost eighteen years, from 8 February 1999, by the date of trial. Assmang is a chrome smelting works with five furnaces. He maintained heavy current overhead lines. He fixed lights and contact points and inspected the electrical components of the furnaces.

7. Post accident, he had resumed work at Assmang and had been working there for another seven years. He had a Grade 12 education and thereafter, obtained an N4 electrical trade test certificate in 2002. In 2007 he underwent technician training in Middelburg. He obtained a high voltage tension certificate in 2014. His position entailed the repair of electrical faults for overhead cranes for which purpose he had access to a specially designed circular ladder at a height of about 110 feet. About five to seven hours of a nine hour work day were devoted to time spent on the ladder. In October 2010, post accident, he was promoted to the position of electrical technician teamleader at an increased salary. He had both extensive experience and competence in his field of work.

8. Although he was knocked unconscious, no serious sequelae arose from this. He sustained a fracture of his C2 vertebra, and underwent an operation for a posterior fusion of his C1 and C3 vertebrae. The first vertebra, C1, joins with the base of the skull and supports the head, while the C2 vertebra is the axis, because the head and C1 swivel around it. The two vertebrae facilitate neck movement.

9. M. was discharged from Midmed Hospital, Middelburg, hospital on 3 February 2010. He returned to work after thirty six days, on 23 March 2010, and was still working at Assmang at the date of trial. He made no claim for past loss of earnings.

10. M. testified that he still encountered problems with turning his neck while working. He continued to suffer from chronic headaches, for which he took over the counter pain tablets. He had general pain while trying to sleep at night, and spasms in his neck. He found it difficult to lift his right hand. His powers of concentration had been compromised. If he made a mistake with an electrical fault, it could potentially cause an explosion at the works. On his return to work, his employer allocated an assistant to him, so was cognizant of his physical challenges. Some of his colleagues had come also to his assistance from time to time. He did not want this to become known to his employer as he felt insecure in his position. His insecurity was compounded by the fact that he was the main breadwinner in his household, had a mortgage bond to repay, a wife and children and an extended family to support.

11. He confirmed, however, that, since his return to work, his disability had not caused any dangerous incidents and that he had not been subjected to any disciplinary proceedings for incompetence in performing his job. He had no record of absenteeism. If he had to re-align his work to that of a sedentary nature, he did not know what else he could do. His immediate supervisor had described him as a good worker with prospects for further promotion.

12. According to Oelofse, as a consequence of his C2 fracture, M. began to suffer from severe headaches, chronic pain and spasms, severe restriction of range of movement and a high probability of adjacent level disc disease. In his view, Oelofse had a higher than 50% probability of undergoing secondary surgery, and showed early radiological

signs of disc space narrowing at the level C3 and C4. This surgery would entail adjacent level cervical fusion.

13. With the probability of a second fusion in the future, M. would "probably only work until the age of 55 years, in a sedentary non-manual labour-type occupation." Oelofse deferred to the occupational therapists and industrial psychologists "regarding retirement and suitable employment options".

14. On 17 January 2017, the occupational therapists appointed by the parties compiled a joint minute, Lourens for M. and Kgomotso Montwedi ("Montwedi") for the RAF. Montwedi did not testify. They agreed on the following:

- a. M. was best suited to sedentary to light work and should not exceed light weight handling categories due to his cervical spine pathology;
- b. He was unsuited to his pre and post accident work and was restricted by the ability to work at an elevated level, which would make him unsuited to job demands;
- c. M. will be an unequal competitor amongst his peers, even with physical adaptations, as a result of physical and cognitive limitations;
- d. Even with treatment from a multi-disciplinary team, his limitations would make him an unattractive employee to prospective employers;
- e. The therapists deferred to the psychologists to comment on post accident loss of income, his future career options and job prospects taking his age, level of education and prognosis into account.

15. On about 23 January 2017, the industrial psychologists met, Kotze for M. and Cilliers for the RAF. They agreed that:

- a. M. was unsuited to his current or similar occupations; should he forfeit his current employment for reasons beyond his control, he would probably face

formidable odds in securing employment in his field of expertise, given his physical restrictions;

b. M. retains the residual physical capacity for sedentary work; theoretically, to re-align his career to match this, he would have to revert to his Grade 12 level of education to secure sedentary employment, Kotze commenting that, noting his age, lack of experience in general administrative work as well as computer and administrative skills, it was unlikely that he would secure employment of a sedentary nature when competing with younger and more recently qualified counterparts;

c. M.'s career prospects had been truncated to a moderate to significant degree by the sequelae of his injuries.

16. In evidence, Lourens suggested that M. should re-align to work involving computers. The movements associated with electrical work, in her view, were not compatible with his disability, particularly work at an elevation. This would exacerbate his already vulnerable spine. She had not contacted M.'s employer as he had asked her not to.

17. Kotze expressed the view that M. should re-align to sedentary work as a data capturer or receptionist, or other administrative categories, but may have difficulty finding such work with other younger competitors. To carry on with electrical work, he would need a diploma or degree. His experience, in her expert view, counted for nothing. Yet she conceded that it might be viable for M. to supervise other electrical technicians at Assmang or elsewhere. Kotze opined that there might be many obstacles in the way of M. running his own business as an electrical technician, considering the small population of Machadadorp amongst other factors. Despite there being no dangerous incident for the past seven years, Kotze still maintained, without substantiation, and in the face of a seven year unblemished record of no incidents post accident, that it was "a matter of time before something went wrong".

