

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

Date of hearing: 6 February 2017

Date of judgment: 7 March 2017

In the matter between:

Case number 29906/2014

Not reportable

Not of interest to other judges

Revised.

M P M

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRENNER, AJ:

1. The material issue for adjudication in this personal injury case is the claim by the plaintiff, M. P. M. ("M."), for past and future loss of income and general damages.
2. 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 14 June 2011, in which M. was injured as a passenger.
3. The parties agreed to the introduction into evidence of the expert reports exchanged

between them, and the experts' joint minutes, and dispensed with the need to call vive voce evidence.

4. The RAF agreed to tender an undertaking for 100% of future medical expenses under section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the RAF Act"), and to pay M.'s legal costs. He did not qualify for an assessment on whole person impairment.

5 He suffered segmental proximal fractures to the right femur. He was hospitalized at Bongani Hospital in Welkom. A week afterwards, an open reduction internal fixation was performed on the femur. On transfer to Westvaal Hospital, he underwent physiotherapy. His treatment was completed in about July 2012.

6. In February 2012, after a delayed union became apparent, M. developed sepsis and osteomyelitis and a debridement was performed. He continues to experience pain and compromised mobility in his right hip and leg, and walks with a limp. He is unable to walk for any extended length of time. His right thigh muscles have started to atrophy. Future treatment is contemplated in the removal of the internal fixation of the right femur and a bone graft, with an indication for the use of antibiotics, analgesics and physiotherapy, with a 10% chance of a hip replacement.

7. M. was born on [...] April 1964, and was 52 at the date of trial. He was an underground rock drill operator employed at AngloGold Ashanti Limited, having commenced employment on 2 November 1993. He spent most of his time in the mine stops. He continues to reside in a hostel in Orkney and is married with two children.

8. He was off from work until 2 August 2012. Although he returned to the same position, he experiences pain in his right leg and negotiates confined spaces underground with difficulty.

9. Post accident, his supervisors have allowed him to drill in the galley section of the mine where he can work in an upright position. He intends to retire at the official retirement age of 60.

10. On 1 August 2016, the orthopaedic surgeons appointed by the parties compiled a

joint minute, Dr VM Close for the F and Dr PR Engelbrecht for M.. They did not agree on any probability of a hip replacement operation in the future. They agreed on the following:

- a. Taking into account that M. remained functionally impaired, both doctors agreed that he suffered from a 15% loss of work capacity, and that his injuries qualified as serious via the standard narrative test;
- b. Osteitis might flare up many years post-accident, and future surgical and conservative treatment was indicated;
- c. Notwithstanding loss of work capacity, M. should be able to work until normal retirement age.

11. Per the minutes compiled on 7 September 2016 between occupational therapists Ms A Greeff for M. and Ms Annandale for the RAF, they agreed to the following on work ability:

- a. His work history revealed primary focus on unskilled work requiring heavy physical exertion; he now suffered from pain and discomfort in his work as a drill rig operator post accident;
- b. They agreed that he was compromised in the use of his right leg and this affected his capacity to perform moderate and heavy physical work such as underground mining and drill rig operation;
- c. He was better suited for work tasks that fell in the sedentary light ranges and allowed for pacing cycles;
- d. His employer had made reasonable accident; should he lose this position, would no longer be suited to work environment; the same principle would become necessary; adaptations for him post would be vulnerable and an underground mining apply if a hip replacement became necessary;

- e. They deferred to the industrial psychologists concerning quantification of loss of earnings.

12. On about 1 August 2016, the industrial psychologists met, namely WJ Wessels for M. and Dr MC Kgosana for the RAF. They agreed that:

- a. Noting M.'s limited scholastic education, that is, Grade 9, and his advanced age at the date of the accident, being 47, he had reached the pinnacle of his career at the time;
- b. M. should be compensated for his past loss of income with deference to the actuarial calculations;
- c. If his physical pain impacted on his productivity, his stope team bonus would be affected, resulting in a loss of earnings; should the future interventions prove unsuccessful, or his osteitis flare up, he may exhaust his seek leave entitlement, resulting in unpaid leave;
- d. No early retirement age was indicated;
- e. He was not in possession of a saleable skill outside of the mining environment, and would probably have to rely on informal activities

13. Based on the totality of the evidence I am satisfied that M.'s effectiveness in the workplace has been directly compromised by his injury. His prospects for securing alternative work in underground mining are problematic. This given the complicated fracture of his right femur and his resultant immobility in an occupation with demands on physical bodily movement.

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

past loss of income.

15. The actuary for M. GA Whittaker ("Whittaker") and the actuary for the RAF, Robert Oketch ("Oketch"), arrived at different calculations for the income generated by M..

