

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

CASE NO.: 14249/2015

DATE: 24/4/2017

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

...24/...04/...2017

In the matter between

PATRICK MOGASHO MOTSWIANE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

VAN DER WESTHUIZEN, A J

[1] The plaintiff instituted an action against the defendant in which he claims damages that he suffered as a result of injuries he sustained in a motor vehicle accident that occurred on or about 9 June 2013 at or near Burgersfort, Limpopo.

[2] On the morning of the commencement of the trial, the defendant conceded the merits and accepted 100% liability in respect of negligence.

[3] The parties were agreed that only the issue in respect of quantum of past and future

loss of income is to be decided. But for general damages, the other rubrics of damages were settled. The issue of general damages is deferred to the HPCSA and accordingly is to be postponed.

[4] In respect of the issue to be decided, the parties were agreed and content to argue that issue with reference to the joint minute of the respective Industrial Psychologists and the latest actuarial report. During argument, counsel for the defendant made reference to the report of the defendant's Industrial psychologist, Ms Nel with special reference to the plaintiffs employment history.

[5] The following is common cause between the parties:

- (a) The injuries suffered by the plaintiff and the *sequelae* thereof. In particular the plaintiff suffered a shortening of the right *tibia* resulting in a limping gait and stiffening of the left index finger;
- (b) It is accepted that the plaintiff will have to undergo amputation of the stiff left index finger in future;
- (c) The plaintiff was unemployed at the time of the accident;
- (d) The plaintiff only obtained gainful employment a year after the accident;
- (e) The plaintiff holds qualifications in security services and has held various positions in security services;
- (f) The plaintiff gained experience in Pipe Track Ventilation (PTV) whilst employed by AAM Mechanised Mining Solutions (Pty) Ltd (**AAM**) based at Xtrata Chrome Mine, Burgersfort. He held that employment for two years prior to the accident occurring. His employment in this capacity was terminated shortly before the accident;
- (g) The plaintiff holds the required red card in the mining industry.

[6] Although the Industrial Psychologists are agreed on some aspects, their differences

relate to the past loss of income and the plaintiffs capacity to secure work in future and the category thereof.

[7] Both Industrial Psychologists are agreed that the plaintiffs ability to again secure employment in the PTV field is truncated as a result of the injuries sustained in the accident. They differ on the degree of truncation.

[8] Mr van **Niekerk**, the Industrial Psychologist on behalf of the plaintiff, postulates that the plaintiff would, but for the accident, probably have again secured employment in the PTV field within a year of his dismissal that occurred immediately prior to the accident occurring. Ms Nel, the Industrial Psychologist on behalf of the defendant, merely states that it was unlikely that the plaintiff would have been re employed by AAM subsequent to the accident. In her report, she does not consider employment in the PTV field by other employers active in that field. None of the Industrial Psychologists seem to have specifically considered the effect of the aforesaid injuries on the plaintiffs chances of securing work in the PTV field post accident.

[9] However, counsel for the plaintiff and the defendant conceded and accepted that due to the injuries suffered with reference to the shortening of the right leg and the stiffening of the left index finger, the plaintiff would have difficulty in obtaining employment in the PTV field.

[10] Both Mr van Niekerk and Ms Nel are agreed that the plaintiff, as a result of his impairments, was rendered an unequal competitor in the workplace. His options for employment within the sedentary / light ranges were poor due to his impairments and his level of education. Both are further agreed that the probable and more obvious employment would be within the security services field and in that regard, as a Grade C security guard.

[11] It is also agreed between the Industrial Psychologists that the level of income would be with the PSIRA rates for a Grade C security guard.

[12] Ms Erasmus, counsel for the defendant, submitted that when regard is had to the plaintiff's career history, his qualifications and most of his experience related to that of security services, and hence that the likelihood of obtaining employment in the PTV field, but for the accident, was poor. She submitted accordingly that the second scenario postulated in the Actuarial report was, post morbid, the more probable scenario. It being common cause that the plaintiff was unemployed prior to the accident, Ms Erasmus submitted that the plaintiff suffered no past loss of income.

[13] Ms De Meyer, who appeared on behalf of the plaintiff, submitted that the plaintiff suffered past loss of income despite the fact that he was unemployed at the time of the accident. That submission is premised upon a statement by Mr van Niekerk contained in the joint minutes of the Industrial Psychologists. That statement related to an opinion that, but for the accident, the plaintiff would probably have, within a year of his dismissal, obtained employment in the PTV field.