18. Cilliers for the RAF testified that M. could continue in current employment, his health and motivation permitting. Re-alignment with his electrical expertise might make him attractive to a potential employer in the electrical industry, or he could work in sales for a

building supplies enterprise, for example. This may be required if his spine deteriorated.

19. The industrial psychologists were of minimal help in their proposals for realistic alternatives for M.'s re-alignment to sedentary employment, a fortiori in the light of the patent fact that his only expertise related to the functions of an electrical technician. It is hardly likely that he had any potential to perform the administrative or sales functions suggested by them. On the inherent probabilities, his re-alignment would entail supervision of electricians and the transfer of his undisputed skills. Cognisance should also be taken of his competence and ability to work hard, even under strained circumstances. M. accepted that he had the potential to generate income until age 55 at a lesser salary, whatever form this re-alignment took. To this end, provision was made for a lesser quantum for future income generation.

20. Based on the totality of the evidence satisfied that M.'s effectiveness in the workplace which is specifically dedicated to electrical technician work in chrome smelting has been compromised by his injury, and by the undisputed orthopaedic that his prospects for securing alternative work in a field in which he has specialized for eighteen years have been deleteriously affected. Complications would probably emanate from the first fusion operation which he underwent when the accident occurred.

21. The conventional approach to calculating future loss of income is to quantify the capitalized value had the claimant not been injured, and compare this with the capitalized value of income to be received now that the claimant has been injured. The difference between the two values, after adjustments for general contingencies, equates to the loss of future income suffered.

22. The actuary for M., Johan Sauer ("Sauer") and the actuary for the RAF, Gerard Jacobson ("Jacobson") agree on the value of pre morbid income to retirement age 55 as R10 598 256,00. Post morbid income was calculated at R8 032 950,00 by Jacobson and at R7 827 386,00 by Sauer. Applying a contingency deduction of 7,5% on income but for the accident, Sauer arrived at R9 803 387,00.

23. With a contingency deduction of 40% income having regard to the accident, Sauer arrived at R4 696 432,00. Both such deductions are fair and were conceded as such by

Counsel for the RAF.

24. The deduction of 40% accommodates reduced mobility in the market place now that M. has been injured, taken cumulatively with the agreements reached by the occupational therapists and the industrial psychologists. See **Van Drimmelin v President Versekeringsmaatskappy 1993 4 OOD E2-19T.**

25. Applying the RAF cap in terms of section 17(4A)(b) of the RAF Act, the future loss of income amounts to R3 995 411,00, and constitutes adequate compensation for future loss of income.

26. It is recorded that M.'s attorneys confirmed that they had not concluded a contingency fee agreement with him.

27. In the result, the following order is made:

- a. The defendant is directed to pay to the plaintiff's attorneys the sum of R450 000,00 for general damages;
- b. The defendant is directed to pay to the plaintiff's attorneys the sum of R3 995 411,00 for future loss of income;
- c. The defendant is directed to effect the payments mentioned above to the credit of the plaintiff's attorneys' account being: VZLR Inc Trust account at Absa Bank Limited van der Walt Street, account number [...], branch code 323345 ("the designated account");
- d. In the event of default on the above payments, interest shall accrue thereon at the rate of 10,5% per annum calculated from the due date to date of final payment;
- e. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the RAF Act, 56 of 1996, in respect of 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or the

rendering of a service or supply of goods to the plaintiff, and after the costs have been incurred and upon the submission of proof thereof, arising out of the injuries sustained in the collision which occurred on 29 January 2010;

f. If the defendant fails to furnish the undertaking to the plaintiff within 30 (thirty) days of the date of this order, the defendant shall be held liable for the payment of the taxable party and party costs incurred in compelling the delivery of the undertaking;

g. the defendant shall pay the plaintiff's taxed or agreed party and party costs to the designated account, for instructing and, if applicable, correspondent attorneys, which costs shall include but not be limited to:

- i. all reserved costs, if any;
- ii. the fees of senior Junior Counsel advocate D Marx for 30 and 31 January 2017;
- iii. the cost of obtaining all expert medico-legal and other reports of an expert nature which were furnished to the defendant and/or its experts;
- iv. the reasonable taxable qualifying, preparation and reservation fees of all experts, including consultation fees with legal teams, if any;
- v. the reasonable attendance fees for the plaintiff's occupational therapist G Lourens and industrial psychologist K Kotze for 30 January 2017;
- vi. the reasonable travelling and accommodation costs, if any, incurred in transporting the plaintiff to all medico-legal appointments;
- vii. the reasonable cost for the interpreter's attendance at court and at the medico-legal appointments for translation of information, if any;

h. if costs are not agreed, the plaintiff shall be entitled to serve a notice of taxation on the defendant's attorneys of record, and shall allow the defendant 14

(fourteen) days within which to pay taxed costs, failing which, interest shall accrue on the outstanding amount at the rate of 10,5% per annum calculated from the due date to date of final payment.

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG
2 March 2017

Appearances

Counsel for the Plaintiff:

Advocate D Marx

Instructed by:

VZLRI Inc Attorneys

Counsel for the First to Third Respondents:

Advocate J Liebel

Instructed by:

Tsebane Molaba Attorneys