16. This is attributable in the main to Whittaker taking cognizance of the annual salary increments under wage agreements in the mining industry, increases being commensurate with headline inflation, additional benefits at 40.80% of basic salary and employer pens on fund contributions. I am satisfied that the higher figure arrived at by Whittaker for past loss, namely R645 588,00 (value of income uninjured), is justifiable. The same rationale applies to the value of future loss of R953 674,00.

17. I disagree with Oketch that the loss can probably be mitigated by the assumption that the claimant will operate a spaza shop for at least five years post retirement at 60. This was not established on the probabilities.

18. Whittaker, in his general deductions, has taken note of loss of income due to illness, savings in regard to travel to and from work, and the risk of future retrenchment and resultant unemployment.

19. Whittaker applied a 5% deduction on past income uninjured, and a 5% deduction on past income as injured. This is in line with M.'s past work history for some four years, after returning to work post accident. The higher deduction of 10% on future income uninjured is normal and in line with realities, taking note of the fact that M. is more mature and the job would be more physically demanding on him, as also increased job vulnerability with prevalent retrenchments in the mining industry.

20 The deduction of 40% on income injured accommodates vulnerability in the market place now that M. has suffered an injury which directly affects his physical productivity and takes account of his 15% loss of work capacity. He returned to work, but mainly in the galley, and with decreased mobility, and the resultant sequelae of pain and fatigue. See **Van Drimmelin v President Versekeringsmaatskappy 1993 4 OOD E2-19T.**

21. The losses fall below the loss limit in the RAF cap in terms of section 17(4A)(b) of

the RAF Act. Past loss of income amounts to R98 879,00 and future loss of income amounts to R363 335,00, bringing the total to R462 214,00 in the aggregate. This constitutes adequate compensation for past and future loss of income.

22. Regarding general damages, this is squarely a matter of judicial discretion. It is an inexact science which is contingent on an overall assessment of the particular facts. There is no hard and fast rule of general application which compels the Court to consider past awards since no two cases can ever be the same. See **RAF v Marunga 2003 (5) 165 SCA 169G-H.**

23. I was referred by the RAF's Counsel to a miscellany of case authorities in which general damages were awarded for similar injuries, namely femur fractures. While comparative analysis is often used by Courts as a useful guide, our Courts remain mindful of the fact that every case comes with a different set of facts. M. claimed payment of R550 000,00 in general damages. Taking all of the above facts into consideration, an award of R350 000,00 is adequate and commensurate with the nature of his injury, his pain and suffering, his inability to work for one year, his fortitude in returning to work despite his physical limitations, having to endure them while working, the consequent fatigue, the injury's impact on his loss of income, loss of amenities of life, and the day to day inconveniences affected by compromised mobility. Despite the fact that he is of a mature age, 52 at present, his probable discomfiture in retirement is another factor which exacerbates his position.

24. It is recorded that M. attorneys confirmed that they had concluded a contingency fee agreement with him

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

- a. The defendant is directed to pay to the plaintiff's attorneys the sum of R350 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 past and 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: Adams and Adams Trust Account, Nedbank Pretoria account number 1604 318 902 branch code 198765 reference NK/SKS/P1277VZLR Inc Trust account at Absa Bank Limited van der Walt Street, account number [...], branch code 323345 ("the designated account");
- d. 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 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 14 June 2011;
- e. the defendant shall pay the plaintiff's taxed or agreed party and party costs to the designated account, on the High Court scale, which costs shall include but not be limited to the following:
 - i. the fees of senior Junior Counsel on the High Court scale inclusive of the reasonable day fee for 6 February 2017, and costs of preparation of heads of argument
 - ii. the reasonable taxable costs of obtaining all expert, medico- legal reports, including addendum reports and joint minutes, and RAF 4 serious injury assessment reports from the plaintiff's experts which were furnished to the defendant;
 - iii. the reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts of whom notice has been given, being:
 - 1. Dr P Engelbrecht, orthopaedic surgeon;

2. Ms A Greeff, occupational therapist;

3. Ms W Wessels, industrial psychologist;

4. Mr Greg Whittaker, actuary;

iv. the reasonable taxable transportation costs, including toll and e-toll charges, incurred by or on behalf of the plaintiff in attending all medico-legal consultations with the experts, consultations with the legal representatives and the court

f. the following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs:

i. the plaintiff shall serve a notice of taxation on the defendant's attorneys of record

ii. the plaintiff shall afford the defendant 79seven) court days within which to make payment of the taxed costs from the date of taxation or settlement thereof

iii. should payment not be made to the designated account timeously, the defendant shall be liable for interest on the taxed or agreed amount at the rate of 9% per annum from the date of the stamped allocator to date of final payment.

g. It is noted that a contingency fee agreement is applicable to this case.

T BRENNER

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

2 March 2017

Appearances

Counsel for the Plaintiff:

Advocate R Ferguson

Instructed by:

Adams and Adams Attorneys

Counsel for the First to Third Respondents:

Advocate B Sibiya

Instructed by:

Tsebane Molabalnc Attorneys