[14] In my view, the fact that the plaintiff was unemployed at the time of the accident, and that in any event it would have taken him a year to obtain employment in whatever field, he has not suffered any past loss of income as a result of the accident. The plaintiff's claim under this rubric is dismissed.

[15] There is no real dispute that the plaintiff would in all probability have succeeded in obtaining employment in the PTV field, Ms Nel merely postulating that AAM would probably not re-employ the plaintiff. Accordingly, I find that as a result of the plaintiff's impairments suffered as a result of the accident, the likelihood of his chances of obtaining employment in the PTV field have been compromised. Both Industrial Psychologists accept that the plaintiff holds preferences of securing work in the mining industry. That preference has now been compromised due to his impairments as a result of the accident.

[16] It follows that the first scenario postulated in the Actuarial Report, with reference to the post morbid situation, is to be preferred. In this regard, both counsel are agreed that a

higher contingency is to be applied, that of 15 - 20%. A recalculation on the higher contingency percentage amounts to R544 858,40 in respect of future loss of income.

[17] The plaintiff is accordingly entitled to the order as set out in the draft order marked XYZ appended hereto, duly completed by me and counter signed by me.

I thus grant the order contained in the draft marked XYZ.

C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

On behalf of Appellant: Ms M de Meyer

Instructed by: Oosthuizen & Steyn Attorneys

On behalf of Respondent: Ms N Erasmus

Instructed by: Rambevha Morobane Attorneys

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: **14249/2015**

Before the Honourable Van de Westhuizen AJ

On this the 21st of April 2017

In the matter between:

PATRICK MOGASHO MOTSWIANE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

BY AGREEMENT BETWEEN THE PARTIES, IT IS ORDERED:

1. Defendant shall pay to the Plaintiff the sum of **R 544 858.40 (FIVE HUNDRED AND FORTY-FOUR THOUSAND EIGHT-HUNDRED AND FIFTY-EIGHT RAND AND FORTY CENTS.)** for delictual damages.

2. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10.5% per annum, calculated from the 15th calendar day after the date of this Order to date of payment.

3. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of the rendering of a service or supplying of goods to him/her resulting the injuries sustained by the i tiff in the motor vehicle accident that occurred on **9 June 2013** to ompensate the Plaintiff in respect of the said costs after the costs have een incurred and upon proof thereof, limited to 100%. The domestic assistance and home maintenance as envisaged in the medical legal reports shall form part of this undertaking.

4.

5. The Defendant shall pay the Plaintiffs taxed or agreed party and party costs on the High Court scale, subject thereto that:

5.1. In the event that the costs are not agreed:

5.1.1. the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

5.1.2. the Plaintiff shall allow the Defendant 14 (fourteen) Court days from date of allocatur to make payment of the taxed costs.

5.1.3. should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.5% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

5.2. such costs shall include:

- 5.2.1. the costs incurred in obtaining payment of the amounts mentioned in paragraphs 2 and 3 above;
- 5.2.2. the costs of counsel, including counsel's charges in respect of his/her full day fee for **21 April 2017**, as well as reasonable preparation;
- 5.2.3. the cost to date of this order, which costs shall further include the costs of the attorney and the correspondent attorney which include necessary travelling costs and expenses (time and kilometers), preparation for trial and attendance at Court which shall include all costs previously reserved, reasonable costs of consulting with plaintiff to consider the offer, the cost incurred to accept the offer and make the offer an order of Court to the discretion of The Taxing Master;
- 5.2.4. the costs of the actuarial calculation obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or to the knowledge of the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles;
- 5.2.5. the costs consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 5 (five) copies thereof;
- 5.2.6. the costs of holding all pre-trial conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;
- 5.2.7. the costs of and consequent to compiling all minutes in respect of pre-trial conferences;

6. The amounts referred to in paragraphs 2 and 5 will be paid to the Plaintiffs attorneys, **Oosthuizen & Steyn Attorneys**, by direct transfer into their trust account,

details of which are the following:

Name:	Oosthuizen & Steyn Attorneys Trust AcC
Bank:	Standard Bank
Account number:	[3...]
Branch code:	071445
Ref:	Oosthuizen/MOT297/0001

7. The issue of general damages is postponed *sine die*.

BY ORDER OF THE COURT:

REGISTRAR

Counsel on behalf of Plaintiff: **Adv. M. de Meyer (Olivier)**
(083-228-6169)

Counsel on behalf of Defendant: **Adv. N. Erasmus**
082-304-4114